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Landlocked States and Access to the Sea: An Evolutionary Study of a Contested Right

Kishor Uprety

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ARTICLE

Landlocked States and Access to the Sea: An Evolutionary Study of a Contested Right

Kishor Uprety*

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I. Introduction: Problems of Economic Development of SWA

Nearly one-fifth of the states of the international community are states without access to and from the sea (SWA), i.e., states that do not possess a coastline.¹ By virtue of their geography, these states do not have access to marine resources. Public international law, particularly the law of the sea, can correct these factual inequalities by establishing a specific legal regime in favor of SWA to provide freedom of access and the right to use the sea.

A. *Notion of Lack of Access*

Being without access means having no maritime coast. SWA are thus deprived of direct access to international maritime transport. Defining the term "without access" narrowly distinguishes the broader category of "geographically disadvantaged states." Within this broader category, however, a few sub-categories can be identified that present some noteworthy characteristics of SWA.

First among these is the category of "states with limited access" such as Jordan, Iraq, and Zaire, which have access to the sea by a small coastal band. Their extremely narrow maritime coast may sometimes be of no utility for foreign trade. Second comes the category of states with a landlocked continental shelf, i.e., with a continental shelf surrounded by other states. These two categories, especially the first one, share many characteristics with SWA. For instance, in Zaire, the small "corridor" that gives it access to the sea is of little use for foreign trade. Nevertheless, for the purpose of uniformity, in this study the term SWA shall only include states having no coast at all.²

Pierre Raton defined an enclave as "a state entirely surrounded by the territory of another state."³ He added that very often the notion of landlocked states, or SWA, and enclaves creates confusion. Switzerland

1. Afghanistan, Bhutan, Laos, Mongolia, and Nepal in Asia; Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Lesotho, Malawi, Mali, Niger, Rwanda, Swaziland, Uganda, Zambia, and Zimbabwe in Africa; Bolivia and Paraguay in Latin America; Austria, Czechoslovakia, Hungary, Liechtenstein, Luxembourg, San Marino, Switzerland, and the Vatican in Europe. This study does not take into account the SWA that emerged after the dismemberment of the former USSR nor the geographic changes that occurred after 1991. The new landlocked countries are Armenia, Belarus, Kyrgyzstan, Moldova, and Tajikistan (created after the dissolution of the former USSR); the Czech and the Slovak Republics (created after the splitting of the former Czechoslovakia); and Ethiopia. See CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK* (1992).

2. However, there exists a kind of convergence of interests among the following three categories: states without access, states with limited access, and states with a landlocked continental shelf. This convergence entails common and joint action in international fora.

3. Pierre Raton, *Les Enclaves*, in *ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL* 186 (1958).

and Austria, for instance, are SWA but are not enclaves because their boundaries are contiguous with several states. Hence, according to the above definition, at present, the only enclaves are the Vatican and San Marino, both encircled by Italian territory, and the Kingdom of Lesotho, which is surrounded by South Africa.

The differences between landlocked states and enclaves is small but significant. The problems of enclaves are more delicate and serious than those of other landlocked states. Indeed, their mere existence depends upon the benevolence of their encircling neighbors.

All enclaves are without access, but the reverse is not true. "Without access" is a general notion applied both to enclaves and landlocked states. Although these two terms have come to be used interchangeably, we shall try to retain their separate meanings according to the above distinction.⁴

Despite significant ideological diversities,⁵ all SWA share certain interests. At present, all are conscious of their geostructural handicap and their common needs, which differ from those of their coastal neighbors. This general consensus is quite obvious. Over the past few decades, in all international conferences in which they have participated, SWA have demanded certain special measures in their favor.

Moreover, it is interesting to note that, within the framework of the Seabed Committee,⁶ the emergence of special interest groups engendered

4. The term "land-locked states" has been defined as "states which do not border open, enclosed or semi-enclosed seas." L.B. SOHN & K. GUSTAFSON, *THE LAW OF THE SEA IN A NUTSHELL* 129 (1984).

5. All but five SWA are republics. Among these five, Liechtenstein, which is a principality, and Luxembourg, which is a dukedom, show the vestiges of European feudalism. In Africa, Lesotho is a kingdom, whereas Burundi, which obtained independence as a kingdom, has now become a republic. The Central African Republic, after a brief spell as an empire, has again been transformed into a republic. In Asia, there are two kingdoms, Bhutan and Nepal. Mongolia, Laos, and Afghanistan are republics. See G.W. EAST, *INSTITUTE OF BRITISH GEOGRAPHERS, THE GEOGRAPHY OF LANDLOCKED STATES* 1-22 (1960) (detailing geographical features); M.I. GLASSNER, *ACCESS TO THE SEA FOR DEVELOPING LAND-LOCKED STATES* 2-15 (1970) (detailing the definition and historical and political characteristics of SWA); K. UPRETY, *LANDLOCKED STATES AND ACCESS TO THE SEA: TOWARDS A UNIVERSAL LAW* 3-11 (1988); ALI ALMEEN, *LAND-LOCKED STATES AND INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO THE ROLE OF NEPAL* (1989); Y. MAKONNEN, *UNESCO REGIONAL PROGRAM FOR AFRICA, INTERNATIONAL LAW AND THE NEW STATES OF AFRICA* 32-33, 36-42 (1983).

6. This body, the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdictions, was created by U.N. General Assembly Resolution 2467 (XXII) of December 21, 1968, and was entrusted to study, inter alia, the legal principles and norms that promote international cooperation in the exploration and use of the sea-bed beyond the limits of national jurisdiction. See UNITED NATIONS, *THE LAW OF THE SEA: RIGHTS OF LANDLOCKED STATES TO AND FROM THE SEA AND FREEDOM OF TRANSIT: LEGISLATIVE HISTORY OF PART X; ARTICLES 124 TO 132 OF THE U.N. CONVENTION ON THE LAW OF THE SEA* 17 (1987).

the dispersion of regional groups. Bolivia and Paraguay, for instance, dissociated themselves from their continental neighbors to join countries like Afghanistan, Nepal, and other SWA, in order to safeguard their economic interests.

However, it must be emphasized that it is not to the advantage of an SWA to maintain poor relations with neighbors over whose territory its goods must traverse. The problems arising from such situations may be illustrated by three interesting examples: a total blockade, economic or political pressure, and the case of an enclave state.

The first example was faced by Zambia when, after some internal problems, Rhodesia decided to close its border to all countries. The Rhodesian decision created an economic asphyxiation of Zambia. Zambia's principal resource was copper, and Rhodesian Railways were the easiest and the most economical means for Zambia to transport some 29,000 tons out of the 56,000 tons of copper it produced.⁷ The same railway allowed Zambia to import about 200,000 tons of different goods, originating mainly from South Africa. Because of the unilateral Rhodesian decision, which imposed a kind of total blockade, all of Zambia's imports and exports ground to a halt, causing the country to suffer severely.⁸

The case of Nepal typifies the second example. It shows how much an SWA suffers from the economic or political pressures exerted by a neighboring country over which the majority of its foreign trade must travel. In 1950, through a bilateral trade treaty, the Indian government recognized the full, unrestricted right of transit to Nepal over Indian territory.⁹ In 1960, this treaty was replaced by the Treaty of Trade and Transit, which posed the idea of a common market between the two countries. The Treaty was to expire on October 31, 1970.¹⁰

7. MARCHES TROPICAUX ET MEDITERRANÉENS 317 (1973).

8. See UPRETY, *supra* note 5, at 12.

9. Treaty of Trade and Commerce, July 31, 1950, India-Nepal, *reprinted in* D. BHATTARAI & P. KHATIWADA, NEPAL INDIA: DEMOCRACY IN THE MAKING OF MUTUAL TRUST 205-08 (1993) [hereinafter Indo-Nepal Treaty of 1950]. The Indo-Nepal Treaty of Trade and Commerce of 1950 established Nepal's right to trade with overseas countries through Indian ports and territories. The government of India agreed to allow all goods imported through any Indian port for export to Nepal to pass without the payment of duties. *Id.* art. 2. Nepal was also granted the right to move goods from one part of Nepal to another through Indian territory. Arrangements were also made for the promotion of contacts between trade businesses of the two countries in order to facilitate the import and export of commodities and to encourage the use of the most economical and convenient routes and methods of transportation. See Amrit Sarup, *Transit Trade of Landlocked Nepal*, 21 INT'L & COMP. L.Q. 289 (1972).

10. Treaty of Trade and Transit, Sept. 11, 1960, India-Nepal, *reprinted in* D. BHATTARAI & P. KHATIWADA, NEPAL INDIA: DEMOCRACY IN THE MAKING OF MUTUAL TRUST 214-18 (1993) [hereinafter Indo-Nepal Treaty of 1960]. This Treaty provided for mutual, duty-free and license-free

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During the 1960s, political relations between Nepal and India were harmonious, whereas Sino-Indian relations had deteriorated. Nepal, however, desired to open new avenues to and to strengthen relations with China. A new trade route toward the north was therefore opened. This resulted in a declaration in 1970 negating the idea of a common market between India and Nepal. Because of Nepal's refusal to consent to the formation of a common market and because of the uncertainty of Sino-Indian relations, India refused to negotiate a new trade treaty. This had a very serious effect on the Nepalese economy.¹¹

The third example is particularly lamentable and highlights the problem of access in an enclave state, Basutoland, resulting from a conflict between South Africa and the United Kingdom. Basutoland was a British protectorate, an enclave in South Africa that became independent in 1966 under the name of Lesotho.¹² The conflict arose between London and Pretoria during 1965. It originated after repeated refusals by South Africa, despite eight successive protests from the British government, to allow the return by air of ten Basuto students to their homeland after completion of studies abroad. The South African

access to the respective markets of India and Nepal for goods originating in either country intended for consumption in the territory of the other. Under it, India agreed to open its market to Nepalese commodities free of duties and quantitative restrictions and to allow Nepal to levy protective duties and impose quantitative restrictions. Sarup, *supra* note 9, at 289-90. India also allowed Nepal to open a separate foreign exchange account. Previously, foreign currency Nepal earned was deposited in the Reserve Bank of India, and Nepal received the equivalent amount of Indian rupees in exchange. See N.P. BANSKOTA, *INDO-NEPAL TRADE AND ECONOMIC RELATIONS* 37 (1981).

The Indo-Nepal Treaty of 1960 expired on October 31, 1971. Both countries felt the need for a new treaty. Nepal asked for two separate treaties, one regulating transit and the other regulating trade. However, India was against the idea, believing that transit and trade were inter-related. See Sarup, *supra* note 9, at 291-92.

Ultimately, a single legal instrument replaced the 1960 Treaty. See Treaty of Trade and Transit, Aug. 13, 1971, *reprinted in* 2 FOR. AFF. J. 8 (1976) [hereinafter Indo-Nepal Treaty of 1971]. Under the 1971 Treaty, India agreed to give favorable treatment regarding customs duties and quantitative restrictions on imports of Nepalese industrial products containing 90% or more of Nepalese or Indian raw materials. S.C. Nagpal, *Indo-Nepal Treaty of Trade and Transit, 1971*, 6 J. WORLD TRADE 593 (1972). In addition, both countries agreed to provide transportation through their respective territories. *Id.*

11. See generally K. UPRETY, *LE NÉPAL ÉCONOMIE ET RELATIONS INTERNATIONALES* (1985); Sarup, *supra* note 9. It should be noted that Nepal continued to request the conclusion of two separate treaties (one for trade and another for transit). The Nepalese reasoned that trade was a specifically bilateral concern requiring regular adjustments, and thus, trade obligations needed to be for shorter periods of time. In contrast, they reasoned that transit had an international character because it was governed mainly by international law, and thus, transit treaties needed to have a longer duration. India systematically rejected Nepal's requests, repeatedly imposing package-deals involving single treaties of relatively short durations.

12. Lesotho has an area of 30,355 square kilometers and a population of 1.8 million. WORLD BANK, *WORLD DEVELOPMENT REPORT* 1993.

government asserted that these students had received in China special training in sabotage and that their presence in Lesotho would be dangerous for the security of South Africa. Finally, the ten students were forced to return to London from Nairobi, after three months of being rebuffed by the South African airport of Johannesburg.¹³

The three above examples clearly indicate the different problems SWA face. The general problem, illustrated by the actions of the South African government, has not been legally solved.¹⁴

Free access to the sea opens the door for international trade. For states without a coast, free access is linked to the question of transit. Persons and property originating from SWA and directed toward the coasts or entering SWA from the sea must pass through the territories of bordering countries. In other words, the access of these states to the principal maritime ways always is naturally indirect; their position obliges them to borrow the territory of other states.

SWA also face peculiar economic and sociopolitical problems. Modern economic progress requires rapid, reliable, efficient, and cost-effective international trade. Freedom of transit has become absolutely vital for SWA that are engaged in economic development.

The distance to the sea, and the resultant high cost of transportation, are obstacles to foreign trade for most of these countries. Transportation costs are not, however, the only problem of such states. As R. Makil puts forth:

The internal regions of big coastal states like Brazil are also very far from the maritime coasts, even more than a state lacking access to the sea [T]here is however an important difference: while the trade of the internal regions of coastal states must simply cross their own territory, the import or export trade of countries lacking access must cross foreign territories, which implies legal, administrative and also political problems.¹⁵

Indeed, the lack of direct access to the sea engenders a series of economic, juridical, and political problems. This is why for decades the SWA have formed a distinct group of nations within the international

13. See UPRETY, *supra* note 5, at 13; see also, *Note by the President of the Security Council*, U.N. SCOR, U.N. Doc. S/13842 (1980) (concerning the detention of an airline passenger en route to Lesotho).

14. As stated by *Moshoeshoe II*, then King of Lesotho: "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 *Punish South Africa but not Lesotho*, INT'L HERALD TRIB., July 7, 1988, at 4.

15. R. Makil, *Transit Right of Landlocked Countries: An Appraisal of International Conventions*, 4 J. WORLD TRADE L. 35 (1970).

system. Their position is based not only on their particular geography, but also on problems this position engenders in the fields of international law, international relations, and economic development.

The law of the sea has evolved to acknowledge some of the economic problems of developing nations. It is thus important to study the attention given by this law to the access of SWA to the sea. It is important as well to determine whether it satisfies the legitimate economic requirements of SWA, the majority of which belong to the group of poorest nations.

B. Economic Development

From an economic standpoint, SWA can be broken down into two main categories: developed SWA and developing SWA. The latter are distinguished by economic under-development caused primarily by their lack of access.¹⁶ The criterion to differentiate developed from developing SWA is the comparative standard of living on the basis of gross national product (GNP) per capita. This criterion, though not perfect, is enough to make a schematic classification.¹⁷

1. Developed SWA.—Presently, all developed SWA¹⁸ are situated in Europe. All European SWA, then, are at the same time surrounded by developed states. For this reason, they do not suffer from a lack of

16. See I.F.I. Shihata, *The World Bank and Human Rights*, in *THE WORLD BANK IN A CHANGING WORLD* 111 (1991) (giving a brief overview of the problem of developing countries in general); *Report of Group of Experts on the Special Problems Involved in the Trade and Economic Development of the Landlocked Developing Countries*, UNCTAD, U.N. Doc. TD/B/308, at 11-17 (1970) (detailing specific economic problems of SWA).

17. See generally D. CARREAU ET AL., *DROIT INTERNATIONAL ÉCONOMIQUE* 62-63 (1990) (on identification of developing states).

18. The term "developed" as opposed to "developing" when referring to a state often creates confusion as several terminologies exist to qualify the same thing. Regardless, in all cases, the differentiation essentially is based on GNP per capita. The World Bank, for instance, identifies states on the basis of their levels of income. In terms of 1990 dollars, low-income countries are those with a GNP per capita of \$610 or less in 1990; middle-income economies are those with a GNP per capita of more than \$610 but less than \$7,620. A further division at GNP per capita of \$2,465 is made between lower-middle-income and upper-middle-income-economies; higher-income-economies are those with a GNP per capita of \$7,620 or more. Among these categories, the lower-income and middle-income economies are referred to as developing economies. See *WORLD BANK, WORLD DEVELOPMENT REPORT 1992: DEVELOPMENT AND THE ENVIRONMENT* (1992); see also, I.F.I. Shihata, *The World Bank Facing the 21st Century: Developments in the Eighties and Prospects for the Nineties*, in *THE WORLD BANK IN A CHANGING WORLD* 15 (1991); V. Rege, *Economies in Transition and Developing Countries*, 27 *J. WORLD TRADE L.* 94, 94-99 (1993); *Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order: Analytical Papers and Analysis of Texts of Relevant Instruments*, U.N. Institute for Training and Research, at 24-28, U.N. Doc. UNITAR/DS/5 (1982).

infrastructure or means of transport. An important portion of their foreign trade exchange remains within their own region. In addition, because they are situated in a continent that is small in size, the distances to maritime ports are relatively small.

Hungary, the poorest SWA in Europe, had a 1990 revenue of US \$2,780 per capita, three times higher than that of Mongolia. Mongolia along with Zambia are the richest of the developing SWA.¹⁹ Switzerland, on the other hand, is the richest SWA in the world. After Sweden, it has the highest revenue per capita in Europe.

The European SWA show that a lack of access does not create any serious problems for the economies of some developed SWA. Besides economic and technical resources, their access to the sea is legally assured by international conventions. However, for the SWA of the Third World, the major handicap for economic development is the lack of any direct access to the sea.

2. *Developing SWA.*—Most of the developing SWA are among the poorest countries in the world. To clearly illustrate the importance of the economic problems that SWA face, the “least developed SWA” must be distinguished from other developing SWA.

(a) *Least developed SWA.*—The least developed SWA represent the least favored group of states and are among the poorest in the world. Several international organizations grant special status to them. However, the criterion of being without access to the sea is not considered in itself sufficient to classify in this group, despite Resolution 11 (II) of the U.N. Conference on Trade and Development (UNCTAD).²⁰ Resolution 11 recommended that the “absence of a seacoast” be considered as a factor to identify the least developed countries (LDCs). Nevertheless, among the twenty-five countries forming the “nucleus” of UNCTAD’s economic classification system, fifteen were without access.²¹ Three-fifths of the LDCs were thus lacking a coastline.

During the seventh session of the Committee for Development Planning, a consultative organ composed of eighteen independent experts examined the question of identifying this new juridical category.²² According to the Committee, countries with the following three

19. WORLD BANK, WORLD DEVELOPMENT REPORT 1992.

20. G.D. Lacharriere, *Identifications et statut des pays moins développés*, in ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 471 (1971) (discussing UNCTAD Res. 11).

21. *Id.*

22. See generally, *Report on the Seventh Session*, Committee for Development Planning, U.N. ESCOR, 51st Sess., at 12-20, U.N. Doc. E/4990.

characteristics were to be classified as LDCs: a gross domestic product (GDP) per capita equal to or less than one hundred percent, a share of manufacturing industries in the GDP equal to or below ten percent, and a literacy rate equal to or below twenty percent.²³ Again, on the basis of the above guidelines, the Committee for Development Planning concluded that twenty-five states could be classified as LDCs. Among them, fifteen were SWA. It should be noted that the number of LDCs rose to twenty-nine in 1976, and to thirty-seven in 1986. At present, fifteen SWA fall in this category of the most unfavored states in the world.

Fifteen out of thirty-seven LDCs are landlocked and thus face additional impediments to their international trade. Production, input use, consumption, and exportation are greatly influenced by the cost and reliability of transport to and from the outside world. The distances from the principal towns in these least developed SWA to the main ports vary from 670 km to 2,690 km (see Table). The international trade of these countries is dependent upon ingress and egress infrastructures and upon services along the transit routes. The landlocked countries have little control, however, over the development and operation of such facilities within the territory of their transit neighbors. Furthermore, the transit neighbors' ability to improve, from their own resources, their infrastructures and services is very limited because many of them are themselves developing countries. This highlights the need for international support in the development of the transit-transport systems in these developing countries.²⁴

Transport costs can include, among others, storage costs along the transit routes, insurance costs, and costs due to extra documentation. In the international trade of SWA, transport costs are in many cases quite significant because of the lack of adequate transportation facilities.²⁵ High transportation costs reduce export earnings and increase import costs. To lessen these additional transport costs, SWA must promote cooperative arrangements with their transit neighbors with the aim of establishing more efficient transit-transportation systems.

23. *Id.*

24. UNCTAD, THE LEAST DEVELOPED COUNTRIES ii (1986).

25. *Id.*

*Main Access to the Sea for Landlocked Asian and African
Developing Countries*

<i>Country</i>	<i>Distance (in km)*</i>	<i>Means**</i>
Afghanistan	2,000-10,600	Rd, R1
Bhutan	800	Rd, R1
Botswana	1,100-1,400	R1
Burkina Faso	900-1,210	Rd
Burundi	1,455-1,850	R1, W
Central African Republic	1,400-1,815	R1, W
Chad	1,715-2,015	Rd, R1
Lao People's Democratic Republic	670	Rd, R1, W
Lesotho	740-800	R1
Malawi	560-700	R1
Mali	1,170-1,289	Rd, R1
Nepal	890	Rd, R1
Niger	1,100-2,690	Rd & R1
Rwanda	1,750	Rd, R1, W
Uganda	1,450	Rd, R1

*Distance from principal towns to main ports. The figures are the shortest and longest routes used. *The LDC 1986 Report*, UNCTAD, at 51, U.N. Doc. TD/B/1120.

**RD = road; R1 = rail; W = water

Source: *A Transport Strategy for Landlocked Developing Countries, Report of the Expert Group on the Transport Infrastructure for Landlocked Developing Countries*, U.N. Doc. TD/B/453/Add.1/Rev.1 (1974).

(b) *Other developing SWA.*—SWA that do not qualify as LDCs fall into the category of “other developing SWA.” However, the distinction between LDCs without access and other developing SWA is not meant to prove that all developing SWA are extremely poor. The aim of the distinction is only to emphasize that among the 37 poorest countries of the world, 15 are without access to the sea. Other developing SWA (excepting Mongolia and Zambia) are hardly at the limit of poverty and extreme destitution.²⁶

Nonetheless, SWA are among the poorest countries of the world. The absence of seacoast, and the resultant isolation from the international market, aggravate their economic situation and constitute the main reason for their underdevelopment.²⁷

C. Absence of Coastline: Cause of Economic Difficulties

A study prepared by the UNCTAD mentions that “the actual experience, like the logical historical evolution, proves that the absence of access to the sea constitutes a major obstacle for economic and social development.”²⁸ General growth in the developing SWA is a result of substituting their dependence upon the importation of goods and services with local production and the development of exports, or the mobilization of capital.²⁹ International transport services are necessary in order to realize this growth. Indeed, developing SWA exhibit some of the lowest of growth rates. Their productive activities are not sufficiently diversified, and their export revenues depend on a limited number of products. These transport services entail higher costs for SWA. Consequently, these costs may delay, or even halt, the development of the country. It is perhaps appropriate to deal briefly with the additional transport costs as they relate to foreign trade at this point.

26. Lacharriere, *supra* note 20, at 472; see also WORLD BANK, WORLD DEVELOPMENT REPORT 1987.

27. At the time the UNCTAD Report of 1987 was published, there were 37 LDCs. UNCTAD, *supra* note 24. The author has not taken into account additions to the list of LDCs occurring after 1987.

28. *Study on the Establishment of a Fund in Favor of the Landlocked Developing Countries: Note by the Secretary General*, U.N. ESCOR, UNCTAD, at 2, U.N. Doc. E/5501 (1974) [hereinafter UNCTAD Study]. In December of 1976, the U.N. General Assembly adopted the Statute of the Special Fund for Land-locked Developing Countries, prepared by the U.N. Commission on Trade and Development (UNCTAD) Secretariat. See UNITED NATIONS, THE HISTORY OF UNCTAD 1964-1984 217 (1985).

29. UNCTAD Study, *supra* note 28.

1. *Additional Transport Charges.*—The lack of direct access to the sea for a state necessarily implies additional expenses because of the costs of transporting goods through a transit state. The notion of evaluating additional transport charges was developed by UNCTAD in its study relating to the creation of a fund in favor of the developing SWA.³⁰

However, there is no simple criterion for evaluating additional transport costs. One must, in effect, measure a hypothetical difference. The term *additional* means that its evaluation must concern only the transport costs directly related to the fact that the concerned states are deprived of a coastline.³¹ The definition thus covers the expenses relating only to international exchange.

The UNCTAD Secretariat deemed additional transport costs to be the transport cost of exporting and importing products between the boundaries of developing SWA and the sea, in other words, the transit cost.³² This definition quite precisely sets forth what may be included in the term “additional transport charges.” All expenses of transportation within the territory of a developing SWA, all expenses relating to the exchanges that do not use maritime ways, all expenses encountered in the transit port (because all the coastal states have to bear similar expenses), and all expenses from the transport of goods by airways are excluded from the transit cost. However, the charges for the entry and exit over boundaries between SWA and transit states are part of “additional transport charges.”

2. *Foreign Trade Deficit.*—Transportation plays an important role in all economies. This is particularly true in the economy of an SWA, whose foreign trade is contingent on the ability to approach the sea. Moreover, the foreign trade of developing states depends heavily on a limited number of products. This characteristic is equally evident in SWA. The majority of the economically weak SWA are situated in the developing regions. In most cases, their neighbors are also developing states with an economic structure analogous to their own.

In general, the trade between SWA and their transit neighbors is rarely important because the two economies do not complement each other. On the contrary, SWA and their transit neighbors often enter into competition for international and external resources. This competition usually occurs in the international market.³³ Here, the handicap of being

30. *Id.*

31. *Id.* at 6.

32. *Id.* at 6-7.

33. Such is not the case, however, with Bhutan and Nepal, which are both heavily dependent

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without access noticeably hinders trade. However, the consequences of such a handicap are not easily measurable in economic terms. One must add to this the isolation and distance from international markets. The formalities of transit seriously affect the trade of SWA, with all the expected consequences: delay, spoilage, expense, and so on. They must face increased costs resulting from the necessity of warehousing stocks, delays in the ports, expenditures in the itineraries of re-exchange (often indispensable), and other unknown circumstances or force majeure.

The dependence of SWA sea trade on transit through a third country is very important. SWA must pay a portion of their transport costs in convertible currencies.³⁴ Thus, they depend heavily on the transport policies of transit states.

In global terms, SWA are not often competitive with other developing states in the international market. The U.N. Economic Commission for Africa (ECA) admitted that transit costs are sometimes so high that the export products of developing SWA cannot be competitive in the international market.³⁵ A report prepared by the UNCTAD Group of Experts on the Transport Infrastructure for Land-Locked Developing Countries mentions that if one were to compare the actual level of exports and imports of SWA, the average cost of access to the sea is somewhere between 5 to 10 percent of the import and export value.³⁶

There are, however, exceptions. Some "privileged" developing SWA — such as Zambia, Swaziland, and Uganda — possess raw materials that have a high demand in the international market. Nevertheless, the relatively rich developing SWA are exceptions to the rule.

In addition to the lack of access, the majority of these states suffer from all the major obstacles encountered by LDCs. With low revenue and productivity, they are characterized by weak institutional frameworks and a heavy dependence upon the export of a limited variety of products.

on India.

34. See generally, *Transport Strategy for Landlocked Developing States*, UNCTAD, U.N. TDBOR, at 6, U.N. Doc. TD/B/453/Add.1, Rev.1 (1973).

35. *Transit Problems of African Landlocked States*, Economic Commission on Africa (ECA), U.N. Doc. E/CN.14/TRANS/29 (1966).

36. *Transport Strategy for Landlocked Developing Countries*, UNCTAD, U.N. TDBOR, at 6, U.N. Doc. TD/B/453/Add.1, Rev.1 (1973). While these documents are outdated, the situation has still not improved, and the problem remains serious. Indeed, the lack of access to the sea constitutes an obstacle to economic development in such states. It is not coincidence that developing states without access are the poorest in the group of developing states, having a quasi-systematic, diminishing growth rate per capita.

This generally entails a deficit in the balance of payments.³⁷ These characteristics determine the posture SWA take in the international arena.

Traditionally, SWA have endeavored to obtain the right of free access to the sea in order to participate in international trade. With this aim, many multilateral and bilateral agreements have been signed guaranteeing the right of transit of SWA through neighboring territories. This has meant a change in the traditional role of the law of the sea. According to R.J. Dupuy, "The classical law of the sea had only one dimension: basically the right of navigation on the surface."³⁸

The oceans cover 70 percent of the surface of the globe. For classical jurists, they constituted the preferential support of *jus communicationis*.³⁹ Today, rapid technological development actually provokes a diversification of maritime uses. Seas constitute a "means of communication," a source of food, and an ample treasure of unexploited resources.⁴⁰ Humanity turns to the sea for subsistence as our needs in food, fuel, and other resources increase. As a result of scientific and technological development, the immeasurable depths of the oceans are actually within the scope of human use. As the utility of the sea has broadened, its role has also evolved from a medium for communications to a reservoir of wealth.⁴¹ As a result, man has developed a new relationship to the sea and its valuable resources.⁴²

R.J. Dupuy has justly emphasized that biological resources present only the first aspect of the reservoir of wealth.⁴³ The trend toward a more diverse use of the sea has occurred only recently, with the prospective exploitation of mineral resources of the seabed. For many years, free access to the sea, based on the freedom of sea passage, constituted the principal claim of SWA. But today, in addition to the question of transit, another problem confronts SWA, that of their access to the resources of the sea on the same terms and conditions as coastal states.

Although the problem of transit for European SWA has been solved, considerable problems remain for developing SWA. This is perhaps why

37. See generally, UNCTAD Study, *supra* note 28.

38. R.J. Dupuy, *Les contradictions du droit de la mer*, REVUE FRANCAISE DE L'ENERGIE, Feb. 1973, at 187.

39. R.J. Dupuy and A. Piquemal, *Les appropriations nationales des espaces maritimes*, COLLOQUIUM MONT PELLIER, May 1972, at 113.

40. UN BROCHURE 1 (August 1974).

41. Dupuy & Piquemal, *supra* note 39, at 13.

42. 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 (1989).

43. Dupuy & Piquemal, *supra* note 39, at 13.

a certain selflessness can be noted among the developed SWA regarding the transit problems of developing SWA.

It has already been mentioned that the sea has two basic utilities: its "economic content" and "support of communication." The growing exploitation of marine resources and the extension of demands of SWA upon maritime spaces render convergence between these two aspects more and more difficult. Historically, the most important question for SWA is freedom of access to the sea. For this reason, SWA have always demanded recognition by the international community of the fundamental universal right of access. This in turn explains their interest in a universal convention on this matter.⁴⁴

II. Sources of the Right of Access to the Sea

Public international law is constantly undergoing change. It is an evolving, kinetic institution. The growing participation of developing countries in international activities has further reinforced its dynamic and malleable nature. Whenever more or less coherent solutions are posed to a particular problem, new questions arise, along with economic, political, and sociological data, to complicate discussions and keep questions unsolved by positive law.

Because the evolution of international law regarding access to the sea is based on different concepts and practices, there exists a great disparity of sources. Positive law concerning access is primarily comprised of international agreements. However, before analyzing the principal conventions, a brief introduction to customary international law as a source of the right of access to the sea is appropriate.

A. Customary International Law

The problem of free access to the sea lies at the juncture of long-established and conflicting principles of international law: state sovereignty and the freedom of communication. As a result, there is a great disparity in the sources of customary law. Three ancient approaches to the problem of access can be located, all having roots in international law. A fourth approach has developed during the second half of the twentieth century. The four theories of customary international law as a basis for claiming the right of access to the sea include (1) freedom of transit, (2) freedom of the high seas, (3) international servitudes, and (4) geographic equality.

44. See N.Q. DINH ET AL., *DROIT INTERNATIONAL PUBLIC* 1031 (4th ed. 1992).

1. *Freedom of Transit*.—P. Reuter believes that “the problem of transit specifically concerns terrestrial communication, mainly for countries with geographically disadvantaged position, because of lack of all accesses or certain access to the sea.”⁴⁵ The Economic Commission for Africa (ECA) clearly mentions that free access to the sea is one of the important aspects of freedom of transit.⁴⁶ Freedom of transit concerns the fundamental economic interests of SWA and comprises a basis for legitimate juridical claims to free access.⁴⁷

States disagree whether there is a general duty to grant the right of transit to their geographically disadvantaged neighbors. States that deny the existence of this right argue that freedom of-transit is subordinated to the fundamental principle of national sovereignty. According to this thesis, the exercise of the transit right is subject to the authorization of the coastal state.⁴⁸

C.C. Hyde, a leading internationalist, believes that the transit right of SWA is not a principle recognized by international law, but rather is a right governed by agreements concluded with coastal states.⁴⁹ This thesis has been defended by certain transit states who feel that the transit right depends on the consent of the transit state. Pakistan, for instance, has declared that a state is not at all obliged to grant others the privilege of transit upon its territory.⁵⁰

However, another school of thought suggests that the economic interdependence of states offers a juridical basis for the recognition of transit rights. The supporters of this theory mention that such rights were created by custom—a custom of long standing economic interaction. Placing transit rights within the arbitrary discretion of a sovereign state, and thereby allowing that state to block the passage of goods, seems redundant where transit is already restricted by customs.

Opinion recorded over the past six decades has definitely favored the proposition that states whose economic life and development depend on

45. P. REUTER, *LE DROIT INTERNATIONAL DES COMMUNICATIONS* 32 (1953/54).

46. *African Transport Development Study*, U.N. ESCOR E.C.A., at 3, U.N. Doc. E/CN.14/Trans/28 (1965).

47. *See generally id.*

48. *See infra* II.B.1.(c)(ii)(2).

49. *See generally* C.C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED BY THE UNITED STATES* 618 (1948).

50. *See UNCTOS: Fifth Committee Report (Question of Free Access to the Sea of Landlocked Countries)*, U.N. GAOR Summary Records of Meetings and Annexes Geneva, at 26-27, U.N. Doc. A/Conf.13/43 (1958) [hereinafter *Fifth Committee Summary Record*] (declaration of the delegates of Pakistan, Thailand, and India); 1 *ACTS OF THE UN CONFERENCE ON THE LAW OF THE SEA (Preparatory Document, 1958) (Declaration of Chinese Delegate)* [hereinafter *ACTS OF THE CONFERENCE*].

transit can legitimately ask for it.⁵¹ This dependence is most evident in the case of SWA. According to Lauterpacht, certain states may legitimately claim "the right of transit."⁵² Lauterpacht opines that the existence of a right of transit depends on two fundamental conditions. First, the state claiming the right of transit must prove both the merits and necessity of transporting goods through the coastal state. Second, the exercise of this right must not prejudice or disturb the transit state.

The freedom of transit over the territory of a neighboring state may represent an advantage of convenience for a coastal state. For an SWA, it is not a question of convenience, but one of survival. Consequently, SWA may legitimately demonstrate a necessity and oblige the transit state to conclude an agreement, i.e., to grant the transit right.⁵³ According to Charles de Visscher, freedom of transit implies that a transport obliged to cross foreign territory separating its departure point from its destination should not encounter any obstacle, charge, or difficulty that would have been avoided if the travel was done entirely within one state.⁵⁴

In light of the above, the grant of transit freedom to SWA is an obligation of the state of passage. This obligation is independent of international agreements. In other words, the freedom of transit is a "right" that all states may demand of transit states without their consent. To ask for this right, the demanding state must fulfill certain conditions. SWA inherently fulfill these conditions because of their geographical position and economic dependence.

2. *Freedom of the High Seas.*—A French authority on international law wrote that the essential juridical norm in freedom of the high seas is the principle of the freedom of utilization. Free utilization of the seas encompasses not only navigation and trade, but also other auxiliary utilities such as fishing, the laying of cables, and scientific research. Consequently, the proposition of an entitlement to free access via freedom of the high seas abrogates any government's reservation of the exclusive use of all or any part of the ocean (or tolerates such insistence only under certain conditions).⁵⁵ According to the same author, "The high sea —

51. D.P. O'CONNELL, 1 INTERNATIONAL LAW 613-15 (1965).

52. E. Lauterpacht, *Freedom of Transit in International Law*, 44 TRANSACTIONS OF THE GROTIUS SOCIETY 332 (1958/59). He added that the Covenant of the League of Nations, the Barcelona Statute, and other similar instruments recognize the principle of free transit. *Id.* They oblige transit states "to negotiate and conclude, on reasonable bases, transit agreements." *Id.* These obligations, in turn, comprise a body of customary international law.

53. On this basis, Nepal asked India to conclude a transit agreement after the expiration of the Treaty of 1960. See Sarup, *supra* note 9, at 287.

54. CHARLES DE VISSCHER, DROIT INTERNATIONAL DES COMMUNICATIONS 11 (1972).

55. See GEORGE SCELLES, MANUEL DE DROIT INTERNATIONAL 382 (1964).

a public international domain — comes only under the jurisdiction of international law. The sea *res communis* signifies that the sea 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.⁵⁶

Other authors also emphasize the legitimacy of the right of SWA to free access to the sea. According to Sibert, "The high sea is 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 who have no seacoast."⁵⁷ The same author adds that the right of access to the sea of SWA seems absolutely legitimate.

Pounds also emphasizes the idea that access to the sea derives from the principle of freedom of the seas:

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.⁵⁸

Hyde also seems to share the idea of free access through freedom of the high seas, but with a few reservations. According to Hyde, the principle of international society that states that the territory of each of its members should be linked to the sea by way of access is sufficiently general to be applied to the utilization of all the appropriate communication means, and it is valid, in fact, for overland transit modes as well as transit through water.⁵⁹

H. Thierry, representative of France to the International Conference on the Law of the Sea (1958), emphasized that SWA have the same rights as other states with regard to the use of the maritime public domain according to the principle of equality of states.⁶⁰ H. Tabibi, member of the International Law Commission, advocated "a strict relation between the right of innocent passage on land and sea Recognizing the right of innocent passage in favor of SWA is the only means to render the

56. *Id.*

57. M. SIBERT, 1 *TRAITE DE DROIT INTERNATIONAL PUBLIC* 660 (1951).

58. Norman J.G. Pounds, *A Free and Secure Access to the Sea*, 49 *ANNALS ASS'N AM. GEOGRAPHERS* 257 (1959).

59. See HYDE, *supra* note 49, at 618. Recognizing, in principle, the validity of free access to the sea, Hyde believes that this validity does not derive from general international law, but rather from the provisions of treaties concluded between concerned parties. *Id.*

60. See generally, Fifth Committee Summary Record, *supra* note 50, at 12-13 (Declaration of the French delegation).

principle of the freedom of the seas effective for them.”⁶¹ Tabibi supported extending the theory of the right of innocent passage over the territory of coastal states. This extension was a logical consequence of the principles of the freedom of seas and the equality of states.

Tabibi quoted a number of texts to defend this thesis, but specifically emphasized the universally acknowledged authority of Hugo Grotius. According to Tabibi, Grotius had already envisaged the extension of the right of innocent passage to the relations between neighboring properties. Tabibi concluded that for SWA, the right of innocent passage on territorial sea and in the air is inviolable and without free access, the principle of freedom of the sea loses all significance.

In sum, the high seas are an international public domain and must be open to all people. It is thus natural to think that the principle of free access to the sea derives from the principle of freedom of the high sea. Without the right of access to the sea, the freedom of the sea would be deprived of its universality. For SWA, if their right of access to the sea is not guaranteed initially, the universal freedom of the high seas is meaningless.

3. *International Servitude*.—The thesis of the right of access as an international servitude is controversial because it proposes that international law grants to SWAs absolute passage upon territories separating them from the sea.⁶² For our purposes, an international servitude⁶³ is an injunctive limitation imposed upon the internal or external sovereignty of a state in favor of another country.⁶⁴

Although doubt exists about whether servitudes constitute a distinct legal category in international law, there are examples of situations in municipal law that involve what would be termed servitudes. Oppenheim

61. A.H. TABIBI, *FREE ACCESS TO THE SEA FOR COUNTRIES WITHOUT SEA COAST* (1958).

62. Dwight H. Reid, *Les Servitudes Internationales*, 3 *RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL* 15 (1933); see also I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 285 (4th ed. 1990).

63. Normally, an international servitude constitutes a real right rather than a constructive one. It is the result of an agreement between two or more states. Under such agreements, one state is granted the right to utilize permanently the territory of another state for a specific purpose. While the servitude may be permissive or restrictive, it does not entail a positive obligation to do something. It establishes, between territories, a permanent and legal relation. The transfer of sovereignty to one or the other territory does not affect this relation. It can be terminated only by mutual agreement, by renunciation of the dominating state, or by consolidation of affected territories under a sole sovereign. See, e.g., PARRY & GRANT, *ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW* (1986); JAMES R. FOX, *DICTIONARY OF INTERNATIONAL & COMPARATIVE LAW* 403 (1992).

64. Most servitudes originate by convention. However, some derive from general law. For example, states must abstain from taking any measure likely to modify the natural course of a waterway that passes through several other states.

defines servitudes 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 of interest of another state."⁶⁵

The theory of international servitudes may be considered a solution to the problem of access to the sea of SWA. According to Labrousse, the doctrine of servitudes must be extended so that SWA have a permanent outlet to the sea, independent of all precise treaties or agreements. Labrousse states, "Wouldn't it be useful to lay the principle that all states which do not have any frontier contiguous to the ocean, may obtain *stricto jure*, as enclave states, an access to the sea by establishing in their favor a servitude of passage grafting the nation whose territory forms an obstacle to this communication?"⁶⁶

Dwight Reid states that with regard to free overland transit, almost all requests for servitudes of passage are granted by agreements.⁶⁷ Treaties would thus afford sufficient access if we consider only the provisions instituted for the benefit of the contracting state. But in practice, the provisions of such agreements are generalized, either by the most favored nation (MFN) clause or by restricted usage. Such undefined privileges may be considered sufficient when the transit right is not essential, but the situation of enclave states requires the clear establishment of a servitude in order to guarantee the permanence of such right.⁶⁸

However, many authors share the opinion that in all situations where a state lacks access to the sea, necessity creates a servitude of passage. Georges Scelles considers free access to the sea to be a servitude of public law. Following similar principles, in municipal law, the enclave properties legally have access to the means of communication. Accordingly, because of its geographical position, an SWA should be considered the dominant state and the transit state the servient state. The right of transit would thus belong to the dominant state and could be imposed upon the servient state. This theory is advantageous for SWA because it grants them the right of passage throughout the territory of the

65. See OPPENHEIM, INTERNATIONAL LAW.

66. PIERRE LABROUSSE, DES SERVITUDES EN DROIT INTERNATIONAL 316 (1919). This view stems more directly from the notion of "particular servitudes" as opposed to "universal servitudes." The term "particular servitudes" covers rights of one or more states over the territory of another such as rights to use waterways and railways for passage. See G.V. La Forest, *Towards a Reformulation of the Law of State Succession*, in INTERNATIONAL LAW IN A CHANGING WORLD 122 (E. Collins, Jr. ed., 1970).

67. See Reid, *supra* note 62, at 15-16.

68. *Id.* at 51.

coastal state independent of bilateral agreements. However, such a right has never been recognized in practice by states always requiring a precise agreement. Consequently, SWA are constantly dependent upon the benevolence of neighboring states.

As mentioned earlier, the notion of international servitudes is very much contested.⁶⁹ The Permanent Court of International Justice (PCIJ) refused to take sides on the matter in the Wimbledon case.⁷⁰ The PCIJ was not required to take part in this controversial question without knowing whether there existed in international law a servitude analogous to the servitude of private law.⁷¹

There are also authors who refuse to recognize the notion of servitude in public law. For them, "there is no servitude of public law; its existence is impossible [to establish] in international law. It is contrary to the requirements of the state. The theory has not provided an acceptable formula; they are absolutely superfluous."⁷² Martin Ira Glassner opines that basing the right of access on servitudes has no solid foundation in public law and is actually extinct.⁷³

Therefore, in short, the notion of servitudes in international law is controversial. Today, this notion does not have the same importance it had in the beginning of the twentieth century. Nevertheless, it is worthy of mention.

4. *Geographical Equality*.—R.J. Dupuy considers the law of the sea to be a "situationalist law," one which takes into account the particular cases and specific problems faced by each state.⁷⁴ Notwithstanding its universal application to all countries of the international community, the law of the sea cannot be generalized because each particular case is governed and regulated separately.⁷⁵ This situationalist conception was especially evident in the period following World War II. According to the UN Charter, the United Nations is bound to act "with a view to the

69. See *supra* II.A.3.

70. Wimbledon (Fr. v. Ger.), 1923 P.C.I.J. (ser. A) No. 1, at 177 (Aug. 17).

71. *Id.*

72. See generally G. Crusen, *Les servitudes internationales*, 22 COLLECTED COURSES OF THE ACADEMY OF INTERNATIONAL LAW 26 (1928).

73. MARTIN I. GLASSNER, ACCESS TO THE SEA FOR DEVELOPING LAND-LOCKED STATES 16 (1970); see also A.D. McNair, *So-called State Servitudes*, in LORD MCNAIR: SELECTED PAPERS AND BIBLIOGRAPHY 17 (1974).

74. This idea is widely accepted. Indeed, international law, or perhaps more precisely international economic law, treats developed and developing countries differently in many respects. See CARREAU ET AL., *supra* note 17, at 61.

75. Unlike this approach, which emphasizes considerations of "pure law," modern doctrines have taken a more abstract approach. They emphasize the economic repercussions resulting from the particular geographical position of SWA and try to bring about juridical solutions.

creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations."⁷⁶ Its purpose is to promote economic progress and propose solutions to international problems.

Resolution 1028 (XI) of the U.N. General Assembly concerning SWA and the expansion of international trade has taken the same direction.⁷⁷ This Resolution invites member states to recognize fully in the field of transit trade the needs of member states who are without access to the sea. The Resolution consequently calls upon member states to grant SWA such proper facilities, in law and in practice, as their future economic development may require.⁷⁸ The first of eight principles adopted by UNCTAD⁷⁹ and later proposed for inclusion in the Preamble of the New York Convention⁸⁰ is more precise. It proclaims that recognition of the right of free access to the sea for every SWA is indispensable for the expansion of international trade and economic development.⁸¹

UNCTAD's provisions concern both developed and underdeveloped SWA. But particular attention is paid to developing SWA in the more recent resolutions that have been adopted within the framework of universal organizations. For instance, the Charter of Economic Rights and Duties of States⁸² sets forth its basic premise as "the expansion of international trade for the interest of all nations and with due respect to the differences between the economic and social systems."⁸³ The Charter proclaims the need to create conditions permitting further expansion of trade and the strengthening of the economic independence of developing states.⁸⁴

According to Guy Feuer, the general idea of the Charter concerning international trade (originating from Articles 14 and 21) is that all states must cooperate with a view to eliminating obstacles to trade and must

76. U.N. CHARTER art. 55.

77. G.A. Res. 1028(XI) (1957).

78. See UNITED NATIONS, THE LAW OF THE SEA: RIGHTS OF ACCESS OF LANDLOCKED STATES TO AND FROM THE SEA AND FREEDOM OF TRANSIT 6 (discussing Resolution 128).

79. See *infra*.

80. See *infra*.

81. Principle I, Principles Relating to Transit Trade of Landlocked Countries, UNCTAD Conference (adopted during its first session held between Mar. 23-June 16, 1964).

82. Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., cited in U.N. GAOR, 2d Comm., 35th Sess., Agenda Item 61(b), U.N. Doc. A/C.2135/L.47 (1980) [hereinafter G.A. Res. 3281].

83. Guy Feuer, *Réflexions sur la charte des droits et devoirs économiques des États*, REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC, Apr./June 1975, at 286.

84. G.A. Res. 3281, *supra* note 82, *pmbl.*, paras. b, c.

resolve in an equitable manner the trade problems of all states, particularly those of developing states.⁸⁵ For SWA to benefit from these measures, they must have access to the sea without hindrance. The Charter makes specific reference to SWA.⁸⁶

Several other international resolutions also take into consideration the particular economic and geographic positions of SWA and grant them an objectively preferential status. From the above, it is obvious that the right of access to the sea for SWA is a compensatory right granted to eliminate the geographic inequality of SWA and the attendant obstacles to trade and development of these states.

B. International Agreements

As far as international agreements serve as a source of a right of access to the sea, some agreements have a larger coverage than others. Without dealing exclusively with the problems of SWA, these more general conventions contain some provisions regarding SWA. On the other hand, there are agreements dealing specifically with the problems of these countries.

1. General Conventions.—General conventions do not have as a specific objective the regulation of the right of access to the sea of SWA. The right of access is thus envisaged in a broad framework, for instance, the rights of river navigation and freedom of transit.

(a) Riparian treaties.—Although the law of rivers was not conceived for the purpose of solving the problems of access to the sea for SWA, it made the first attempt of an international nature to deal with the question of access to the sea. This was stated by Charles de Visscher, who wrote that the principle of the right of access to the sea visibly inspired the international treaties that serve as the bases of the modern law of rivers.⁸⁷ For de Visscher, the legal regime of international rivers⁸⁸ is,

85. Feuer, *supra* note 83, at 295.

86. See Article 25 of the Charter, which provides 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." G.A. Res. 3281, *supra* note 82, art. 25.

87. See DE VISSCHER, *supra* note 54, at 9.

88. It may be useful to clarify the term "international river." An international river is one that traverses the territories of two or more states. However, the term is often used to mean rivers that geographically and economically affect the territory and interests of two or more states. A treaty concerning an international river may relate to any of several questions. It may govern the extent

to some extent, "the *nucleus* around which the modern law of communication was gradually constituted."⁸⁹

(i) *Historical regime*.—At the outset, the law of rivers was inspired by the concept of universalism. After the Vienna Congress, it was the triumph of particularism of riparian states. Yet, the objective remained the free access to the sea for upstream territories. The institution of central organs continued the growth of the law of rivers. These organs were aimed at controlling the application of treaties and ensuring the exercise of freedom of navigation.

From the Middle Ages until the end of the eighteenth century, the navigation of rivers was kept under the jurisdiction of individual sovereigns. Each local sovereign considered himself the absolute master of the portion of the river passing through his territory. He reserved the exclusive privilege of navigation for his own subjects. In the eighteenth century, jurists started to make claims for freedom of navigation. In favor of freedom of navigation, Grotius invoked the natural law of innocent passage.⁹⁰ But these voices were left without response.

A century later, when the army of the First French Republic defeated the coalition of the *ancien regime*, it found that international rivers in its path (like the Escault and the Meuse) had remained closed to international trade for a century and a half.⁹¹ On November 16, 1792, the Provisional Executive Council of the Republic decreed the liberalization of the Escault and the Meuse. The decree indicated that the hindrances to the navigation and trade on the Escault and Meuse were directly contrary to the fundamental principles of natural law.⁹²

In 1804, the Paris Convention⁹³ adopted the principle of the freedom of navigation on the Rhine, the most important European international river. It asked for the co-administration of riparian access. The solution proposed by the Convention was regional and particular.

to which an upper riparian state is restricted from using the waters — i.e., by building a dam or an irrigation system — so that the lower riparian states are not affected adversely. Fishing may also be governed by an international river treaty. An even clearer example is the right of navigation for a lower riparian state over an international river giving access to the sea. This is a typical example of an international servitude involving an international river. See THE LEGAL REGIME OF INTERNATIONAL RIVERS AND LAKES (R. Zacklin & L. Caflisch eds., 1981).

89. DE VISSCHER, *supra* note 54, at 7.

90. See BELA VITANYI, THE INTERNATIONAL REGIME OF RIVER NAVIGATION 21-23 (1979).

91. See Treaty of Munster of 1648.

92. See VITANYI, *supra* note 90, at 31-32.

93. Convention on the Concessions to Navigation of the Rhine, Aug. 15, 1804, Fr.-Ger., 4 Martens Nouveau Recueil 36 [hereinafter Paris Treaty].

Another riparian treaty was signed in Paris on May 30, 1814.⁹⁴ It emphasized the communication between people and provided for a congress to be held in Vienna. According to the Treaty of Paris of 1814 and the Final Act of the Vienna Congress,⁹⁵ the law of rivers had the aim of ensuring the navigation of upstream countries through free access to the sea. Article 5 of the Paris Treaty on the Rhine⁹⁶ emphasized free access to the sea, providing that "[t]he 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."⁹⁷

Articles 108 to 116 of the Final Act of Vienna dealt with river navigation. These articles served as a basis for all nineteenth century treaties on navigation. Charles de Visscher has written that "in the Vienna Congress the regime of navigable means of communication were envisaged mainly as a case which concerned only riparian states."⁹⁸

Despite the triumph of particularism in the Vienna Congress, the universal scope of the proposals could not be ignored. Besides freedom of navigation in international rivers, the Final Act of Vienna also provided for freedom of navigation in all tributaries of international rivers without discrimination.⁹⁹

(ii) *General regime.*—The problem of access to the sea was partially solved by the following special conventions during the nineteenth century: the 1821 Convention for Elbe,¹⁰⁰ the Mayence Convention of 1831¹⁰¹ and the Mannheim Convention of 1868 for the Rhine,¹⁰² and the Treaties of Paris, Berlin, and London for the Danube.¹⁰³ Since the Vienna Congress, the international law of rivers

94. Treaty of Peace, May 30, 1814, Fr.-Aus., 2 Martens Nouveau Recueil 1.

95. Final Act of the Congress of Vienna, June 9, 1815, 1 MAJOR PEACE TREATIES 519 [hereinafter Vienna Treaty]. For a general account of the Vienna Congress in relation with navigation, see VITANYI, *supra* note 90, at 52-69.

96. For a general account of the Paris Treaty in relation with navigation, see VITANYI, *supra* note 90, at 47-52.

97. See THE LEGAL REGIME OF INTERNATIONAL RIVERS AND LAKES, *supra* note 88, at 209.

98. DE VISSCHER, *supra* note 54, at 71.

99. Vienna Treaty, *supra* note 95, arts. 1-2. It is appropriate to mention that the United States invoked the decision of the Vienna Congress to assure free navigation on the Saint Lawrence. In the same vein, the triumph of freedom of navigation spread to all continents. In the Americas, navigational freedom was proclaimed for the Amazon, the Rio de la Plata, the Rio Grande, and their tributaries. In Africa, navigational freedom was declared for the Congo and the Niger. In Asia, the Yan-tse-kiang was opened for foreign flags. While in Europe, the Treaty of Westphalia divided Central Europe into several States, some of them SWA, with important consequences.

100. Act for the Free Navigation of the Elbe, June 23, 1821 [Dresden].

101. Convention of Mayence, Mar. 31, 1831.

102. Revised Convention for the Navigation of Rhine, Oct. 17, 1868 [Manheim].

103. Peace Treaty of Paris, Mar. 30, 1856; Treaty of Berlin, July 13, 1878; London Treaty on

has been amplified. In a series of particular conventions, specific and appropriate modalities were made applicable to each waterway.¹⁰⁴

The remarkable territorial changes that resulted in the dissolution of the Austro-Hungarian monarchy consequently gave birth to several states. Three of them were SWA: Hungary, Czechoslovakia, and Austria. These new states internationalized the Danube and several of its tributaries and sub-tributaries.

In the Treaty of Versailles, a clause regarding a general regime of transit freedom on navigable waterways was inserted.¹⁰⁵ For this purpose, a conference was held in Barcelona under the auspices of the League of Nations.¹⁰⁶ Among the legal instruments prepared by this Barcelona Conference, the Convention of 1921 concerns navigable waterways. This Barcelona Convention brought in the principle of freedom of access by assimilating riparian and non-riparian categories. The Barcelona Convention substituted the classical denomination of "international river" with "water ways of international concern."¹⁰⁷ This internationalization, with the help of regional agreements concluded by the new states, found new scope for application.

(iii) *Special regimes*.—The legal regime for three international rivers — the Danube, the Mekong, and the Niger — are briefly presented as examples. These cases are significant with regard to the right of access to the sea of SWA.

(1) *The Danube*.—Among international rivers, the Danube, as an economic artery of Central Europe, is the biggest in the region. The legal regime for this river is presently determined by the Convention of Belgrade, a multilateral convention in which the following three SWA, riparian to the Danube, are party: Austria, Hungary, and Czechoslovakia.¹⁰⁸ This Convention, dated August 18, 1948, succeeded the Treaties of Paris (1856) and Berlin (1878). The Convention of Belgrade recognized the principles of freedom of navigation and equal treatment for all nationals, commercial ships, and goods of the states.

Lower Danube Navigation, Mar. 10, 1883; see also VITANYI, *supra* note 90, at 81-88.

104. See GLASSNER, *supra* note 63, at 18.

105. Treaty of Versailles, June 28, 1919, 225 Consol. T.S. 188.

106. The conference was known as the First General Conference on Communication and Transit and was convened on March 10, 1921.

107. VITANYI, *supra* note 90, at 154.

108. See INTERNATIONAL LAW 410-11 (Grigory I. Tunkin ed., 1986).

(2) *The Mekong*.—The principal riparian states of the Mekong River include three littoral states — Cambodia, Vietnam, and Thailand — and an SWA, Laos. The rules actually in place concerning the regime of navigation on the Mekong derive from a treaty signed on December 29, 1954.¹⁰⁹ This treaty recognizes the principle of freedom of navigation.

(3) *The Niger*.—Nine states are riparian to the Niger River, and four of them are SWA: Burkina Faso, Mali, Niger, and Chad. Sixteen non-African powers established the legal regime for the Niger in 1885 through the Treaty of Berlin. It endorses the principles of freedom of navigation and complete equality of treatment for 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 in order to abrogate the regime laid down by the Convention of Saint-Germain. In October 1963, they signed an “Act concerning navigation and economic cooperation between the states of the Niger basin.” This Act also endorsed the principles of freedom and equality of treatment.¹¹⁰ Similarly, an Agreement of November 25, 1964, created the River Niger Commission. This Commission is comprised only of riparian states and has limited consultative jurisdiction.¹¹¹

(iv) *Guarantee of the freedom of navigation*.—At the outset, one of the objectives of the law of rivers was to ensure both riparian and non-riparian states the freedom of navigation to the sea. This right of free access to the sea concerned not only SWA, but all states. It was the law of rivers that regulated for the first time the right of free access to the sea by imposing certain duties upon riparian states. The law of rivers was also the first to vest certain jurisdictional competencies in a central organ, which elaborated regulations, controlled treaty applications, and enforced rules and commonly made decisions.

The Paris Treaty established two commissions: the European Danube Commission (for maritime navigation) and the Danube Commission (for river navigation).¹¹² While the Danube Commission

109. The Mekong crosses China, Myanmar, Laos, Thailand, and Cambodia before emptying into the South China Sea. It is only navigable between Luang Prabang and Laos. China and Myanmar have refused to participate in the development of the river.

110. See U.N. DEP'T OF INT'L ECON. & SOC. AFFAIRS, TREATIES CONCERNING THE UTILIZATION OF INTERNATIONAL WATER COURSES FOR OTHER PURPOSES THAN NAVIGATION, at 6-8, U.N. Doc. ST/ESA/141 [hereinafter *Natural Resources/Water Series No. 13*].

111. The regime of this Commission was further regulated on November 21, 1980, through the Convention signed at Faranah creating the Niger Basin Authority. See *id.* at 56-66.

112. Peace Treaty of Paris arts. 16-18. In fact, the Danube Commission (river navigation) was

excluded non-riparian states, the European Danube Commission was composed of certain riparian and non-riparian states.¹¹³ The Commission, for political reasons, had an exceptionally extended power.

The functions of these commissions were similar to those of other river commissions. Among other things, they coordinated activities of riparian states, elaborated navigation rules, supervised the application of these rules, and undertook the obligatory settlement of disputes between riparian states.¹¹⁴

A decade later, in 1868, states riparian and non-riparian to the Rhine for the first time conceived a statute applicable to all navigable parts of this river. These states understood the statute to include some principles of freedom and to contain a provision on the institution of a "Commission."¹¹⁵

The "Commission" controlled the execution of the rules among riparian governments, deliberating on the position of these member governments and hearing appeals on judgments relating to the navigation of the Rhine rendered by the tribunal of first instance.¹¹⁶ A riparian SWA, Switzerland, was represented on the Commission, as were some non-riparian states such as Great Britain, Italy, and Belgium. Indeed, the creation of a central organ to control navigation and apply treaty provisions is an excellent means of ensuring freedom of transit through neighboring coastal territories.

The law of rivers was the first legal framework to deal with potential solutions for free access to the sea. It tried to rectify the problems of free navigation by creating a mechanism of maintenance. There are several similarities between the right of riparian navigation and the right of access to and from the sea of SWA.

(b) *Freedom of transit treaties.*—The development in laws and regulations on international transit after World War I was considerable. The focus on international transit in the significant peace treaties of 1919; the Treaties of Versailles,¹¹⁷ Saint-Germain,¹¹⁸ Neuilly-Sur-Seine,¹¹⁹

meant to be permanent and the European Danube Commission (maritime navigation) to be temporary. However, the first could never become operational while the second continued to exist. See THE LEGAL REGIME OF INTERNATIONAL RIVERS & LAKES, *supra* note 88, at 213.

113. Representatives of Great Britain, France, Austria, Prussia, Russia, Sardinia, and Turkey comprised the European Danube Commission (maritime navigation). THE LEGAL REGIME OF INTERNATIONAL RIVERS & LAKES, *supra* note 88, at 213.

114. *Id.* at 212-13.

115. See generally MANUAL OF PUBLIC INTERNATIONAL LAW 327 (Max Sorenson ed., 1968).

116. DINH ET AL., *supra* note 44, at 1113.

117. Treaty of Versailles.

118. Treaty of Saint-Germain, Sept. 10, 1919, 226 Consol. T.S. 9.

and Trianon;¹²⁰ proves its importance. Some of these treaties sought to solve the transit problems of certain European SWA. For instance, the Treaty of Versailles, in Article 104, dealt with the status of the Free City of Danzig. The Trianon Treaty contained provisions concerning Hungary. The Saint-Germain Treaty granted transit facilities to Austria.

(i) *Barcelona Statute*.—The Barcelona Statute of 1921¹²¹ was adopted primarily to alter the economic consequences of the principle of nationalities applied, *strictum jus*, by the Versailles Treaty. It was indeed necessary to prepare, without delay, an international regime of transit in order to guarantee the communication among the European SWAs that had emerged after the dismemberment of the Austro-Hungarian Empire. After the creation of the League of Nations, the need for the establishment of a regime on transit freedom became apparent. The founding nations tried to grant general recognition for the right of free international transit.

The Covenant of the League of Nations imposed on member states the obligation to make necessary provisions to secure and maintain freedom of communication and transit.¹²² The Covenant also required equitable treatment for trade of all members of the League. Some technical organs were also created, among them, the Organization of Communication and Transit, which was responsible for proposing appropriate measures to ensure, at all times, freedom of communication and transit.

The First General Conference on Communication and Transit adopted the texts of a series of conventions, among them, a statute relating to freedom of transit.¹²³

(1) *Content of the Barcelona Statute*.—The Barcelona Statute relating to the freedom of transit originated with the Barcelona Convention of April 20, 1921.¹²⁴ This Statute constitutes the basis of most of the trade agreements dealing with transit signed after the 1930s. Some of these agreements refer specifically to the Barcelona Statute. In most of the agreements, the expressions “freedom of transit” and “free

119. Treaty of Neuilly, Nov. 27, 1919, 226 Consol. T.S. 333.

120. Treaty of Trianon, June 4, 1920, 3 TOYNBEE, MAJOR PEACE TREATIES OF MODERN HISTORY 1863.

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

122. See LEAGUE OF NATIONS COVENANT art. 23(e).

123. *Barcelona Statute*, *supra* note 121.

124. *Id.* It came into force on October 21 of that year.

transit of goods" are considered to be in accordance with the spirit of the statute.

The Barcelona Statute, which is an integral part of the Barcelona Convention, requires all contracting states to facilitate freedom of transit by rail or internal navigable waterways. This requirement includes routes in use across territories under contracting states' jurisdiction that are convenient for international transit.¹²⁵ The contracting states may apply reasonable tariffs — with regard to rates, conditions of traffic, and commercial competition — on the traffic in transit, regardless of the traffic's point of departure or destination.¹²⁶ These tariffs must be fixed in order to facilitate international traffic.¹²⁷ The taxes, facilities, or restrictions may not be based directly or indirectly upon the flag, ownership of goods, or means of transport utilized for a journey.¹²⁸

The regime the Barcelona Statute established on freedom of transit proves that the states present at the Conference intended to recognize for SWA a right of transit in bordering territories.

(2) *Limitations of the Barcelona Statute.*—Although the Barcelona Statute provides that the principle of freedom of transit must be observed by all possible means, signatories to the Barcelona Convention may depart from that principle. In case of serious events affecting the security or vital interests of the transit country, a state may disregard the provisions of the Statute for a limited time. Moreover, a state may refuse the transit of goods or passengers for public health or public security reasons. States may also refuse transit under the authority of general international conventions or under decisions taken by the League of Nations. Another important limitation relates to the means of transport. The Statute concerns only water and rail transport and is not applicable to overland or air transport.

As these limitations reveal, the Statute attempts, within the framework of a treaty, to establish an equilibrium between the principles of freedom of transport and state sovereignty.¹²⁹ As one author has noted, the balancing of these principles illustrates the contradictions of a fragile legal regime built in a protectionist context where transit is presented as a privilege rather than as a real right.¹³⁰ Nevertheless, the

125. *Id.* art. 2.

126. *Id.* art. 4.

127. *Id.*

128. Barcelona Statute, *supra* note 121, art. 4.

129. *See, e.g., id.* art. 1.

130. Loic Marion, *Liberté de transit en droit international* (1974) (unpublished thesis, University of Rennes, France).

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Barcelona Statute, despite its deficiencies, is both an important step toward the formation of a universal law and a set of "minimum standards."¹³¹

(ii) *The Havana Charter*.—The U.N. Charter has no specific provision governing communication and transit similar to Article 23 of the Covenant of the League of Nations. Indeed, as revealed in Article 55, the U.N. Charter deals in a rather vague manner with a broad range of economic and social questions.¹³² The vagueness and imprecision of Article 55 of the U.N. Charter originated from the unstable political situation of 1945 Europe. It was not possible to draw, even in a general manner, a common line of conduct in the U.N.¹³³

Within the framework of the U.N., ECOSOC coordinates the activities of member states in the field of economic and social cooperation. Following a U.S. demand, ECOSOC held an international conference in 1946 in London to study a project for creating an international trade organization.¹³⁴ The London conference prepared a draft proposal to establish the UN International Trade Organization. The draft was submitted in August of 1947 to a new conference held in Geneva.¹³⁵ The conference of Havana¹³⁶ then developed a definitive text. The International Trade Organization never came into force, however.¹³⁷ With 106 Articles, the Charter prepared at Havana was

131. Between the two World Wars, a series of important agreements were added to the Barcelona Convention. They are the statute on the Free Navigation of International Waterways adopted by the Barcelona Convention, Apr. 20, 1921, 7 L.N.T.S. 35, and the Geneva Convention on the International Regime of Maritime Ports and the International Regime of Rail, Dec. 9, 1923. These conventions — in particular, the latter, which recognized that SWA had rights equal to those of coastal states for access to maritime ports — are important for SWA.

132. U.N. CHARTER ch. IX. Article 55 reads:

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.

U.N. CHARTER art. 55.

133. Marion, *supra* note 130, at 382; *see also* THE HISTORY OF UNCTAD 1964-1984 53-56 (1985).

134. The conference was held in London during October and November of 1946. The conference that produced the Charter was the United Nations Conference on Trade and Employment.

135. CARREAU ET AL., *supra* note 17, at 95.

136. From November 21, 1947, to March 24, 1948.

137. *See* CARREAU ET AL., *supra* note 17, at 95-96; *Charter of the International Trade Organization*, U.N. Conference on Trade and Employment, U.N. Doc. E/Conf.2/78 (1948) [hereinafter *Havana Charter*].

extremely long. Twenty-seven instruments of ratification were necessary for it to become applicable. Only two states ratified the Charter, and thus, it did not become positive law.

The aim of the Havana Charter¹³⁸ was to create an international trade organization to supervise the world trade system largely on the basis of the principle of free competition and free enterprise. The Havana Charter fixed certain goals for the signatory states to attain. These goals included "favoring for all states 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."¹³⁹

Although never ratified, the Havana Charter may be considered an additional step in the process of establishing free and secure access to the sea. Moreover, it laid the groundwork for the establishment of the General Agreement on Tariffs and Trade.

(iii) *Article 5 of the GATT.*—Contrary to the Havana Charter, the General Agreement on Tariffs and Trade (GATT) was a self-executing agreement. It did not require ratification to become positive law. The GATT came into force on January 1, 1948, in conformity with the terms of the protocol for provisional application dated October 30, 1947.

Article 5 of the GATT deals with "freedom of transit." Although it does not specifically deal with SWA,¹⁴⁰ it reaffirms the principles laid

138. See Havana Charter, *supra* note 137.

139. *Id.* art. 1.

140. The U.N. Secretariat, in its study on the "question of free access to the sea of SWA," summarized the principal provisions of Article 5 of the GATT as related to SWA. They are as follows:

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 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 baggages.

See MEMORANDUM CONCERNING THE QUESTION OF FREE ACCESS TO THE SEA OF LANDLOCKED COUNTRIES, U.N. Doc. A/Conf.13/29 (1958).

down by the Barcelona Statute. One important difference between Article 5 of the GATT and the Barcelona Statute has been noted by Loic Marion. In his words, "the word *sovereignty* does not appear at all in the seven paragraphs of the Article, while at each moment, the draftsmen of the Barcelona Statute recall the sovereign right of states."¹⁴¹ Another difference is that the GATT provides signatory states greater facilities than those provided by the Barcelona Statute. While Article 2 of the Barcelona Statute limits freedom of transit to the utilization of railways and waterways, Article 5 of the GATT includes overland transport.

On one point, however, Article 5 of the GATT remains incomplete compared with the Barcelona Statute, namely the transit of persons. The circulation of persons is not governed by Article 5. Indeed, this exclusion can be justified by the limited nature of the objectives of GATT. Moreover, the draftsmen of Article 5 may have taken into consideration the ability of states party to the Barcelona Statute to derogate from the provisions concerning the transit of persons.

(c) *The U.N. Conference on the Law of the Sea.*—During its eleventh session, the United Nations General Assembly recommended to the conference of plenipotentiaries that a study be conducted on the problem of free access to the sea of SWA.¹⁴² The Geneva Conference of 1958¹⁴³ established the Fifth Committee for that very purpose. While the Geneva Conference considered several proposals from SWA all seeking recognition of a general law of access to the sea, the Geneva Convention on the High Seas¹⁴⁴ ultimately did not provide such recognition. Instead, it recorded the views of transit states, which preferred conventional procedures.

Before analyzing Article 3 of the Geneva Convention on the High Seas, a short history of Article 3 will be presented in order to illustrate the arguments of SWA and transit states concerning the right of access.

(i) *History of Article Three.*—The Committee on Industry and Trade of the Economic Commission for Asia and the Far East (ECAFE) examined the problem of its members without access¹⁴⁵ during its

141. Marion, *supra* note 130, at 387.

142. See M.I. GLASSNER, *supra* note 75, at 29.

143. The U.N. 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, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter Geneva Convention].

144. See *id.*

145. The SWA represented on ECAFE were Afghanistan, Laos, and Nepal.

Eighth Session.¹⁴⁶ During the Twelfth Session, held in February 1956, ECAFE adopted a resolution of its Committee on Industry and Trade. This resolution recommended "that the members recognize fully the needs of members deprived of access or simply from easy access to the sea, with regard to the transit trade and grant to these countries necessary facilities in conformity with the law and international practices." Thus, for the first time, an important international organization gave special attention to the problems of SWA, even though the text of the resolution emphasized the needs, but not the rights, of SWA.

Subsequently, the Committee continued to study the subject, and the ECAFE Secretariat prepared a report entitled "Problems of Countries of Asia and the Far-East Deprived of Access to the Sea." This report recommended encouraging (i) the adherence of member states to the Barcelona Statute on freedom of transit; (ii) the conclusion of bilateral agreements between states in conformity with the principles of the Barcelona Statute, the Havana Charter, and the GATT; (iii) the appropriate formation of functionaries and agents in charge of different stages of transit traffic; and (iv) the insertion of projects in the economic development plans of states for the expansion of transport and the development of new trade routes with the purpose of facilitating the trade and transit of SWA.

Questions relating to specific problems of SWA grew gradually. The recommendations of ECAFE, although modest, opened a track within the United Nations for considering a comprehensive and precise approach to the problem. Consequently, in a resolution relating to SWA and the expansion of international trade, the U.N. General Assembly encouraged member states to recognize the needs of SWA in the matter of transit.¹⁴⁷

Pressure by delegates of certain SWA — particularly Afghanistan, Czechoslovakia, and Bolivia — was a determinative factor. The General Assembly recommended that the Geneva Conference on the Law of the Sea examine the question of free access to the sea as established by international practice and bilateral treaties.¹⁴⁸ Shortly before the opening of the Geneva Conference, a preliminary conference involving thirteen SWA was held in order to prepare the proposal. This preliminary conference prescribed a list of seven general principles.¹⁴⁹

146. Held from January 24 to 31, 1952.

147. G.A. Res. 1028 (XI) (1957).

148. G.A. Res. 1105 (XI) (1957). (See paragraph 3 in particular.)

149. See *infra* note 166 and accompanying text.

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(ii) *Conflicting theses.*—For the first time, a passionate confrontation between SWA and transit states regarding the right of access took place. Soon after, in the Fifth Committee, instead of having to confront three classical regional groups, the Committee dealt with a group of transit states and a group of states deprived of access to the sea. These groups differed on one fundamental point: whether the right of access was a general rule of international law applicable independent of all agreements or whether it constituted a strictly conventional right, arising only from bilateral agreements.¹⁵⁰

(1) *Thesis of SWA.*—SWA maintained that free access to the sea was not simply a neighborly favor, but rather a right recognized by international law and affirmed by international practice. This right derived from two principles: juridical equality between states and freedom of the high seas.

The delegate of Paraguay (an SWA) to the Fifth Committee of the U.N. Conference on the Law of the Sea declared that free access to the sea, a right recognized by the law of nations, constituted a universal norm of international law.¹⁵¹ The delegate of Hungary (a SWA) had a similar view. He stated that free access to the sea was a right for SWA no matter the category of codification given it. By denying it absolutely, he reasoned that a state shirked its international responsibility. However, the delegate did acknowledge that the right does not prevent transit states from laying certain reasonable conditions.¹⁵²

Some transit states even recognized that access to the sea was an established right in international law. The Argentinean delegate, for instance, while noting that several treaties were concluded during the last century between Argentina, Bolivia, and Paraguay to facilitate the access of these latter two countries to the sea, concluded that these rights were actually an integral part of international law.¹⁵³

(2) *Thesis of transit states.*—Most transit states believed that the principle of territorial sovereignty limited the right of access to the sea. Access to the sea of SWA, then, depended upon the benevolence of SWA's neighbors. In this context, the delegate from Thailand stated that the right of access was not analogous to the right of innocent passage. In his view, while the right of innocent passage could be exercised

150. See generally, Fifth Committee Summary Records, *supra* note 50.

151. *Id.* at 26.

152. *Id.* at 8-9.

153. *Id.* at 2.

without the express agreement of concerned coastal states, the right of transit could be exercised only with the authorization of coastal states, who had the sole authority to grant such transit. Thus, the delegate concluded that SWA did not possess any natural right of transit through neighboring states and that this right could only be granted through agreements between parties.¹⁵⁴

Mr. Bhutto, delegate of Pakistan, went further. He expressed doubts about the existence of a right of access to the sea, noting that the Pakistani delegation explored each and every corner of international law without discovering the right or series of rights claimed by the SWA. He even opined that a state was not at all obliged to grant to other states the privilege of transit upon its territory.¹⁵⁵ Thus, Mr. Bhutto concluded that, against the principle of free access to the sea, there was a fundamental and universally recognized principle of sovereignty that transcended all considerations.¹⁵⁶

Mr. Sen from India shared this view. He declared that a significant difference existed between freedom of the high seas and the right of access to the sea. In his view, the first of these rights was indeed an established principle of international law, whereas the second was subordinate to the sovereignty of coastal states.¹⁵⁷

Despite long and vigorous denunciations by many authors of the doctrine of sovereignty of states, it cannot be denied that it is still the very basis of international relations and is accepted as one of the most sacred of principles.¹⁵⁸ Clearly, the Fifth Committee's dealings demonstrated this point.

(iii) *Article Three of the Convention on the High Seas.*—The U.N. Conference on the Law of the Sea assigned its Fifth Committee to examine the regime of free access to the sea.¹⁵⁹ The Fifth Committee was to prepare a draft-convention to be included in the general codification of rules relating to the regime of the sea.¹⁶⁰ This Committee, unlike the other four, had no draft articles prepared by the International Law Commission. However, the Fifth Committee had two important documents at its disposal. The first was a memorandum

154. *Id.* at 26.

155. Fifth Committee Summary Records, *supra* note 50, at 26-27.

156. *Id.* at 26.

157. *Id.* at 27.

158. R.P. ANAND, INTERNATIONAL LAW AND DEVELOPING COUNTRIES 72 (1987).

159. See Fifth Committee Summary Records, *supra* note 50.

160. See *supra* note 143 and accompanying text.

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prepared by the U.N. Secretariat.¹⁶¹ The first two chapters of this memorandum related the deliberations of the U.N. on the question of free access to the sea of SWA and the different theories concerning the right of access to the sea.¹⁶² The last chapter of the memorandum cited bilateral and multilateral treaties dealing with solutions to problems of access to the sea for states deprived of a coastline.¹⁶³ 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 specified the position of American states on the question of access to the sea.

The Presidency of the Fifth Committee was given to Jaroslav Zourek, delegate of Czechoslovakia. Not surprisingly, this created a certain negative attitude among transit states. In this regard, it was noted that "the President of the Fifth Committee was both judge and party which always is a hindrance for the well functioning of a Committee."¹⁶⁴

The representatives of Bolivia and Afghanistan were chosen as Vice-President and Rapporteur respectively. Consequently, the littoral states, despite their majority in the conference, were not represented in the Bureau of the Fifth Committee. This might explain the distrust the transit states manifested with regard to the draft report the Rapporteur presented in the plenary session. It is worth mentioning that the Fifth Committee was the only Committee that asked that the draft report of its Bureau be opened for discussion and that the Rapporteur be obliged to change certain points of the report.

The discussions of the Fifth Committee centered around two draft texts. The first of these texts, proposed by nineteen states (among which eleven were SWA), reconsidered the principles dealt with by the preliminary conference.¹⁶⁵ The SWA asserted that the seven principles the preliminary conference of SWA proclaimed¹⁶⁶ had to be part of the

161. G.A. Res. 1105(XI) (1957).

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

163. ACTS OF THE CONFERENCE, *supra* note 50, at 308.

164. M.R. SIMMONET, LA CONVENTION SUR LA HAUTE MER (1966).

165. See ACTS OF THE CONFERENCE, *supra* note 50, at 84-85.

166. These principles were as follows:

(i) The right of access to the sea of SWA derives from the fundamental principle of freedom of the sea.

(ii) All SWA 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 a SWA, in high seas, benefit from a regime identical to that of the vessels of coastal States in the territorial and internal waters. They benefit

future Convention. Transit states admitted without protest that the second and the third principles were positive law. In contrast, the first and fifth principles were not unanimously accepted as principles of international law. Accordingly, it appeared that coastal states were not prepared to recognize a real right of access to the sea for SWA.

The second text was proposed by three coastal states: Italy, the Netherlands, and the United Kingdom. The text contained two proposals. The first sought to render the Convention applicable to both coastal and non-coastal states on an egalitarian basis. Thus, under this proposal, each and every state, even coastal states, would be treated as if they lacked access. The second proposal recommended that the Conference adopt a non-binding "Resolution" on the free access to the sea of SWA rather than a "Convention" with binding rules.

The competing texts resulted in an impasse. After an effort to create a single text by integrating the two available texts, the Committee decided to consider a draft compromise presented by Switzerland. The Swiss text was adopted (with several modifications in favor of coastal states), and it became the famous Article 3 of the Convention on the High Seas. Article 3 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:

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 SWA 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 a SWA 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 the entire jurisdiction over the means of communications and all consented facilities, shall have the right to take necessary and indispensable measures so that the exercise of right of free access to the sea does not violate their legitimate interests of any kind, mainly security and public health.

(vii) The provisions codifying the principles governing the right of free access of SWA shall not abrogate the 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 agreement in the future, provided that these latter do not introduce a regime less favorable and are not contrary to the above-mentioned provisions.

See R. Makil, *supra* note 15, at 43-44.

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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.

As evident from the language of Article 3, the Fifth Committee did not grant a right of free access to non-coastal states. Instead, it granted them the possibility of access. Accordingly, the 1958 General Conference on the Law of the Sea did not resolve the problem of a lack of access to the sea for SWA.

2. *Specific Conventions.*—The Convention of New York is the only multilateral source giving specific solutions to the specific problems of SWA. Specific solutions have also arisen through particular bilateral agreements signed on different continents.

(a) *The Convention of New York.*—The New York Convention¹⁶⁷ was the result of initiative taken by four Asian SWA — Afghanistan, Laos, Mongolia, and Nepal — during the ECAFE Ministerial Conference on Economic Cooperation in Asia held in Manila in December of 1963.¹⁶⁸ The Conference adopted a resolution advocating the necessity of recognizing the right of free transit to the sea for SWA.¹⁶⁹ This was quite an achievement, constituting the first time that the word “right” was utilized in an international resolution concerning SWA. Preceding resolutions had only recognized the “needs” of such states.

167. Convention on Transit Trade of Landlocked States, done at New York, July 8, 1965, 597 U.N.T.S. 42 [hereinafter New York Convention].

168. See T.M. Franck et al., *The New Poor: Landlocked, Shelflocked and Other Geographically Disadvantaged States*, 7 N.Y.U. J. INT'L L. & POL. 53 (1974).

169. See *Resolution on Asian Economic Cooperation adopted by the Ministerial Conference, in UN ECAFE Regional Economic Cooperation in Asia and the Far East, Report of the Ministerial Conference on Asian Economic Cooperation*, at 2, U.N. Doc. E/CN 11/641 (1964). The Conference also decided unanimously to request that the ECAFE Secretariat prepare a draft-convention. Afghanistan, Laos, and Nepal were appointed to prepare it. The draft-convention was later cosponsored by eight African landlocked States. Hereinafter, it is referred to as the Afro-Asian Draft.

ECAFE adopted another resolution during its 1964 meeting in Teheran, which preceded the first meeting of the United Nations Conference on Trade and Development (UNCTAD). This resolution recommended that the problem of free access be benevolently considered during subsequent meetings of UNCTAD.¹⁷⁰

UNCTAD met in Geneva from March 23 to June 27, 1964. A draft of the Convention Relating to the Transit Trade of Landlocked Countries was presented by Afghanistan, Laos, and Nepal. Eight African states also supported this draft, which constituted the basis of an effort to obtain solid guarantees from UNCTAD concerning freedom of access to the sea. Although the question was not completely apposite to UNCTAD's primary purpose, UNCTAD entrusted the study to a sub-committee comprised of forty members constituted within the framework of the Fifth Committee. During its meetings, the sub-committee was asked to deal with a number of drafts originating from different countries. The members of the sub-committee admitted generally that it was necessary to modernize the Barcelona Statute. The developing SWA desired a convention dealing with their problem. The transit states, however, contended that UNCTAD did not have the legal experts or basic information to conclude such a convention.

The sub-committee adopted eight principles that the Fifth Committee and subsequently UNCTAD adopted in its plenary session.¹⁷¹ These principles were inspired by the principles the preliminary conference of SWA established in Geneva in 1958.¹⁷² Some of them are identical to those of Geneva.

There are two notable differences between the principles UNCTAD adopted in 1964 and those the preliminary conference of SWA adopted in 1958. Few novelties can be found in the principles of 1964. They focus on the problems of trade and economic development of SWA. The text of UNCTAD's resolution provides that in order to favor the economic development of SWA, it is essential to put at their disposal facilities that allow SWA to mitigate the effects that their enclave positions inflict upon their trade. The sixth principle has the objective of establishing a universal approach to solving the special problems SWA face with regard to trade and development in the different geographical

170. See generally, U.N. ECAFE, 20th Sess., at 2, U.N. Doc. E/CN 11/657 (1964).

171. 2 INTERNATIONAL LAW OF DEVELOPMENT: BASIC DOCUMENTS 801-802 (A.P. Mutharika ed., 1978) [hereinafter INTERNATIONAL LAW OF DEVELOPMENT].

172. See *supra* note 166 and accompanying text.

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regions by encouraging the conclusion of regional and international agreements in the field of transit.¹⁷³

The text of 1958 obliges a transit state to grant freedom of transit for persons and goods of SWA. In contrast, the fourth principle of 1964 provides that the right of free transit may be granted to SWA by all other states "on a reciprocal basis." By subordinating the right of access to reciprocity, the principles UNCTAD laid down take a step backward from the principles set forth in Geneva.

The inclusion of 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 a SWA, a position differing from that of its partners. In contrast, the principle of reciprocity is based on relations between equal partners. In practice, the subordination of the right of free access to the principle of reciprocity results in the cancellation of the first by the second.

An interpretative note and a recommendation were added to these principles. The note provides that these principles are interdependent, and that each is to be interpreted with due consideration to the other. The recommendation asks the U.N. 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 transit trade of SWA.¹⁷⁴ The Committee¹⁷⁵ was to refer to the propositions African and Asian SWA presented to the 1964 UNCTAD Conference, principles of international law, conventions and existing agreements in force, as well as additional solutions proposed by governments. Finally, the recommendation invites the U.N. to convoke a plenipotentiary conference in 1965 to examine the draft the Commission of Twenty-Four prepared and to adopt a Convention on transit trade of landlocked countries.

The Committee of Twenty-Four met in October and November of 1964 in New York under the Presidency of Paul Ruegger, delegate from

173. Principle VI reads: "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." INTERNATIONAL LAW OF DEVELOPMENT, *supra* note 171, at 802.

174. See *Preparation of a Convention Relating to the Transit Trade of Landlocked Countries*, in 1 PROCEEDINGS OF THE UNCTAD, FINAL ACT AND REPORT, Annex A VI.1, U.N. Doc. E/Conf 46/39, E/Conf 46/141 (1964).

175. This Committee, appointed by the UN Secretary General following a request from the 1964 UNCTAD Conference (UNCTAD I), was comprised of 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 SWA.

Switzerland. It based its work essentially on the draft Afghanistan, Laos, and Nepal prepared on behalf of the African and Asian SWA.¹⁷⁶ Both general and specific discussions took place within the Committee of Twenty-Four, ranging from the problem of adherence of states to the Barcelona Convention to the question of transit of armaments and munitions. The Committee prepared a draft Convention on the transit trade of landlocked countries to be submitted to the conference of plenipotentiaries. After the Committee of Twenty-Four completed its work, the nineteenth session of the General Assembly brought in a resolution calling for a decisive conference to take place the next summer.

The conference of plenipotentiaries on Transit Trade of Landlocked Countries met on June 7, 1965, and completed its work one month later.¹⁷⁷ Fifty-eight states (among which twenty-three were SWA) participated in the conference; eleven more attended as observers. The conference adopted two resolutions and one convention relating to the transit trade of SWA.

Under the first resolution, dated July 6, the conference of plenipotentiaries recognized that the Convention of 1965 facilitating international maritime traffic (and its annex adopted by the international conference held in London in 1965 facilitating travel and maritime transport) was applicable to the maritime trade of SWA¹⁷⁸ through Article II, paragraph 2 of the Convention. Under the second resolution, the conference invited the Inter-governmental Maritime Consultative Organization to take appropriate measures to facilitate the transit traffic of SWA within the framework of the Convention.

Finally, the third document the Conference adopted was the Convention on the Transit Trade of Landlocked Countries of July 8, 1965,¹⁷⁹ which entered into force on June 9, 1967. The main purpose of the Convention was to incorporate into treaty law the rights and obligations of landlocked states and their neighbors with regard to the movement of goods in international transit.

During the conference, vigorous debate took place about the legal nature of the right of freedom of access. Delegates discussed whether free access to the sea was a natural right of SWA and, thus, was to be

176. The Afro-Asian Draft, *supra* note 169.

177. The draft prepared by the Committee of 24 was submitted to the Conference of Plenipotentiaries for consideration and adoption.

178. The Convention contained a clause providing that the adopted measure could be applied in the same manner to government vessels of coastal or non-coastal States that were parties to the Convention.

179. Convention on Transit Trade of Land Locked States, *supra* note 167.

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reaffirmed by the conference or whether the duty of the plenipotentiaries was merely to solve the technical problems of transit transport of these states. Even the SWA expressed different opinions with regard to a number of provisions of the Convention. While European SWA were largely complacent, Asian, African, and Latin American SWA petitioned vigorously for certain rights and guarantees.

As in Geneva, the SWA sought recognition for an unrestricted right of free access. However, the Convention of New York attempted to establish an equilibrium between the principles of freedom of the sea and territorial sovereignty. Moreover, the Convention based free access on economic principles rather than on general international law.

(i) *Access as an option.*—During the examination of the Afro-Asian draft in the Committee of Twenty-Four, the representatives of Bolivia and Paraguay proposed adding a new article to the Convention.¹⁸⁰ The proposed article reaffirmed the right of all SWA to free access to the sea and to free transit throughout the territory of states situated between SWA and maritime coasts.

In demanding the inclusion of these principles either in the preamble or in the main body of the Convention, the Bolivian delegate argued that UNCTAD had previously recognized their importance. The delegate declared that SWA expected these principles to be incorporated into an international convention so as to establish them as elements of positive law. In support of these statements, certain members of the Committee of Twenty-Four indicated that these principles were already recognized by international law and codified in general international conventions, namely the Convention on the High Seas.¹⁸¹

Other delegates, mostly from transit states, opposed the inclusion of the phrase “as recognized principles of international law.” According to them, these were economic principles and not principles of international law. They asserted that the mere repetition of identical clauses in a number of treaties did not establish them as a general rule of international law. For instance, the Pakistani delegate went so far as to declare in the Committee of Twenty-Four, that the draft presented by the two Latin American SWA was based on a fallacious hypothesis. As he put it, “It invokes the principles of international law which do not exist. It confuses the principles of economic cooperation with legal principles.” In the end,

180. See *COMPTES RENDUS ANALYTIQUES DE LA COMMISSION, E/Conf. 46/AC 2/L, 7/Rev 1.*

181. See *UNCTAD: Report of the Committee on the Preparation of a Draft Convention Relating to Transit Trade of Landlocked Countries*, U.N. GAOR, at 20, U.N. Doc. A/5906 (1965) [hereinafter *Committee Report*].

as a result of transit state opposition, the SWA withdrew their demand to establish as a recognized principle of international law the right of free access.

(ii) *Access as an obligation.*—The primary objective of the conference of plenipotentiaries of 1965 was the universal acceptance of the Convention on the Transit Trade of Landlocked Countries. To avoid detracting from the Convention's main objective, the conference adopted the position of transit states as expressed by the British delegate. Britain proposed reaffirming in the preamble the principles¹⁸² adopted by the Geneva Conference.¹⁸³ The positioning of these principles within the Convention was of primary importance because placing them in the main body of the Convention would give them an obligatory force. The Committee of Twenty-four as well as the plenary body of the conference held long discussions on Britain's proposal and its ultimate form in the Convention.¹⁸⁴ In the end, the conference decided to insert these principles only in the preamble.

While acceptance of this placement constituted a considerable concession on the part of SWA resulting in the principle of free access being less than obligatory, the New York Convention was a step forward for SWA because it recognized the right of free access to the sea by reaffirming the principles of the 1964 Geneva Conference.¹⁸⁵ According to the first of these principles, "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."¹⁸⁶ This is further enhanced in the fourth principle, which mentions that in order to promote fully the economic development of land-locked countries, all states must grant to them, "on the basis of reciprocity, free and unrestricted transit" for their "access to international and regional trade in all circumstances and for every type of good."¹⁸⁷

These two principles, which are themselves quite watered down, are tempered by the fifth principle, which provides 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

182. See *supra* note 166 and accompanying text.

183. See Fifth Committee Summary Record, *supra* note 50, para. 40.

184. *Id.* para. 32.

185. *Supra* note 166 and accompanying text.

186. *Supra* note 166 and accompanying text.

187. *Supra* note 166 and accompanying text.

any kind."¹⁸⁸ The fifth principle also states that these principles are interdependent and that each must be interpreted with due consideration to the others.¹⁸⁹

As before, the territorial sovereignty of transit states was the main obstacle in the New York Convention to the recognition of the right of access. The granting of this right was again dependent on guaranteeing transit state sovereignty. This explains, to some extent, the contradiction of the first and fifth principles of the preamble of the 1965 Convention. In essence, to counter-balance the first principle, which sets forth the right of freedom of access, the conference felt compelled to include the fifth principle, which affirms the sovereign rights of transit states by emphasizing the inter-dependent nature of the principles of free access and territorial sovereignty.

(iii) *Specific provisions of the New York Convention.*—The New York Convention of 1965 starts with a relatively long preamble that reiterates the abstract of the 11th U.N. General Assembly resolution text,¹⁹⁰ the eight principles of the 1964 UNCTAD,¹⁹¹ and Article 3 of the 1958 Convention on the High Seas.¹⁹² Most of the provisions originate from the Barcelona Statute and, in some cases, are copied word for word. The main objective of the New York Convention was to affirm the principle of access to the sea for SWA. The 1965 Convention is distinguishable from the Barcelona Statute predominantly by its scope of application, which is more limited than that of the Barcelona Statute. The Statute deals with transit in general and does not specifically refer to SWA,¹⁹³ whereas the New York Convention deals exclusively with the access to and from the sea of SWA.¹⁹⁴

According to Article one, the 1965 Convention is applicable only to the area between SWA and maritime ports.¹⁹⁵ This Article defines traffic in transit as the passage of goods "throughout the territory of a contracting state, between a SWA and the sea, when this passage is a portion of a complete journey comprising a sea transport which precedes or follows directly the passage."¹⁹⁶

188. *Supra* note 166 and accompanying text.

189. *Supra* note 166 and accompanying text.

190. *See* New York Convention, *supra* note 167, pmbl.

191. *See supra* note 171 and accompanying text.

192. *See* Geneva Convention, *supra* note 143.

193. *See* Barcelona Statute, *supra* note 121.

194. *See* New York Convention, *supra* note 167.

195. *See id.* art. 1.

196. *Id.*

The most important provision is the first sentence of Article two. 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 transport. Such traffic must be permitted under mutually acceptable means and may not be discriminatory.¹⁹⁷ However, the rules governing the means of transport must be established through common accord between concerned states, who must adhere to the international conventions to which the states are parties.

Paragraph 3 of Article 2 deals with the passage of persons whose movement is essential for transport in transit. Such passage must respect the laws and rules of concerned contracting states. Traffic in transit throughout the territorial water of the transit state is authorized in conformity with principles of customary international law, provisions of applicable international conventions, and internal regulations.

Article 3 provides that a transit state may not levy customs duties or other taxes on transit traffic except for dues resulting from the supervision and administration of the traffic in transit.¹⁹⁸ Article 4 requires transit states to provide means of transport so that traffic in transit can flow without undue delay¹⁹⁹ and provides that resulting tariffs for such facilities must be equitable.²⁰⁰

The New York Convention contains some technical provisions proposed in Afro-Asian drafts. For instance, transit states must use simplified documentation and other special procedures with regard to traffic in transit,²⁰¹ must provide warehousing facilities,²⁰² and may grant free zones or similar facilities by mutual agreement with SWA.²⁰³

The Convention also sets forth situations in which access may be prohibited. For instance, access may be restricted to secure public order;²⁰⁴ to protect the essential security interests of the transit state;²⁰⁵ in case of serious events endangering the political existence or safety of a contracting state;²⁰⁶ in the event of war; or to comply with

197. *Id.* art. 2.

198. *Id.* art. 3.

199. New York Convention, *supra* note 167, art. 4.

200. *Id.*

201. *Id.* art. 5.

202. *Id.* art. 6.

203. *Id.* art. 8.

204. New York Convention, *supra* note 167, art. 11.

205. *Id.* para 4.

206. *Id.* art. 12.

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obligations under regional or international conventions to which the contracting state is a party.²⁰⁷

Articles 9, 10, 15, and 16 also contain important provisions. Article 9 permits a contracting state to provide better transit facilities than those required under the Convention. Article 10 excludes the rights and privileges granted under the Convention from the requirements of MFN clauses, provided these rights and privileges are granted to SWA because of their special geographical position. Article 15 renders the clauses of the Convention applicable only on a reciprocal basis. Article 16 provides for an arbitration procedure for the settlement of disputes not solved through negotiation or other peaceful means. Finally, Articles 17 through 23 deal with procedural matters such as the signature, ratification, accession, entry into force, and revision of the Convention.²⁰⁸

(iv) *Evaluation of the Convention.*—The New York Convention of 1965 was the first international agreement to deal exclusively with the specific problems of transit trade.²⁰⁹ It did not, however, radically depart from former conventions whose influence is evident. In evaluating the Convention, commentators have given diverging opinions.

Some saw the Convention as a significant achievement for SWA. Mr. Hakim Tabibi, who contributed to the formation of the Convention, wrote that “in view of SWA, the legal recognition of their rights on a universal level presents a victory they searched for during forty years.”²¹⁰ He added that the Convention not only created an atmosphere of cooperation between SWA and their transit neighbors, but also stimulated the foreign trade of SWA, the majority of which are situated in Africa and Asia.²¹¹

R. Makil wrote that it was the first international agreement to recognize the special position of SWA.²¹² In his words, “the recognition of a special status for SWA derives from Article 10 of the Convention in so far as the exclusion of special rights from the scope of application of MFN clauses granted by it is concerned.”²¹³ Makil further wrote that the international regulations on the rights of SWA dispersed in a number

207. *Id.* art. 13.

208. *See id.* arts. 15-23.

209. *See generally* T.M. Franck et al., *supra* note 168, at 55.

210. A.H. TABIBI, *THE RIGHT OF FREE ACCESS TO THE SEA* 19 (1966).

211. *Id.*

212. Makil, *supra* note 15, at 46.

213. *Id.*

of bilateral and multilateral agreements had now been set down in a single convention and had definitively acquired legal status.²¹⁴

Others had a more shaded assessment of the Convention. Comparing the 1965 Convention with the Barcelona Statute, C. Palazzoli concluded that the Convention at the same time represented progress, stagnation, and regression.²¹⁵ Ravan Fahardi was more severe. He noted that the Convention pleased transit states, who would not likely reopen talks on access to the sea for SWA in the future, and that SWA would also not likely reopen the issue, thus leaving the goals of SWA half fulfilled. However, Fahardi added that the Convention retained its juridical importance as a legal document, even if not signed by a number of states.²¹⁶

It is clear from the above paragraphs that despite similarities between the 1965 New York Convention and the 1921 Statute of Barcelona, the Convention constituted somewhat of an achievement for SWA. Although containing weak points deriving from the rigid position of transit states, the Convention was the first multilateral agreement that in a single text dealt precisely with the transit problems of states deprived of access to and from the sea. Furthermore, although criticized, the New York Convention had at least one virtue: it showed that certain self-executing and enforceable rules for transit rights of landlocked states could be formulated in the framework of a multilateral convention intended to be universal in scope.²¹⁷

(b) *Examples of particular agreements.*—SWA have concluded a considerable number of bilateral treaties dealing with transit and access to the sea. To better envisage the level of evolution of such bilateral agreements, we shall give examples from several continents. A detailed examination of each particular agreement is not necessary because most contain similar provisions.

(i) *European Agreements.*—Before World War I, Switzerland was the first SWA to ask for the right of a maritime flag. It was also the first to attempt to solve its transit problem with its neighbor, the kingdom

214. *Id.*

215. C. Palazzoli, *De quelques développements récents du droit des gens en matière d'accès à la mer des pays dépourvus de littoral*, in REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 734 (1966).

216. Interview with R. Fahardi (July 5, 1967), cited in M.I. GLASSNER, ACCESS TO THE SEA FOR DEVELOPING LAND-LOCKED STATES 216 (1970).

217. See L.C. Caflisch, *Land-locked States and their Access to and From the Sea*, 49 BRITISH YEARBOOK OF INTERNATIONAL LAW 85 (1978).

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of Sardinia. The two parties concluded a treaty on March 16, 1816. From World War I onward, the number of treaties grew significantly in Europe. The main reason for this growth was the consecutive emergence of states without maritime access resulting from the dismemberment of the Austro-Hungarian Empire. Austria and Hungary, for example, lost all access to the sea.

On April 21, 1921, Germany, Poland, and the Free City of Danzig signed a convention regarding transit freedom between Eastern Prussia and the rest of Germany.²¹⁸ The "corridor of Danzig," which allowed Poland to freely approach the sea, separated East Prussia from the rest of Germany, making East Prussia a German enclave within a foreign territory. The Free City of Danzig also agreed to allow Polish goods free transit over its territory. In return, Germany granted Poland and Danzig the same transit freedom throughout its territory. According to the Convention, all goods in transit were exempted from all customs or other similar dues,²¹⁹ and persons in transit along with their luggage were also exempted from all customs or other similar duties.²²⁰

On November 9, 1920, Poland concluded a bilateral agreement with the Free City of Danzig.²²¹ This agreement authorized Poland to establish in Danzig such Polish administrative services as were necessary for the registration and inspection of the seaworthiness of Polish ships.²²² The Free City of Danzig granted Polish vessels the same treatment granted to Danzig ships.²²³ Danzig also agreed to maintain a free zone in the port of the city.²²⁴

In fact, this zone existed before the agreement, maintained under the jurisdiction of the Danzig Ports and Waterways Board.²²⁵ This Board was in charge of making available to Poland free use of the means of communication,²²⁶ which under the 1920 Agreement included waterways and the entire railway system. The 1920 Agreement was signed in a special context after the first World War: the defeat of Germany and creation of the Danzig corridor. Transit facilities were not

218. Convention Between Germany and Poland and the Free City of Danzig Concerning Freedom of Transit Between East Prussia and the Rest of Germany, signed at Paris, Apr. 21, 1921, 12 L.N.T.S. 63.

219. *Id.* art. 2.

220. *See id.* art. 81.

221. Convention Between Poland and the Free City of Danzig, signed at Paris, Nov. 9, 1920, 6 L.N.T.S. 191 [hereinafter 1920 Convention].

222. *Id.* art. 8.

223. *Id.* art. 10.

224. *Id.* art. 18.

225. *Id.* art. 19.

226. *See generally* 1920 Convention, *supra* note 221, art. 29.

exclusively granted because of the benevolent intent to apply international law and facilitate the access to the sea of neighbors deprived of direct access.

Another legal instrument granting transport concessions to an SWA was the agreement of March 23, 1921, between Czechoslovakia and Italy.²²⁷ The purpose of this agreement was to facilitate transit between the two states. Czechoslovakia obtained the right to install its own customs office in the port of Trieste.²²⁸ In addition, the Italian administration authorized the transit of Czech vehicles originating from this port and passing through Italian territory.²²⁹ Finally, Czechoslovakia obtained the right to use a warehouse to facilitate the loading and unloading of railway goods.²³⁰

The convention dated March 8, 1923, between Czechoslovakia and Hungary is also worth mentioning.²³¹ This convention, signed between two SWA sharing the same kind of difficulties regarding free access to the sea, guarantees transit facilities similar to those mentioned above.²³²

In each of these agreements, a relatively liberal attitude on the part of transit states is obvious. This attitude continued in the direction of further liberalization of transit on the European continent.

In the period after World War II, the United Nations Economic Commission for Europe (ECE) impelled the development of free transit. It contributed to the adoption of an international juridical regime facilitating overland and railway transit. The Committee of Internal Transport of the ECE prepared the Convention Concerning Overland and Railway Transit.

Two conventions were signed on January 10, 1952, for the specific purposes of exempting goods transported by rail through the frontiers²³³ and facilitating the passage of railway passengers and baggage.²³⁴ These Conventions entered into force on April 1, 1953. The ECE also

227. Convention Between the Kingdom of Italy and the Czechoslovak Republic Regarding Concessions and Facilities to be Granted to Czechoslovak Traffic in the Port of Trieste, signed at Rome, Mar. 23, 1921, 32 L.N.T.S. 251 [hereinafter Port of Trieste Convention].

228. *Id.* art. 1.

229. *Id.* art. 2.

230. *Id.* art. 3.

231. Convention Between the Government of the Kingdom of Hungary and the Government of the Czechoslovak Republic Regulating the Running of Czechoslovak Trains Over the Hungarian Section of the Cata-Lucenec Line, signed at Budapest, Mar. 8, 1923, 48 L.N.T.S. 259.

232. *See id.* arts. 2, 3.

233. International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail, Jan. 10, 1952, 163 U.N.T.S. 27.

234. International Convention to Facilitate the Crossing of Frontiers for Passengers and Baggage carried by Rail, Jan. 10, 1952, 163 U.N.T.S. 3 [hereinafter Convention on Passengers and Baggage].

focused on overland transport, preparing a provisional agreement in 1949 to regulate international transit and to facilitate the conclusion of the definitive Customs Convention on the International Transport of Goods Under Cover of TIR Carnets (TIR Convention).²³⁵ The TIR Convention played a considerable role in the development of European overland transport. L. Marion emphasized its importance, writing that "without TIR, life would be impossible in Europe."²³⁶

Most European states — among them five SWA — adhered to the TIR Convention.²³⁷ It offers an example of a multilateral solution to the transit problems of a continent. It facilitated and liberalized international transport among European states without creating obstacles to the conclusion of multilateral agreements for the creation of a customs union and economic zone, or similar bilateral agreements. Following the TIR Convention, many other international legal instruments dealing with different, specific matters related to free trade were signed in Europe, each more liberal than its predecessor.²³⁸

(ii) *African Agreements.*—In 1945, Liberia and Ethiopia were the only independent states in Africa. Almost all of black Africa became independent by 1965. Before 1965, very few independent African states could conclude agreements with foreign powers. Therefore, the majority of African access agreements were concluded between non-African foreign powers.

235. Known as the TIR Convention, the Customs Convention on the International Transport of Goods Under Cover of TIR Carnets was signed in Geneva on January 15, 1959, and entered into force on January 7, 1960. See Customs Convention on the International Transport of Goods under Cover of TIR Carnets, Jan. 15, 1959, 348 U.N.T.S. 13. The Convention concerns the transport of goods contained in overland vehicles or in containers loaded on such vehicles. The TIR regime constitutes a simplified system of administrative formalities for customs and police. Transit States agreed to introduce this simplified system through their own legislation. The Convention signed in 1959 was replaced by a convention of the same name concluded on November 14, 1975, in Geneva. See Customs Convention on the International Transport of Goods Under Cover of TIR Carnets, Nov. 14, 1975, 1079 U.N.T.S. 89. For the main features of the Convention, see *Progress in the Implementation of Specific Actions Related to the Particular Needs and Problems of the Landlocked Developing Countries, General Assembly Report*, at 35-37, U.N. Doc. A/39/462 (1984).

236. Marion, *supra* note 130, at 465.

237. Austria, Luxembourg, Switzerland, Czechoslovakia, and Hungary.

238. In this context, it is appropriate to mention that there exist in Europe several economic organizations facilitating the freedom of exchange between member States. All European SWA belong to one or more of these organizations. For instance, Luxembourg is a member of BENELUX, which is itself integrated into the European Community (EC). Austria and Switzerland are members of the European Free Trade Association (EFTA). Hungary and Czechoslovakia were members of the Council of Mutual Economic Assistance (CMEA). These organizations, which are among the most integrated of Conventions, give to European SWA advantages over SWA of other continents.

The problem of free access to the sea was most apparent in Ethiopia, which was the only independent African SWA. To solve this problem, Ethiopia concluded an agreement with Italy on August 2, 1929.²³⁹ The agreement dealt with the construction of a route linking Assab to Dessia.²⁴⁰ Italy granted to Ethiopia a free zone in the Port of Assab²⁴¹ and allowed Ethiopia to construct warehouses in this zone.²⁴²

Another agreement signed on May 15, 1902, at Adis Ababa between Ethiopia and Great Britain concerned the demarcation of boundaries between Ethiopia and Uganda. This agreement granted to Great Britain the right to construct a railway through Ethiopian territory to connect Sudan with landlocked Uganda.

Several other agreements were signed between the colonial powers to facilitate free access to the sea for their colonies. For instance, Great Britain and Portugal signed a treaty on November 14, 1890, guaranteeing free navigation on the Zambesi.²⁴³ Under Article 3 of this agreement, the King of Portugal agreed to improve the means of communication between Portuguese ports and territories in the British zone of influence.²⁴⁴

A similar example is the Treaty of March 15, 1921, between Great Britain and Belgium.²⁴⁵ Under this treaty, Britain agreed to take measures to improve Belgian trade in the East African territories in exchange for access to Belgian ports situated in the Indian Ocean.

The last example of an agreement two colonial powers signed is the Convention of June 17, 1950, between Great Britain and the Republic of Portugal regarding the port of Beira, Mozambique.²⁴⁶ This agreement ensured access to the sea for the British colonies of Northern Rhodesia (Zambia), Bechuanaland (Botswana), Swaziland, Nyasaland (Malawi), and Basutoland (Lesotho).²⁴⁷ The contracting states also agreed to avoid

239. See *Report of the Secretariat of the Economic Commission for Africa, Transit Problems of Eastern African Landlocked States*, at 14, U.N. Doc. E/CN.14/INR/44 (1963) [hereinafter ECA Report].

240. Convention on Passengers and Baggage, *supra* note 234.

241. *Id.*

242. *Id.*

243. Treaty Regarding Navigation on the Zambesi, Nov. 14, 1890, Gr. Brit.-Port., *cited in* ECA Report, *supra* note 239, at 15.

244. Agreement with Portugal for Modus Vivendi in Africa, signed at London, Nov. 14, 1890, 82 B.S.P. 336, 18 M.C.T. 1051.

245. Convention with a View to Facilitating Belgian Traffic Through the Territories of East Africa, signed at London, Mar. 15, 1921, Gr. Brit.-Belg., 5 L.N.T.S. 321 [hereinafter Convention Facilitating Belgian Traffic].

246. Convention Regarding Port of Beira, June 17, 1950, Gr. Brit.-Port.

247. *Id.*

applying discriminatory railway tariffs within the concerned territories.²⁴⁸

Half of the world's present SWA are situated in Africa. It is thus important to consider treaties signed by African SWA after attaining independence. To solve their problem of transit, the African SWA have also signed bilateral agreements with their transit neighbors. A great number of agreements concern trade and overland public transport.²⁴⁹ They are applicable to the transport of goods as well as passengers.

On June 8, 1963, Mali and Senegal signed a most significant agreement regarding the utilization of port installations.²⁵⁰ This agreement formed distinct free zones within the customs zones of the Senegalese port installations of Dakar and Kaolack. Customs authorities of both states supervised ingress into and egress from these zones.²⁵¹ This agreement, by creating a free zone in favor of an SWA in the port of a transit state, seems generous in comparison to other bilateral agreements, which merely provide warehousing facilities. A more recent example of the latter is a Protocol between Rwanda and Kenya regarding warehousing facilities at Maritini (Mombasa).²⁵²

In addition to bilateral agreements, a number of international organizations, generally regional or sub-regional, facilitate the exchange of goods and services between African states. Most of these institutions were initially created to develop general economic cooperation among the states of their respective regions. Within the framework of these institutions, organizations facilitating transit among states were also created. While these organizations have been less effective than their European counterparts, they are also of a more recent origin.

(iii) *Latin American Agreements.*—Bolivia and Paraguay, South American SWA, have established special relationships with their neighbors through agreements. Bolivia, which formerly was part of the Incan Empire, was a part of the Vice Royalty of Peru during the Spanish

248. *Id.*

249. See, e.g., Agreement of July 26, 1968, Mali-Upper Volta; Agreement of October 10, 1966, Niger-Upper Volta; Agreement of June 28, 1961, Upper Volta-Ghana. 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*, at 32-34, U.N. Doc. A/AC 138/37 (1971) [hereinafter *Study on Free Access*]. See also Y. MAKONNEN, *supra* note 5, at 282-90 (for a general account on the practice of some African States on bilateral treaties).

250. Agreement Concerning the Use of Senegal Port Facilities Designated for Transit Traffic to and from Mali, June 8, 1963, Mali-Sen [hereinafter *Agreement Concerning Senegal Ports*].

251. *Id.* art. 6.

252. See Agreement of February 26, 1992, Rwanda-Kenya.

dominion from the sixteenth century to the beginning of the nineteenth century.²⁵³ It acquired its independence in 1824.

Bolivia signed an important treaty with Chile to solve its "transit problem" on October 20, 1904. The Treaty of Peace and Friendship perpetually granted Bolivia an extended and complete right of transit trade on Chilean territory and authorized Bolivia to establish customs offices in the Chilean ports of the Pacific.²⁵⁴ The Treaty of Commerce of 1912 reaffirmed these provisions.

During the war against Paraguay,²⁵⁵ Bolivia encountered difficulties concerning the quality of imported armaments and food for its army. As a result, Bolivia signed a new Convention with Chile in 1937, giving it freedom of transit without restriction.²⁵⁶

Similarly, Bolivia concluded with Argentina, its southern neighbor on the Atlantic, the Treaty of Friendship, Commerce and Navigation on July 9, 1868.²⁵⁷ The Treaty contained certain provisions concerning transit freedom.²⁵⁸ The two contracting states clearly recognized freedom of transit for national and foreign trade in maritime and river ports²⁵⁹ and restricted dues and tariffs on goods in transit to minimal warehousing duties and tolls.²⁶⁰ Moreover, the two mutually recognized the right of free navigation on the Rio de la Plata and several of its tributaries.²⁶¹

253. Bolivia's transit problem became an issue after the Pacific War (1879-83). Before that time, because the American Republics were young, lowly-populated, and enormously extended states, their boundaries were not well defined. However, the legal principle of "uti possidetis" determined the boundaries of American countries after their independence. Under this principle, these countries maintained the boundaries they had had while ruled by the Spanish Crown. Since all these territories belonged to the Crown, there was no need to precisely determine the boundaries of each territory, and Spanish law was at times contradictory in defining them.

Under Spanish law, Chile and Peru shared the Pacific coast and Bolivia had no access to the sea. LAW NO. 5, TIT. XV, 11 SPANISH RECOMPILATION OF INDIAN LAWS (1680). A number of Peruvian and Chilean administrative acts throughout the centuries affirmed these boundaries. After Independence, Bolivia questioned the interpretation of this Law. With its defeat in the Pacific War, Bolivia's lack of access to the sea was sanctioned. The author thanks R. Vargas-Hidalgo, lawyer at IFAD, for information on Latin America. For the particular case of Bolivia, see J.H. MERRYMAN & E.D. ACKERMAN, INTERNATIONAL LEGAL DEVELOPMENT AND TRANSIT TRADE OF LANDLOCKED STATES: THE CASE OF BOLIVIA (1969).

254. Treaty of Commerce, Aug. 6, 1912, Bol.-Chile, art. 7, 4 B.O.T.V. 463 (Bolivia).

255. This war took place between 1932-34.

256. Convention, Sept. 18, 1937, Bol.-Chile, 4 B.O.T.V. 515 (Bolivia).

257. Treaty of Friendship, Commerce and Navigation, July 9, 1868, *reprinted in* 4 COLECCION DE TRATADOS VIGENTES DE LA REPUBLICA DE BOLIVIA 35.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

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Pursuant to the Convention of November 19, 1937, Argentina exempted the transport of Bolivian petrol and derivative products through Argentinean territory from national, provincial, and municipal transit and fiscal duties.²⁶²

Bolivia has also concluded several treaties with its eastern neighbor, Brazil. For instance, on March 27, 1867, Bolivia signed the Treaty of Friendship, Navigation, Trade, and Extradition.²⁶³ Under this Treaty, the Republic of Bolivia and the Emperor of Brazil declared transit between the two states to be free.²⁶⁴ Passengers or luggage traveling across the frontier between the two countries were exempted from all national and municipal taxes,²⁶⁵ being subject only to the police and fiscal regulations each country enacted.²⁶⁶ In addition, pursuant to Article 7, Brazil granted freedom of navigation on waterways for Bolivian trade and vessels.²⁶⁷ Brazil and Bolivia signed another treaty relating to river navigation in 1910.²⁶⁸ In this treaty, the two states granted access to all existing facilities and affirmed the freedom of overland and river transit the parties previously recognized in the treaty of 1903.²⁶⁹

Bolivia signed a number of similar treaties with Peru such as the Treaty of Peace and Friendship of November 5, 1863,²⁷⁰ the Treaty of Commerce and Customs of November 27, 1905,²⁷¹ and the Convention relating to trade traffic via Mollendo of January 21, 1917.²⁷² In all of these treaties, transit states recognized, on a reciprocal basis, "the freedom of transit trade for all natural, industrial as well as imported products."

Paraguay has a significantly easier situation than Bolivia. It enjoys the right of free access to the sea by its international rivers. The principal links to the sea are the Panama and Paraguay Rivers and the railway between Asuncion and Buenos Aires.

262. Convention, Nov. 19, 1937, Arg.-Bol.

263. Treaty of Friendship, Navigation and Extradition, Mar. 27, 1867, Bol.-Braz., *reprinted in* 4 COLLECCION DE TRATADOS VIGENTES DE LA REPUBLICA DE BOLIVIA 35.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* art. 7.

268. Treaty of Commerce and Fluvial Navigation, Aug. 12, 1910, Bol.-Braz. (signed at Rio de Janiero).

269. Treaty of Delimitation, Nov. 17, 1903, Bol.-Braz. (signed at Petropolis).

270. Treaty of Peace and Friendship, Nov. 5, 1863, Bol.-Peru, *reprinted in* 4 COLLECCION DE TRATADOS VIGENTES DE LA REPUBLICO DE BOLIVIA 373.

271. Treaty of Commerce and Customs, Nov. 27, 1905, Bol.-Peru.

272. Convention Relating to Trade Traffic via Mollendo, Jan. 21, 1917, Bol.-Peru, *reprinted in* 4 COLLECCION DE TRATADOS VIGENTES DE LA REPUBLICO DE BOLIVIA 420.

The Treaty of Navigation concluded between Paraguay and Argentina²⁷³ established free navigation on the Paraguay, Parana, and Rio de la Plata rivers for Argentinean and Paraguayan vessels. Each state agreed to treat the vessels of the other state in the same manner it treated its own vessels in regards to navigation.²⁷⁴

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 Free Trade Association (LAFTA), which helped ensure their access to the international market.²⁷⁵ The treaty creating this organization, signed on February 18, 1960, in Montevideo, stated as a goal the progressive abolition of customs duties and quantitative restrictions among member states within twelve years. This union, however, appeared to be most advantageous for Argentina, Brazil, and Mexico because of the relative industrialization of these countries in comparison to the other members. As a consequence, some members of LAFTA decided to create a more homogeneous and restrictive organization, the "Andean Group,"²⁷⁶ which is comprised of six states, including Bolivia.

(iv) *Asian Agreements.*—The first SWA in Asia to conclude a bilateral agreement for the purpose of facilitating its transit trade was Afghanistan. It concluded the Anglo-Afghan Treaty on November 22, 1921, with its southern neighbor, British India.²⁷⁷ It was not exclusively a trade or transit treaty as it also dealt with other aspects of relations between neighboring states.

273. Treaty of Navigation, Jan. 23, 1967, Arg.-Para., 634 U.N.T.S. 182.

274. *Id.* art. 1.

275. See Treaty Establishing a Free Trade Area and Instituting the Latin American Free Trade Association, Feb. 18, 1960, reprinted in 4 A.P. MUTHARIKA, INTERNATIONAL LAW OF DEVELOPMENT: BASIC DOCUMENTS 2211 (1979). LAFTA was formed in 1960 to develop a common market based on the EC model. Initially, seven countries participated: Argentina, Brazil, Chile, Mexico, Paraguay, Peru, and Uruguay. Later, Ecuador, Colombia, Venezuela, and Bolivia joined. While reductions in internal import tariffs were achieved, little progress was made in establishing common external tariffs. 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 and was replaced by the Latin American Integration Association, which was the result of a treaty signed at Montevideo by eleven countries for the purpose of establishing a common market. These countries were Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela.

276. See Agreement on Andean Subregional Integration, May 26, 1969, 8 I.L.M. 916 (signed in Bogota).

277. The Anglo-Afghan Treaty entered into force on 1922. See Anglo-Afghan Treaty, Nov. 22, 1921, reprinted in R. GOPALAKRISHNA, THE GEOGRAPHY AND POLITICS OF AFGHANISTAN 232 (1982).

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Article 6 of the Anglo-Afghan Treaty is of particular interest. By virtue of Article 6, Great Britain granted Afghanistan the right to freely import from the British islands and British India all the materials necessary for the well-being of Afghanistan. Similarly, Great Britain authorized Afghanistan to freely export to India all kinds of goods²⁷⁸ and agreed not to levy clearing duties in Indian ports on goods exported by Afghanistan.²⁷⁹

The Anglo-Afghan Convention on Trade dated June 5, 1923, completed the Treaty of 1921.²⁸⁰ It put into effect the measures needed to fulfill the objectives of the Treaty of 1921 and to correct certain lacunae.²⁸¹

After the transfer of sovereignty that created the state of Pakistan, Pakistan and Afghanistan confronted the same transit problems, and the two states signed an agreement on March 2, 1965.²⁸² The agreement provided reciprocal freedom of transit for traffic to or from the territory of the other party.²⁸³ In addition, the agreement contained provisions frequently found in past bilateral transit agreements such as clauses exempting goods from all duties and taxes and regulating the means of transport and warehousing.²⁸⁴

The first treaty Nepal and India concluded involved trade and transit and was signed on July 31, 1950.²⁸⁵ The treaty was based on the recognition, without reservation, of the right of free transit of goods through both the territory and the ports of India.²⁸⁶ The Treaty was revised in 1960, 1971, and 1978.²⁸⁷ In the 1978 revision, India for the

278. *Id.* art. 6.

279. *Id.* art. 7.

280. *Id.*

281. See Anglo-Afghan Convention on Trade, June 5, 1923.

282. Agreement on the Regulation of Traffic in Transit, Mar. 2, 1965, Pak.-Afg., reprinted in GOPALAKRISHNA, *supra* note 277, at 238.

283. *Id.* art. 1.

284. See generally *id.* arts. 2, 4, 5.

285. See Indo-Nepal Treaty of 1950, *supra* note 9.

286. *Id.*

287. Although the Treaty appears liberal, most of its clauses have remained purely theoretical. Several books dealing with this problem have been published in Nepal and India. see BANSKOTA, *supra* note 10; see also UPRETY, *supra* note 11.

The Indo-Nepal Trade Treaty dealt mainly with the free flow of goods between the two countries. Its objectives were to promote, facilitate, expand, and diversify trade between the two countries. Indo-Nepal Treaty of 1950, *supra* note 9, art. 1. To achieve these purposes, Nepal and India granted each other, unconditionally, treatment no less favorable than that accorded to third countries with regard to customs charges and duties on exports and imports. *Id.* art. 3. In addition, certain primary products were exempted on a reciprocal basis from basic customs duties and quantitative restrictions. See *id.* Protocol, para. IV.

first time accepted Nepal's demand to conclude separate treaties for trade and transit, and two treaties were signed.

In the beginning of 1989, the Nepalese and Indian governments held discussions on the renewal of the treaties of 1978. In March of 1989, the Nepalese government learned that the Indian government had declined to renew either treaty. The treaties were to expire on March 31, 1989. Apparently, India decided not to renew the treaties because the Nepalese government had previously purchased certain weapons from the People's Republic of China.

India's decision had serious impact on Nepal's economy.²⁸⁸ At

The treaty also exempted on a non-reciprocal basis from basic Indian customs duties and quantitative restrictions exports of goods manufactured in Nepal and with 80% Nepalese or combined Nepalese and Indian raw materials. Goods with a 50% Nepalese or Nepalese and Indian value added were, on a case by case basis, subjected to a 50% exemption from Indian customs duties. All other exports of goods manufactured in Nepal with less than 50% value added received treatment identical to that granted by India to imports from third countries. *Id.* arts. 4, 5, Protocol, para. V.

Under the Treaty, the Nepalese government further agreed to exempt imports of Indian goods from customs duties and quantitative import restrictions "to the maximum extent compatible with their development needs and [for the] protection of their industries." *Id.* art. 6. Moreover, to foster the industrial development of Nepal, India agreed to give Nepal additional preferential customs treatment wherever the cost of production of exportable goods manufactured in Nepal with a Nepalese added value of 80% was higher than the cost of production in India. The Treaty also provided that payments for transactions were to be made in accordance with foreign exchange laws of the Contracting Parties (in practice, the currency used was Indian Rupees). Nepal also agreed to provide necessary facilities for goods from India without affecting the development and protection of her industries.

This Treaty came into force on March 25, 1978, for a five-year period. With subsequent renewal on March 21, 1983, the Treaty expired on March 31, 1989.

The Treaty of Transit also came into force on March 25, 1978, but had a duration of seven-years. One of the most important aspects of the Treaty of Transit was that it recognized Nepal's need as a landlocked state for access to and from the sea in order to promote its international trade. Specifically, the need to facilitate traffic in transit through the territories of the contracting parties was recognized in paragraphs 3 and 4 of the Preamble. Therefore, 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.

Fifteen agreed points of entry at the Indo-Nepalese border for goods in transit and relevant procedures were laid down in the Protocol to the Treaty. The number of these points could be extended by mutual agreement. Calcutta was designated as the sea port. The Trustee of the Port of Calcutta leased land for the construction of required storage facilities at Calcutta port to the Nepal Transit and Warehousing Company (NTWC) for a period of 25 years. The NTWC Ltd was established on September 15, 1971, as a wholly owned company of the Nepalese government.

Under the Indo-Nepal Transit Treaty, Nepal was granted use of both railways and roads as means of transportation for goods in Transit from and to Nepal. Nepal was also allowed to use Calcutta and Haldia ports. India agreed to provide Nepal warehouses, sheds, and open space for the storage of transit cargo to and from Nepal through India. This Agreement also expired on March 31, 1989.

288. The immediate effects of the termination of the treaties were manifold. First, exports from Nepal to India previously exempted from Indian customs duties under the lapsed Treaty of Trade

first, the economic difficulties were eclipsed by a surge of nationalism in the population. However, after one year the economic effects had become intolerable. This situation coincided with international political changes of the nineties. It led to political upheavals and a popular revolution which, in turn, transformed the political system into a constitutional monarchy.²⁸⁹ Immediately after the formation of the interim government, the Nepalese Prime Minister visited India and finally obtained a *status quo ante* to stay in effect until the renegotiation of the treaties.

After the general election and the formation of a new government in 1991, the Indo-Nepal treaties were renegotiated. The treaties signed, *grosso modo*, were identical to the treaties of 1978. Despite two years of economic crisis and difficult bargaining, Nepal received from India only what had been granted in 1978.²⁹⁰

Under the Indo-Nepal Trade Treaty of 1991,²⁹¹ both countries agreed to reciprocally exempt imported primary products from basic customs duties and quantitative restrictions. Moreover, each country granted the other MFN treatment, i.e., treatment no less favorable than that accorded to any third country with respect to customs duties and charges of all kinds.²⁹²

Several agreements were concluded by other Asian SWA. For instance, in order to facilitate their transit trade, Laos and Thailand signed an agreement that guaranteed freedom of transit for goods throughout the country.²⁹³ This transit benefitted from the rights and privileges of transit provided under the Barcelona Statute.²⁹⁴ Laos concluded two

were charged customs duties ranging from 100% to 150% of their declared value. Second, exports from India to Nepal were charged customs duties at third country rates (which Nepal later lowered). Third and finally, goods in transit from Calcutta entered India from only two entry points maintained by India at the Indo-Nepalese border. See K. UPRETY & K. DAHAL, *NEPAL: EVOLUTIONARY FEATURES OF ITS ECONOMIC RELATIONS: WITH SPECIFIC REFERENCE TO SOME BILATERAL TREATIES* (1991).

289. See generally M. Hutt, *Drafting the Constitution, 1990*, in 31 *ASIAN SURVEY* 1020 (1991); see also F. Gaige & J. Scholz, *The 1991 Parliamentary Elections in Nepal, Political Freedom and Stability*, in 31 *ASIAN SURVEY* 1041 (1991).

290. For instance, the Indo-Nepal Transit Treaty re-opened the 15 transit points from the port of Calcutta to the port of Nepal. Traffic in transit was exempted from customs and transit duties with the exception of 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. India also granted Nepal use of roads and railways for the purpose of transit. See UPRETY & DAHAL, *supra* note 288.

291. Treaty of Trade, Dec. 6, 1991, Nepal-India, *reprinted in* TRADE PROMOTION CENTER *NEPAL'S TRADE AND TRANSIT AGREEMENTS* 72 (1993).

292. *Id.* art. 3.

293. See the Agreement and Protocol on Transit of Goods, July 29, 1959.

294. *Id.*

other treaties with its transit neighbors Cambodia²⁹⁵ and Vietnam²⁹⁶ that contained similar clauses.

3. *Success of Multilateral Conventions.*—The adherence of states to the three international agreements relating to transit — the Barcelona Statute, the GATT, and the Convention of New York — are discussed in this section. According to international law, adherence is the process by which a third state becomes a party to a treaty. It is the juridical act by which a state that is not a party to a treaty brings itself under its scope.²⁹⁷ The conditions relating to the adherence of states are relatively liberal in multilateral transit agreements. They give the largest scope possible to the freedom of transit. But the conditions of such adherence vary, and the reasons for this are manifold.

A significant number of states did not participate in the Conference of Barcelona, with only six SWA taking part.²⁹⁸ This is perhaps why signatory states emphasized in the preamble of the Convention their intention to encourage future accession by other states.²⁹⁹

Procedures concerning accession differentiated between states that were members of the League of Nations and those that were not. According to Article 5(1), a member of the League of Nations could accede to the Convention simply through notification of adherence.³⁰⁰ In contrast, a non-member had to comply with a supplementary requirement. According to Article 5(2), a non-member could accede to the Convention only if the Council of the League gave its official approval.

As of World War II, thirty-two states had ratified the Barcelona Convention under these rules. Problems arose, however, after the

295. Transit Agreement and Interpretative Note, Oct. 10, 1959.

296. Convention on Transit Between the Republic of Vietnam and the Kingdom of Laos, June 11, 1959, reprinted in ECA Report, *supra* note 243, Annex II; See also, TRANSIT TRADE OF LANDLOCKED COUNTRIES OF THE ECAFE REGION, Annexes 9, 10, U.N. Doc. E/CONF 46/AC 2/5 (1964).

297. Accession has historically been a secondary process, the act whereby a State accepts the offer or opportunity of becoming a party to a treaty already signed by other States, though not necessarily yet in force. In recent years, however, it has become a primary process, the act whereby a State becomes a party to an instrument intended to become a treaty, the text of which has been drafted under the auspices of an international organization and which has been thrown open for accession. See PARRY & GRANT, ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW (1986).

298. The six SWA are Austria, Bolivia, Luxembourg, Paraguay, Switzerland, and Czechoslovakia.

299. "[G]eneral 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" Barcelona Convention, *pmbi*.

300. See Barcelona Convention art. 5, para. 1.

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dissolution of the League of Nations. Because the League Council had been given the exclusive authority to decide non-member adherence, the League's dissolution left no procedure for accession to the Convention. This procedural defect became more obvious as more colonies became independent.

This procedural problem was resolved with the formation of the United Nations. The administrative functions the Secretariat of the League formerly assumed, including the function of depository, were transferred to the Secretariat of the United Nations.³⁰¹ Thus, all states the General Assembly invited could adhere to the Barcelona Convention. Despite the new procedure, accession of states becoming independent after World War II was very limited. To date, only seven states have acceded to the Convention of which four are deprived of a maritime coast.

The limited interest of new states in joining the Barcelona Convention and Statute is likely a result of participation of these states in either Article 5 of the GATT or the 1965 New York Convention. Although freedom of transit is not the principal worry of the GATT, it is inseparable from any system such as this that seeks to regulate international trade.³⁰² While the GATT has its own specific restrictive provisions concerning accession, the Convention of New York is more liberal. Under Article 19, states, members of the U.N., specialized institutions, state parties to the Statute of the ICJ, and other states the U.N. General Assembly invites may accede to the Convention. The instrument of accession is deposited with the Secretary General of the U.N.

All of these conventions have been beneficial because they have helped SWA to better focus on and define their transit problems. In addition and more importantly, they have, at least to some extent, given SWA the opportunity to resolve them.

III. Application of Right of Access

“[P]erhaps the element of municipal law most conspicuously lacking in the international system is effective machinery for enforcing the law.”³⁰³ Indeed, international law is typically enforced by self-help.

301. G.A. Res. XXIV(I), at 35, U.N. Doc. A/64.

302. A characteristic of the GATT is that its different procedures allow states to participate in varying degrees depending on the level of development of their economic system. The contracting parties and the candidate determine during negotiations the conditions of accession, mainly the payment of the “accession” or “entrance” duty.

303. J.G. MERRILLS, *ANATOMY OF INTERNATIONAL LAW* 32 (1981).

SWA, it seems, have always borne this in mind, continuously attempting to utilize international law to their advantage, although at times their demands have not been duly considered. The application of the right of access to the sea of SWA is governed by a series of rules and regulations. These rules will be reviewed in the following two parts: (1) the promotion of access to the sea and (2) restrictions on the right of access.

A. Promotion of Access to the Sea

In order to ensure access to the sea for SWA, it was necessary to guarantee the application of a right to access. The state representatives participating in the New York Conference of 1965 understood this problem. Perhaps this is why the transit states agreed to take the measures necessary to facilitate the transit of SWA through their territories. Even in the Barcelona Statute, provisions guaranteeing transit freedom can be found.³⁰⁴ The New York Convention went further and provided for important derogations from customary international law. Indeed, facilities granted to SWA were excluded from MFN treatment.³⁰⁵

1. Technical Resources.—Traffic in transit must benefit from technical resources that ensure continuity and efficiency. SWA must be permitted those resources that are indispensable for transit traffic and whose absence would severely limit the exercise of the right of access.

(a) Means of communication.—An SWA is different from other countries because it can approach the international communications network only indirectly by passing through other countries, i.e., by borrowing the means of communication of a foreign state. In the case of developing SWA, this handicap is more serious and significantly hinders their economic development. Consequently, the coastal states — and among them, the neighbors of SWA — must accept certain concessions in order to let SWA pass easily to the sea.

International agreements vary in the means of communications they grant to SWA through transit states. Article 2 of the Barcelona Statute provides that transit by rail or waterway shall be set up on routes in use and convenient for international transit. Article 5(2) of the GATT ensures freedom of transit throughout the territory of contracting parties for transit to or from the territory of other contracting parties via the

304. See Barcelona Statute, *supra* note 121, art. 2.

305. See New York Convention art. 3.

routes *most convenient* for international transit.³⁰⁶ The New York Convention is more timid. Its Article 2(1) mentions that the contracting states shall facilitate transit on routes in use mutually acceptable for transit.³⁰⁷

The above provisions do not give SWA the right to claim particular means of communication to support singularized traffic in transit.³⁰⁸ Thus, the transit traffic of individual SWA often suffers from insufficient infrastructure. The conventions leave it to the concerned states to take those measures compatible with their sovereignty to secure specialized means of transit. The parties involved are free to choose, among the means in service, those that seem most appropriate or mutually acceptable. Usually, however, transit states determine the means they will grant and propose their use to SWA. Often transit states, for political or economic reasons, do not authorize the utilization of the most efficient or practical means of transport. For instance, this has often been the case with India and Nepal.³⁰⁹

(b) *Means of transport.*—Article 1(D) of the New York Convention enumerates, in a restrictive manner, the following means of transport: railway stock, seagoing and river vessels, road vehicles, as well as porters and pack animals when the local situation requires.³¹⁰ Regarding transport facilities, the New York Convention compromises between SWA, who sought to require transit states to provide all means of transport necessary for their transit trade, and transit states, who opposed these demands.

Article 4 of the Afro-Asian draft illustrated the position of developing SWA.³¹¹ It sought to oblige transit states to furnish *adequate means* of transport for the transit trade of states deprived of access to the sea.³¹² On behalf of the authors of the Afro-Asian draft, the Nepalese representative explained that a provision obliging transit states to furnish sufficient means of transport was necessary because experience had shown that insufficient means of transport was one of the principal obstacles to the expansion of international trade. The coastal states strongly opposed this obligation. The delegates of certain developing transit states, considering the inability of most states to cover

306. GATT art. 5(2).

307. New York Convention, *supra* note 167, art. 2(1).

308. See Advisory Opinion, *Railway Traffic*, 1931 P.C.I.J. (ser. A/B) No. 42.

309. See Sarup, *supra* note 9; UPRETY, *supra* note 11.

310. See New York Convention, *supra* note 167, art. 1(D).

311. See Afro-Asian Draft, *supra* note 173, art. 4.

312. *Id.*

the costs of such an obligation, proposed that any indication of an obligation concerning means of transport be avoided.³¹³ In the end, the delegates chose an intermediary position by obliging transit states merely to enter into negotiations concerning the means of transport to be used when necessary.³¹⁴

In a draft version of the New York Convention proposed by seven SWA, two separate articles concerned means of transport.³¹⁵ Article 9 mentioned that for the orderly movement of goods in transit, transit states were obligated to furnish adequate means of transport on entry, exit, or other intermediary points. Article 10 went further, obliging transit states to improve the means of transport when such means do not enable SWA to exercise rights of access to and from the sea and granting SWA the right to construct, modify, or ameliorate transportation, communication, and port facilities with the agreement of the transit states.

The Barcelona Statute, in contrast, contains no provisions requiring transit states to provide the means of transport necessary for SWA to truly attain transit freedom. Admittedly, Article 1 of the Barcelona Statute remarks that freedom of transit encompasses the means of transport provided. However, Article 4 also allows transit states to apply tariffs on routes operated or administered for the benefit of SWA and, thus, leaves room for transit states to restrict SWA transit by placing exploitative tariffs on means of transport. To attenuate the restrictive effect of the Statute, Article 4(3) of the New York Convention provides that any haulage service established as a monopoly on waterways used for transit must be organized so as not to hinder the transit of vessels.³¹⁶ However, Article 4(3) only concerns river transport.

SWA would have preferred to regulate technical resources through multilateral means — i.e. through the 1965 New York Convention — but transit states instead looked toward bilateral agreements to accomplish this task. The New York Convention retained the intermediary solution of a general evocation of technical resources. Transit states were in fact invited to find juridical solutions to common regulations on technical facilities through bilateral agreement with the neighboring SWA. In this spirit, many bilateral treaties were signed. For instance, the United

313. See *Report of the Committee on the Preparation of a Draft Convention Relating to Transit Trade of Landlocked Countries* UNCTAD, at 34-39, U.N. Doc. A/5906 (1965).

314. New York Convention, *supra* note 167, art. 5.

315. The draft was presented in the Committee of Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction.

316. New York Convention, *supra* note 167, art. 4(3).

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Kingdom and Portugal signed the Agreements of April 7, 1964,³¹⁷ and Afghanistan and Pakistan signed the Agreement of March 2, 1965.³¹⁸

(c) *Use of maritime ports.*—There are two potential methods of securing access to a maritime port. First, transit states can establish free zones in favor of SWA in maritime ports. Second, they can permit SWA to establish modest material facilities for maritime transit operations in the ports. The latter option is often provided for in bilateral treaties.

(i) *Free zones.*—The regime of free zones is actually the most important of the special customs regimes applicable to a limited geographical region.³¹⁹ UNCTAD defines a free zone as “an enclave in a national customs territory generally situated in proximity to a port or an international airport, and in which foreign products may be introduced without customs formalities.”³²⁰ These imported products may generally be treated — warehoused, mixed, conditioned, and so forth — in the free zone.³²¹ Often, the products may be removed from or fabricated in the zone without the intervention of customs authorities.³²² Goods are not subject to customs duties until they enter the national territory.³²³

The 1921 Barcelona Statute reflects the refusal of states to relinquish rights of territorial sovereignty and contains no provisions concerning free zones.³²⁴ This is also the case with the Convention and Statute on the Regime of Navigable Waterways of International Concern, signed in Barcelona in 1921,³²⁵ and of the Statute on the International Regime of Maritime Ports, adopted in Geneva in 1923.³²⁶

In contrast, a number of bilateral treaties on trade and certain peace treaties concluded before 1921 deal with the creation and maintenance of

317. Convention Relative to the Construction of Connecting Railways Between Swaziland and Mozambique, Apr. 7, 1964, 537 U.N.T.S. 167.

318. Agreement on the Regulation of Traffic in Transit, *supra* note 282.

319. A free zone is a fraction of territory, usually limited to a port area, exceptionally extended to an entire region, which, though under the sovereignty of the territorial state, is placed beyond its customs line pursuant to either an internal decision of the state or an international act. See DICTIONARY OF THE TERMINOLOGY OF INTERNATIONAL LAW (1960).

320. See generally UNCTAD, Committee on Manufactures, at 2, U.N. Doc.TD/B/C 2/125 (1973).

321. *Id.*

322. *Id.*

323. *Id.*

324. See Barcelona Statute, *supra* note 121.

325. Convention and Statute on the Regime of Navigable Waterways of International Concern, Apr. 20, 1921, 7 U.N.T.S. 35.

326. Statute on the International Regime of Maritime Ports, Dec. 9, 1923, 19 Martens Nouveau Recueil (ser. 3), 250.

free zones. The "golden period" for bilateral agreements creating free zones in maritime ports occurred between the two World Wars. During this period, the League of Nations proposed that states use legal means to solve problems caused by the lack of access to the sea. After 1945, however, few agreements creating maritime port free zones in favor of SWA were concluded.

The New York Convention appears to be the result of a compromise between the demands of SWA and the requirements of coastal states. While allowing for the creation of free zones, the Convention placed the decision to create such a zone squarely with the transit state. Despite the total absence of provisions for free zones in the Barcelona Statute and the relative timidity of the Convention of New York, there are new bilateral treaties that contain provisions relating to the creation of free zones. Most share common rules from which a general regime of free zones can be identified.

(1) *Points in common.*—Most treaties creating free zones have certain provisions in common. For instance, all the treaties limit the extent of the zones and place them beyond the reach of fiscal and customs legislation, although they remain under the sovereignty of territorial states.

In general, a free zone comprises an area of a city or a port including shops, beaches, and a place for the stationing of vessels. The area where the loading and unloading of vessels and packing of goods takes place is also often part of the zone. Some transit states are particularly generous toward their neighboring SWA in regard to the facilities they allow. Such is the case with Argentina, which authorizes Bolivia to build industries and installations for fabrication within the free zone in the port of Barranqueras.³²⁷ In general, free zones are linked with the railway network of the territorial state, are physically separate from the rest of the port, and are supervised by the customs authority of the country. Goods kept in the free zone are not considered as sojourning within the national territory of the transit state. The zones escape the fiscal and customs laws and are generally managed by the SWA. However, the free zones are subject to certain supervision and control on the part of the territorial state.

327. See *Study on Free Access*, *supra* note 249, at 52; see also UNCTAD: *Background Paper on the Question of Free Zones with Reference to Articles 8 of the Draft Convention on Transit Trade of Landlocked States*, U.N. Doc. TD/Transit/4 (1965).

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(2) *Differing provisions.*—Treaties vary considerably with regard to the duration and the administration of the zones. The New York Convention leaves the responsibility of determining the creation and duration of the zone to bilateral treaties. With regard to the duration of the zone, in most cases, the free zone is created for a determined period, especially in ancient treaties. For instance, the zone in the Greco-Serbian Treaty had a duration of 50 years³²⁸ and 130 years in the Italo-Ethiopian Treaty.³²⁹

Some treaties have established free zones in perpetuity. For instance, Great Britain and Belgium created a perpetual zone facilitating the access of Congo (Belgian) to the sea through Eastern Africa.³³⁰ Other treaties do not mention the duration of the zone. The agreement between Senegal and Mali,³³¹ the treaty between Argentina and Bolivia,³³² and a number of agreements in developing SWA do not have such provisions.

In most cases, functionaries appointed by the states to whom concessions are granted manage the zone. However, in some cases, mixed agencies are responsible for management. For instance, under the Convention of November 9, 1920, between Poland and the Free City of Danzig, the Council of Port and Waterways of Danzig managed the free zone.³³³ This council was composed of an equal number of Polish and Danzig representatives.³³⁴

Treaties also differ with regard to the compensation given for the concession. Generally, it is granted free of cost. In some instances, however, the territorial state demands the payment of a certain amount from the SWA. For instance, under Article 3 of the Greco-Serbian Convention of 1923,³³⁵ the landlocked Kingdom of Serbia had to pay for any land expropriated.³³⁶

Finally, it must be noted that all treaties SWA and transit states enter into do not necessarily provide for the creation of free zones. While most agreements on transit trade concluded in Latin America provide for the establishment of such zones, such concessions are uncommon in African

328. Convention for the Regulation of Transit Via Salonica, May 10, 1923, 21 L.N.T.S. 443 (signed at Belgrade).

329. See Convention on Passengers and Baggage, *supra* note 234.

330. See Convention Facilitating Belgian Traffic, *supra* note 245.

331. See Agreement Concerning Senegal Ports, *supra* note 250.

332. Treaty of Friendship, Trade, and Navigation, July 9, 1968, Arg.-Bol.

333. See 1920 Convention, *supra* note 221, art. 18.

334. *Id.*

335. See Greco-Serbian Convention, *supra* note 328.

336. *Id.* art. 3.

and Asian agreements. In most of these treaties, transit neighbors limit the material facilities granted to small transit operations in maritime ports.

(ii) *Facilities in transit ports.*—Most bilateral trade treaties grant SWA only simple material facilities rather than the major concessions involved in the creation of a free zone. Some treaties, however, propose an intermediary solution, granting SWA facilities analogous to a free zone without the allocation of a determined space.

(1) *Granted by the New York Convention.*—The New York Convention deals with transport facilities and installations in relatively general terms. Its Article 6 concerns the modalities of warehousing goods in transit,³³⁷ mentioning that the entry, exit, and intermediary points of transit may be fixed by agreement between concerned parties.³³⁸ It adds that transit states shall grant conditions of warehousing at least as favorable as those granted to goods of their own country and that tariffs and transit charges shall be established in conformity with Article 4 of the Convention. According to Article 4(1), the contracting states are to provide in entry and exit points and as required at points of trans-shipment adequate means of transport and sufficient handling equipment to effectuate transit without unnecessary delay.

(2) *Granted by bilateral treaties.*—The Barcelona Statute is silent on this matter,³³⁹ but a number of bilateral trade treaties signed before and after 1921 contain provisions regarding the establishment of transport facilities.³⁴⁰ Among the ancient treaties, the convention between Italy and Czechoslovakia relating to concessions and facilities granted to Czechoslovakia in the port of Trieste serves as an example.³⁴¹ Under this convention, Czechoslovakia obtained temporary use of a hangar and an uncovered space in the Italian port. In return, Czechoslovakia paid the Italian government rent.

Most treaties concluded after World War II contain provisions concerning warehousing. The agreement of March 2, 1965, between Afghanistan and Pakistan provides that Pakistan shall earmark sheds and open spaces in the port of Karachi for goods in transit to or from

337. New York Convention, *supra* note 167, art. 6.

338. *Id.*

339. *See generally* Barcelona Statute, *supra* note 121.

340. Certain peace treaties — especially the Versailles Treaty in Articles 328 to 330 and 363 to 364 — contain provisions granting some of these facilities.

341. *See* Port of Trieste Convention, *supra* note 227.

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Afghanistan.³⁴² The treaty between Turkey and Afghanistan of 1969 is more precise. Its Article 8 requires the parties to provide godowns³⁴³ as well as installations for loading and unloading in their territory.³⁴⁴

The Treaty of Trade and Transit and its Protocol, signed by India and Nepal on September 11, 1960, is among the most restrictive of the treaties.³⁴⁵ Under the Protocol, the Indian government agreed to have the Port Authority assign a separate shed in the Port of Calcutta in which all goods in transit could be stored.³⁴⁶ The warehousing of these goods was to be effectuated in conformity with Indian laws and regulations.

The agreement between Laos and Thailand appears comparatively liberal.³⁴⁷ While the protocol to the agreement provides that the Port Services of Thailand is to manage warehouses reserved in the port of Bangkok for the storage of goods in transit to or from Laos, the agreement provides for the creation of mixed commissions composed of representatives of both states to supervise the storage and embarkation of goods in transit on trucks or trains. The agreement between Laos and Cambodia is significantly more generous.³⁴⁸ Under it, Cambodia agreed to provide private warehouses in the port of Komping Som (formerly Sihanouk city) to be operated by Laotian nationals.

Obviously, the nature of facilities transit states grant to SWA changes according to the geographical and political situation of the concerned states. The extent of such facilities also often depends on the negotiating capabilities of the states asking for them. On the whole, however, three situations can be noted. First, in Europe, the problem of transit does not exist. Second, the transit states of Latin America are more accommodating toward their neighboring SWA than the transit states of Africa and Asia. Third and finally, African states are more flexible than Asian states. The situation in Asia is certainly a result of the small number of SWA, which have little leverage when asking for extended rights and facilities from their considerably larger transit neighbors.

342. See *supra* note 282, art. 5.

343. A godown is a type of warehouse or similar storage place particular to India and other oriental countries. RANDOMHOUSE DICTIONARY OF THE ENGLISH LANGUAGE 606 (1973).

344. Agreements Relating to Transport of Goods and Passengers in Transit Throughout and Between the Territory of Afghanistan and Turkey, May 18, 1969.

345. See Indo-Nepal Treaty of 1960, *supra* note 10.

346. *Id.* protocol, para. 4.

347. Agreement and Protocol on Transit of Goods; July 29, 1959.

348. See Convention on Transit Between the Republic of Vietnam and the Kingdom of Laos, *supra* note 296.

2. *Reduced Administrative Formalities.*—Goods in transit passing through a state cannot be considered as having entered that state definitively. It is thus normal that the application of legal rules governing immigration or imports are waived. In this context and in order to establish and control the documentation required during passage through frontiers, states have tried to simplify, through conventional means, most administrative formalities. Naturally, an ideal formula has yet to be found. The principal reason, perhaps, is the refusal of the transit states to lessen their power over transit operation. The Barcelona Statute as well as the GATT are particularly vague in regards to simplifying administrative formalities.

(a) *Incompleteness of the Barcelona Statute and the GATT.*—The Barcelona Statute lays down a simple precept: all measures for regulating and facilitating traffic across territory the transit state takes under its sovereign power and authority shall facilitate free transit³⁴⁹ by rail or waterway on routes in use that are convenient for international transit. Article 5 of the GATT is not much clearer. It simply mentions that traffic in transit shall not be subject to unnecessary delays and restrictions and that contracting parties shall grant treatment no less favorable than that given to transit traffic of 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. This deliberate imprecision results from transit states' intention to reserve their regulatory power over all foreign activities in their territory. Transit states are simply not prepared to make concessions in this area.

(b) *Simplification of administrative formalities by the New York Convention.*—The New York Convention did not adopt proposals of SWA respecting the territorial sovereignty of transit states. The desires of SWA were incorporated into Article 12 of the Afro-Asian draft, which encouraged the adoption of simplified administrative procedures regarding transit such as simplified documentation and customs procedures.³⁵⁰

The representative of Afghanistan, during discussions in the Committee of Twenty-Four, emphasized the difficulties SWA faced because of the absence of simple and efficient methods of administration. To remedy such situations, SWA insisted that Article 12 mention in a clear and complete manner provisions to be applied in such cases.³⁵¹

349. *Id.* art. 2(1).

350. See Afro-Asian Draft, *supra* note 169, art. 12.

351. See Committee Report, *supra* note 181.

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Some representatives of transit states proposed entirely deleting Article 12 because it contained detailed administrative provisions.³⁵² In their opinion, it was not necessary to include them in a convention based primarily on general principles,³⁵³ and such detailed formalities could be appropriately established through bilateral agreements between concerned states.

As a result of the opposition of transit states, a Working Group of the Committee of Twenty-Four presented a new text to make Article 12 of the Afro-Asian draft less objectionable.³⁵⁴ This text contained several sensible modifications to Article 12 and mentioned that, as a general rule, the examination of goods in transit was to be limited to summary examination and test checks.³⁵⁵ In addition, the text was less detailed than the Afro-Asian draft.

The Committee of Twenty-four chose not to adopt any of the Article 12 texts. Instead, it forwarded both the text the Working Group adopted and the text of the Afro-Asian draft to several governments and the Conference of Plenipotentiaries. However, while adopting proposals of transit states, the 1965 New York Conference retained neither of the two texts in totality.

The first paragraph of Article 5 is imprecise concerning administrative procedures to be utilized. Under it, contracting states are to implement only those administrative and customs measures that permit free and uninterrupted traffic in transit and, if necessary, to undertake negotiations to agree on measures to ensure and facilitate transit.³⁵⁶ The second paragraph is more explicit, providing that the concerned states are to use simplified documentation and expeditious methods with regard to customs, transport, and other administrative procedures relating to traffic in transit for all transit through their territory, including any transport taking place in the course of such transit.³⁵⁷ Thus, Article 5 reformulated the entire text the Working Group presented, which itself was a compromise.

Most bilateral treaties contain provisions concerning administrative formalities. In the Nepal-Pakistan Treaty, the two governments agreed to reduce to a minimum all transit formalities.³⁵⁸ Similarly, the Afghan-Soviet Agreement provides that customs formalities in the territories of

352. See *id.* at 57-62 (discussions by the representatives of India, Czechoslovakia, Switzerland).

353. *Id.*

354. *Id.* at 60.

355. *Id.*

356. New York Convention, *supra* note 167, art. 5(1).

357. *Id.* art. 5(2).

358. See Agreement on the Regulation of Traffic in Transit, Jan. 28, 1963, Nepal-Pak.

the contracting parties are to be reduced to a minimum with respect to goods in transit.³⁵⁹ The creation of free zones, deriving essentially from bilateral agreements, also allows a partial resolution to the problems of administrative formalities.

In conclusion, despite the existence of several conventions, SWA, particularly developing SWA, suffer from the delays caused by the administrative formalities in transit states, which penalize their transport in transit.

3. *Reduced Financial Barriers.*—The most serious obstacle to freedom of access to the sea is the imposition of customs duties and other taxes on goods in transit. Assuring freedom of transit thus requires the amelioration of such taxes.

During the Barcelona Conference, the Rumanian delegate named transit an economic weapon, specifically the weapon of protectionism. H.O. Mange, the British technical counsellor to the Barcelona Conference, gave a diametrically opposed opinion. He stated that freedom of transit did not give rise to the right to enter a state, but only the right to cross its territory. In his opinion, every state remained master of its own home, but had to abstain from abusing its geographical position by refusing to grant, or granting only under costly conditions, a right of passage for normal obligatory traffic crossing its territory. The growth in the number of SWA since the second World War alone, according to Mange, was enough in itself to justify this principle.³⁶⁰

Positive law has evolved along the lines described by M. Mange. States have abandoned the practice of subjugating goods in transit of SWA to customs duties and other taxes. There is no precise and explicit universal rule. Most international agreements abide by principles of exemption for special duties on transit and non discrimination.

(a) *Exemptions from customs duties and transit taxes.*—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 and assessing duties and taxes during transit.³⁶¹ This objective is one of the essential bases of the legal regime on freedom of transit and was established even before the Convention of 1965. Indeed, Article 3

359. See Agreement Concerning Transit Questions, June 28, 1955, U.S.S.R.-Afg., 240 U.N.T.S. 260.

360. L'OEUVRE DE BARCELONE, EXPOSE PAR QUELQUES UNS DE SES AUTEURS (1922).

361. See generally New York Convention, *supra* note 167, art. 3.

of the Barcelona Statute provides that transit traffic is not to be subjected to any special dues,³⁶² and Article 5 of the GATT affirms that traffic in transit is to be exempted from customs duties.³⁶³

In contrast, Article 3 of the New York Convention, which deals with transit tariffs, is based on solidly established international practice.³⁶⁴ This Article reconsiders Article 3 of the Barcelona Statute and develops Paragraph 2 of the fourth principle of the Preamble of the 1965 New York Convention. It affirms that in the territory of a transit state, traffic in transit shall not be subjected to customs duties or taxes chargeable by reason of importation or exportation or to any other special transit dues.³⁶⁵ Thus, Article 3 of the Convention prohibits special taxes on goods in transit.

All treaties relating to the access of SWA to and from the sea have provisions on this matter. The Afghan-Iranian Treaty of February 1962,³⁶⁶ for example, provides that goods in transit shall not be subjected to any customs duties, taxes or dues levied by the national, provincial, or municipal authorities. The precision regarding "provincial or municipal" taxes in the treaty is important. SWA have often had difficulties with local or provincial administrations, which sometimes impose taxes and local duties on goods in transit in contravention to national commitments. This was perhaps why the Nepalese delegate, during the discussion in the Commission of Twenty-Four, demanded that precise language exempting goods in transit from all provincial taxes be added to Article 3 of the New York Convention.

(b) *Remunerative charges distinguished.*—The principle of exemption of customs duties and transit taxes has an exception: dues deriving from the cost of services rendered. All international agreements relating to transit authorize the imposition of charges for expenses passage states bear for traffic in transit. As a matter of principle, an SWA must participate in the expenses its coastal neighbor incurs in facilitating the passage of the SWA's goods in transit.

Article 3 of the New York Convention allows transit states to levy dues on traffic in transit as long as such dues are used to defray expenses incurred for the supervision and administration of particular transit.³⁶⁷ This rule is the result of generally established and uncontested practice.

362. See Barcelona Statute, *supra* note 121, art. 3.

363. See GATT art. 5, para. 3.

364. See generally New York Convention, *supra* note 167, art. 3.

365. See *id.*

366. Afghan-Iranian Treaty, Feb. 1962.

367. See New York Convention, *supra* note 167, art. 3.

Similar provisions are made in the Barcelona Statute,³⁶⁸ the GATT,³⁶⁹ the 1958 Geneva Convention on territorial sea and contiguous zone,³⁷⁰ and all other bilateral agreements concerning transit of SWA.

(c) *Determination of appropriate remuneration.*—The fact that a transit state receives remuneration for services rendered is absolutely legitimate. However, there is a danger that states will abuse this right and apply excessively high tariffs in an effort to recover lost customs duties. Thus, it is always necessary to remain cautious that these tariffs do not indirectly become a tax levied on goods in transit.

For this reason, the Commission for the Study on the Freedom of Communication and Transit³⁷¹ presented a draft to the Barcelona Convention that provided that contracting states would be prohibited from using transit tariffs as “an instrument for international economic struggle.” But the Barcelona Convention did not retain the draft. During the Barcelona Conference, the SWA strongly recommended inserting provisions concerning the principle of national treatment³⁷² in the Barcelona Statute. Instead, however, the principle of national treatment was replaced by the principle of nondiscrimination between transit states themselves.³⁷³

Due to its great importance, the question was discussed at length in the Conference of New York. Here, as in Barcelona, the discussion was limited to the principle of national treatment and not to the principle of tariff nondiscrimination.

The draft prepared by the Afro-Asian SWA and reconsidered by the Committee of Twenty-Four provided that charges applicable to transport in transit would not be greater than those applicable to internal transport.³⁷⁴ Based on this proposed text, a transit state would have been required to treat the traffic in transit of SWA on an equal basis not only with regard to the costs the transit state imposed upon a third state but also with regard to the costs imposed upon the traffic of its own nationals.

368. Barcelona Statute, *supra* note 121, art. 3.

369. GATT art. 5, para. 3.

370. 1958 Geneva Convention on Territorial Sea & Contiguous Zone, art. 18.

371. This was a provisional Commission of the League of Nations. Its role was to prepare a draft proposal for a general international convention on transit.

372. National treatment is a feature of many international agreements under which parties treat the citizens, commodities, products, ships, and so on of other parties in the same manner as they treat their own. JAMES R. FOX, *DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW* 296 (1992) (defining national clause).

373. See generally Barcelona Statute, *supra* note 167, arts. 2, 3.

374. See Afro-Asian Draft, *supra* note 169, art. 4.

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The New York Conference of 1965, however, did not adopt this draft. While the text the Convention of 1965 adopted is more detailed than the Barcelona Statute, in substance the Convention makes no progress from Article 4 of the 1921 Statute.

Article 4(2) of the New York Convention limits tariffs and charges on traffic in transit to those that are reasonable in rate and method of application.³⁷⁵ The Convention provides that such tariffs are to facilitate traffic in transit.³⁷⁶ It avoids dealing with the principle of national treatment and instead sets forth an imprecise formula under which tariffs are not to be greater than those contracting states impose on transports of goods of coastal states throughout their territory.³⁷⁷ Finally, the Convention provides that these measures are to be applicable to traffic in transit using facilities operated or administered by the state and by firms or individuals.³⁷⁸ In such cases, the contracting state is to fix the tariffs or charges.³⁷⁹

The ambiguity of Article 4 of the Convention results from a compromise between two opposite views, that of coastal states and that of SWA. Although the principle of national treatment does not appear in the text of the New York Convention, it can be noted in bilateral treaties. However, most bilateral treaties utilize provisions analogous to the 1965 Convention and authorize the imposition of dues corresponding to services rendered provided that such dues are not discriminatory.³⁸⁰

4. Most Favored Nation Treatment.—Promotion of access to the sea does not affect the MFN rights of third parties. The right of access to the sea deriving from the principle of freedom of the seas constitutes a specific right for SWA that is linked to geographical position. Therefore, a transit state that grants special advantages based on free access to the sea must not be obliged to grant the same concessions to a third state by virtue of MFN treatment. Article 10 of the New York Convention, which affirms the non-application of MFN treatment, reinforces the specific nature of the right of free access.³⁸¹ This right, fundamental for SWA, remains within the framework of the Convention, a right exclusively reserved to contracting states.

375. See New York Convention, *supra* note 167, art. 4(2).

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

380. See, e.g., Agreement On the Regulation of Traffic in Transit, Nepal-Pak.; Agreement between Laos and Kambodia, Oct. 1959.

381. New York Convention, *supra* note 167, art. 10.

The first paragraph of Article 10, which develops the seventh principle of the Preamble,³⁸² requires contracting states to exclude the special rights granted to SWA under the convention from MFN treatment.³⁸³ This provision, which strengthens the scope of the right of access, was not included in the Barcelona Statute.

The GATT treaty, which is centered primarily on the premise of MFN treatment, accepts certain derogations with regard to the following three phenomena: the development of regional integrations, the participation of socialist states in international trade, and the emergence of developing states.

Taking note of UNCTAD's first meeting, the GATT revised the agreement in favor of the last phenomenon, the emergence of developing states. The status granted to developing states clearly reflects an inegalitarian nature; it has a compensatory vocation. It may be questioned why such a status cannot be recognized on a universal level for all SWA. The Convention of New York grants such status only to states that are signatories to the Convention.

B. Restrictions upon Access to the Sea

The New York Convention tried to establish an equilibrium between the principle of free access to the sea and the principle of territorial sovereignty. Indeed, the Preamble of the Convention of New York reads: "the transit state which conserves the full sovereignty on its territory shall have the right to take all indispensable measures so that the exercise of the right of free and restrictionless transit does not violate, in any way, its legitimate interests of all order."³⁸⁴

The terms of this Preamble illustrate the contradictions existing in a particularly fragile juridical regime. The concept of "legitimate interests of all order" conflicts with the notion of a "right of free and restrictionless transit," rendering the text ambiguous and leaving aside prospects for a solution. This lacuna, however, is not particular to the New York Convention; it is obvious in most international agreements relating to transit.

The ambiguity of the treaty provisions requires one to subdivide restrictions on the right of access into two groups. Certain restrictions are unchallengeable in their principle and, thus, constitute normal limitations to the right of access of SWA. These general limits arose by definition

382. *See id.* pmb., princ. 7.

383. *See id.* art. 10(1).

384. *Id.* pmb., princ. 5.

with the delineation of the scope of the right of access and, thus, may be listed within the framework of usual restrictions between transit states and SWA. However, other restrictions on the right of access are less accepted. SWA have challenged restrictions that do not preserve legitimate interests of transit states and that totally ignore the situation of SWA. Most of these contested limitations are justified through claims of preserving the security interests of transit states. Some, however, derive more particularly from special provisions of international conventions.

1. General Restrictions.—Limitations upon access arising from the special nature of the right of access — i.e., arising from the definition of the right of access — may be considered general restrictions. Access to the sea constitutes a special right within the more general category of the right of transit. However, in order to ensure the application of the right of access, simple general measures concerning transit are not enough. Specific measures to assure access to the sea must be conceded to SWA.

Given the sacrifices asked of them, it is understandable that transit states require assurances that the facilities granted remain limited to SWA only and that all “profit sharing” with others be prohibited. In this context, it is absolutely appropriate to circumscribe the scope of the right of access to the sea. Article 1 of the New York Convention gives a series of definitions with the purpose of determining this scope.³⁸⁵

According to Article 1, traffic in transit signifies the passage of goods throughout the territory of a contracting state between a state without coast and the sea provided that this passage begins or terminates within the said SWA and includes sea transport directly preceding or following such passage.³⁸⁶ This definition contains an important restriction on the right of access. It envisages the right of access as an exercise of SWA’s maritime rights, limiting the right to the passage of goods between SWA and the sea.³⁸⁷ This limitation, in contrast, does not exist in the Barcelona Statute,³⁸⁸ which deals with the problem of transit by focusing on the relationship between the coastal states and SWA.

Not all SWA approve of defining the right of access as a right running only to the sea because doing so excludes all transports not involving maritime transit. Indeed, the effect has been that all non-maritime inter-regional exchanges remain beyond the scope of the right

385. *See id.* art. 1.

386. New York Convention, *supra* note 167, art. 1(b).

387. *Id.*

388. *See generally* Barcelona Statute, *supra* note 121.

of access, which is harmful for certain SWA who have a considerable amount of trade taking place within their own region.³⁸⁹

The New York Convention also attempted to define SWA and transit states. According to the 1965 Convention, the term SWA constitutes all contracting states that do not have a seacoast.³⁹⁰ It thus excludes from SWA states having a coast totally or partially unsuitable for navigation. The definition also excludes states with territory partially an enclave within the territory of another state. The term transit state includes all contracting states situated between an SWA and the sea, with or without a seacoast, through which the traffic in transit passes.³⁹¹ Thus, based on these definitions, it is obvious that the freedom of transit, as envisaged in Article 2 of the 1965 Convention, benefits only SWA and only their transit throughout the territory of intermediary states, even if these intermediary states are themselves SWA.

2. *Specific Restrictions.*—The sovereignty of a state within its entire territory is recognized by general international law. States mutually acknowledge one another's sovereignty within their own boundaries. In this regard, the fifth principle of Geneva asserts that transit states retain full sovereignty in their territory.³⁹² The provisions of the Geneva Convention on the High Seas refer to two situations that require protecting the interests of transit states: health and security and exceptional circumstances. These situations give rise to specific restrictions upon the right of access to the sea.

(a) *Security and health.*—Transit states may enact measures to protect their territorial integrity and legitimate interests. The New York Convention recognizes this right. The fifth principle of the preamble declares that transit states have the right to take all necessary measures to ensure that the right of free transit does not violate its legitimate interests. Moreover the Convention authorizes each contracting state to take any action necessary to protect its essential security interests.³⁹³

These imprecise provisions allow transit states to restrict, and even suspend, freedom of access under the pretext of protecting legitimate interests. It is legitimate for transit states to take appropriate measures in order to avoid abusive use of the freedom of access. However, such

389. An example is Afghanistan and Nepal, whose main trading partners are their neighbors.

390. New York Convention, *supra* note 167, art. 1. The Afro-Asian draft did not contain such a definition.

391. *Id.* art. 1(c).

392. See *supra* note 170 and accompanying text.

393. New York Convention, *supra* note 167, art. 11(4).

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measures should only be implemented in exceptional circumstances and should be fashioned narrowly so as not to unduly restrict freedom of access.

Article 11 moves in this direction.³⁹⁴ Under paragraph 2, contracting states may take the precautions and measures necessary to ensure that persons and goods, mainly goods subject to monopoly, are actually in transit and that the means of transport are actually utilized for the passage of said goods.³⁹⁵ Paragraph 2 also authorizes taking the measures necessary to protect the safety of routes and means of communication.³⁹⁶

Paragraph 1 of Article 11 is less precise.³⁹⁷ Under it, each contracting state may prohibit the admission of a category of goods or persons either (1) for reasons of public morals, health, and security or (2) as a precaution against pests and plant and animal diseases. This clause is imprecise enough to concern, *inter alia*, the transport of arms.³⁹⁸ By means of combining this paragraph with paragraph 4 of Article 11, the transit state can oppose the transit of armaments.³⁹⁹

During the preparation of Article 11, India asked to include a special clause concerning armaments, munitions, and military supplies in the list of categories of goods for which the transit state would not be obliged to grant freedom of transit.⁴⁰⁰ The developing SWA opposed the insertion of such a provision.⁴⁰¹ They contended that the right to import armaments for defense and national security is universally recognized and declared that they would not accept any amendment restricting their sovereign rights.⁴⁰²

Based on these opposite views, the Convention allows the transport of arms but gives discretionary power to transit states to restrict this transport.⁴⁰³ The ICJ affirmed this discretionary power in the *Right of Passage over Indian Territory* case.⁴⁰⁴

394. *See id.* art. 11.

395. *Id.* para. 2.

396. *Id.*

397. *Id.* para. 1.

398. New York Convention, *supra* note 167, art. 11(1).

399. *See id.* art. 11(4).

400. *See* Committee Report, *supra* note 181.

401. *Id.*

402. *Id.*

403. New York Convention, *supra* note 167, art. 11(1), (4).

404. *Right of Passage over Indian Territory* (Port. v. India), 1960 I.C.J. 6. Portuguese possessions in India included the two enclaves of Dadra and Nagar-Aveli, which in mid-1954 passed under an autonomous local administration. Portugal claimed a right of passage to and between these enclaves to the extent necessary for the exercise of its sovereignty and subject to Indian regulation

(b) *Exceptional circumstances.*—Under exceptional circumstances, a transit state may disregard, for a limited time, some of its obligations to SWA and restrict the right of access to the sea. These derogations are permissible in periods of domestic social unrest and war.

(i) *Social unrest.*—The exercise of freedom of access to and from the sea must not hamper the vital interests of transit states. All international agreements dealing with transit limit the exercise of this freedom during a disturbance in the internal public order of the transit state. These provisions illustrate the view that self-protection is of primary importance to a state.

Article 7 of the Barcelona Statute permits states to derogate from the agreement temporarily during exceptional, serious events concerning the safety or vital interests of the state or the public.⁴⁰⁵ This provision was reconsidered in Article 7 of the Afro-Asian draft.⁴⁰⁶ During discussions on this Article in the Committee of Twenty-Four, the representatives of some SWA proposed defining the particular cases in which derogation could occur.⁴⁰⁷ Article 12 of the New York Convention slightly modified and, in fact, improved Article 7 of the Barcelona Statute. The measures were made applicable “in case of emergency endangering the political existence or the security of the transit state.”⁴⁰⁸ However, it omitted the words “vital interests” and “in exceptional circumstances, in the time of crisis or for public security reasons.”⁴⁰⁹

Thus, Article 12 of the New York Convention and Article 7 of the Barcelona Statute introduce two restrictions upon the rights of transit states. First, derogations must be exceptional and temporary. Additionally, freedom of transit may never be totally suspended. Even during such a derogation, free transit must be maintained through all possible means. Despite the dual limit, however, Article 12 is vague because international law does not provide a clear and precise definition

and control. It also claimed that in July 1954 India prevented it from exercising that right contrary to prior practice and argued that the situation needed to be redressed. On November 26, 1957, the ICJ ruled that it had jurisdiction over the dispute after challenges to its jurisdiction from India. On April 12, 1960, the Court ruled that Portugal had in 1954 the right of passage claimed by it, but that such right did not extend to armed forces, armed police, arms, and ammunition and that India had not violated this right of passage. See SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 114-35.

405. See Barcelona Statute, *supra* note 121, art. 7.

406. See Afro-Asian Draft, *supra* note 169, art. 7.

407. See Committee Report, *supra* note 181.

408. New York Convention, *supra* note 167, art. 12.

409. *Id.*

of an international crisis necessitating the suspension of the international obligations of a state.

(ii) *War*.—Under the Charter of the United Nations, the term *war* is referred to only in the Preamble.⁴¹⁰ However, according to the Charter's Article 2(4), all members must refrain from "the threat or use of force against the territorial integrity or political independence of any state" in their international relations.⁴¹¹

Conventions relating to freedom of transit concluded under the auspices of international organizations generally contain provisions on a convention's application in time of war. Article 13 of the New York Convention, which reconsiders Article 8 of the Barcelona Statute, mentions that the Convention does not fix rights and duties of belligerent and neutral states in time of war.⁴¹² Despite this precaution, the New York Convention remains imprecise on this point and leaves many questions unanswered.

3. *Restrictions Deriving from Superior Conventions*.—In both of the primary international documents on transit — the Barcelona Statute and New York Convention — the supremacy of either the League Covenant or the U.N. Charter is obvious.

The Statute⁴¹³ and Convention⁴¹⁴ mention that their obligations do not require contracting states to violate their rights and duties as members of the League of Nations or United Nations. These provisions clearly subordinate the Convention and Statute to the rules of the Covenant and the Charter.

Article 103 of the U.N. Charter itself indicates that its obligations must prevail over particular obligations states establish. Thus, by calling upon the aegis of the Charter, transit states may restrict or prohibit freedom of access granted by other conventions.

The Security Council also has the right to take a series of measures to maintain international peace and security.⁴¹⁵ Member states are thus obliged to carry out the measures the Council decides.⁴¹⁶ For instance, under measures the Security Council passed to sanction the "illegitimate"

410. U.N. CHARTER pmbi.

411. *Id.* art. 2(4).

412. See Barcelona Statute, *supra* note 121, art. 8; New York Convention, *supra* note 167, art. 13.

413. Barcelona Statute, *supra* note 121, art. 9.

414. New York Convention, *supra* note 167, art. 14.

415. U.N. CHARTER art. 25.

416. U.N. CHARTER chs. V-VII.

government of Rhodesia after it proclaimed independence,⁴¹⁷ member states were required not only to stop importing goods from Rhodesia, but also to stop participating in Rhodesian exports by not helping the Salisbury government with the transport of goods.⁴¹⁸

Article 5 of the Barcelona Statute and Article 11 of the New York Convention also allow its contracting members to derogate from their provisions under exceptions contracting members introduce in order to comply with certain other international agreements. Thus, a hierarchy of norms expressed as an international public order is established based on the superiority of certain rules of universal concern. This hierarchy is another means by which the right of access of SWA may be displaced.

4. *Restrictions Contested by SWA.*—The New York Convention has successively dealt with three types of rather contested restrictions on the right of access. They are briefly considered below.

(a) *State voluntarism.*—Most provisions concerning the right of access originate in bilateral agreements concluded voluntarily between SWA and transit states. Such provisions commonly reflect the disadvantageous compromise SWA are forced to make, a situation in which SWA are practically placed in the position of petitioners. Legally, from a purely formal viewpoint, the process of bilateral negotiations thus objectively favors transit states. Rights obtained in such a framework often are the result of kindness rather than egalitarianism.

In the context of general principles of international law, it is unconscionable to make the status of a country subject to, and conditioned upon, the benevolence or malevolence of another state. Access to the sea, and its many economic consequences, constitutes a rule of international public law that should not be infringed upon by bilateral treaties. The issue of free access comes fully under general international law. It constitutes a paradigmatic example of *jus cogens*. Regardless, according to some convention provisions, mainly those of the New York Convention, the majority of transit facilities the coastal states grant to SWA are subject to mutual accord.

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

417. See S.C. Res. 232, U.N. SCOR (1966).

418. The total application of these measures was intended to paralyze the Rhodesian economy. However, Rhodesia's neighbors did not entirely respect this decision, and thus, the measures turned out to be ineffective.

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freedom of transit shall be granted under the terms of this convention for traffic in transit and means of transport 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.⁴¹⁹

Thus, the measures by which transit traffic is to be facilitated must be mutually acceptable. In addition, the sixth principle adopted by UNCTAD stipulates that for the purpose of arriving at a universal solution to the particular problems of SWA, all states shall favor the conclusion of regional or other international agreements.⁴²⁰

With regard to the peculiar nature of the right of freedom of transit, the UN Secretary-General's comments concerning provisions of the Barcelona Statute and the GATT are significant. The Secretary-General noted during the 1958 Conference on the Law of the Sea that these two texts considered freedom of transit to be more a subject for international treaties than a rule of customary international law. This remark holds true for the New York Convention as well. According to the Convention, the right of access depends essentially on the consent of states and is granted by bilateral treaties.⁴²¹

However, it may be concluded that the right of free access arises to allow SWA to enjoy the freedom of the seas and to participate in the exploration and exploitation of the seabed and its resources. In this context, coastal states have an obligation to grant the right of free transit to and from the sea independently from agreements.

(b) *Reciprocity*.—The New York Convention, restating similar provisions contained in the 1958 Geneva Conference on High Seas⁴²² and the 1964 UNCTAD,⁴²³ guarantees to SWA freedom of access to the sea on the basis of reciprocity. The Afro-Asian draft did not contain such a provision, nor does the Barcelona Statute. On the contrary, while the Statute relating to the International Regime of Maritime Ports adopted at Geneva in 1923 provides that the right of access to ports and equality of national treatment must be granted by all contracting states on the basis of reciprocity,⁴²⁴ the Protocol to the Geneva Statute notes that this

419. New York Convention, *supra* note 167, art. 2.

420. See *supra* note 170 and accompanying text.

421. New York Convention, *supra* note 167, art. 3.

422. Geneva Convention, *supra* note 143, art. 3(1).

423. See *supra* note 170 and accompanying text.

424. See Geneva Convention on the International Regime of Maritime Ports and the International Regime of Rail, *supra* note 131.

clause must not have the effect of depriving SWA from the advantages granted by the rest of the Statute.

During discussions in the Committee of Twenty-Four, the representatives of certain transit states proposed provisions under which they would be required to grant rights to traffic in transit only on a reciprocal basis.⁴²⁵ SWA responded that the application of reciprocity to the right of access was unreconcilable with the very principles under which this right was to be granted. In the end, the transit states prevailed. Article 15 provides that the Convention's provisions are to be applied on a reciprocal basis.⁴²⁶ However, it is appropriate to note that reciprocity can be justly established only when a minimum of equality and a similarity of situation exist between the parties.⁴²⁷

SWA considered treaty provisions linking freedom of access to the rule of reciprocity to be based on the erroneous hypothesis that SWA and transit states are in comparable positions and have identical needs regarding transit. Such is not the case. Geography is a principal cause of extreme underdevelopment of third world SWA, engendering inequality, even within the same region, between these states and their neighbors. Simply put, transit for SWA is vital. The principle of freedom of transit is precisely meant to allow SWA to exercise their right of access to and from the sea. Indeed, the principle of reciprocity should not have gained a place in the New York Convention, which specifically attempted to solve the transit problems of SWA. By including provisions requiring reciprocity, the Convention of 1965 failed to distinguish those transit facilities needed by SWA because of their geographic position from traffic and communication facilities granted to all states as a matter of course. As such, the reciprocity requirement effectively acts as a restriction upon the right of access to the sea.

(c) *Definition of means of transport.*—The definition of “means of transport” in the New York Convention is limited.⁴²⁸ Article 1(D) defines the term as:

- (i) Any railway stock, sea-going and river vessels and overland vehicles;
- (ii) Where the local situation so requires, porters and pack animals; and

425. See generally Committee Report, *supra* note 181.

426. New York Convention, *supra* note 167, art. 15.

427. See M. Virally, *Le Principe de Reciprocite dans le Droit International Contemporain*, in 122 ACADEMY OF INTERNATIONAL LAW, COLLECTED COURSES 1 (1967).

428. New York Convention, *supra* note 167, art. 1(d).

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(iii) If agreed upon by contracting states concerned, other means of transport as well as pipelines and gaslines, when they are used for traffic in transit.⁴²⁹

In comparison, the Barcelona Statute has a more general scope than the 1965 Convention.⁴³⁰ The Statute enumerates vessels, ships, vehicles, wagons, and other means of transport in its definition. The New York Convention retains the expression "other means of transport," but subordinates three other means to agreements between concerned states. Thus, the Convention exhaustively enumerates the "means of transport" within its purview and relegates *any* "other means of transport," including pipelines and gaslines, to bilateral agreements.

It is noteworthy that the Convention includes no provisions concerning the movement of aircraft. Given the detailed nature of Article 1, it seems that this category of transport was intentionally excluded. On the other hand, the Convention is the first multilateral agreement dealing with transit to mention pipelines and gasoline.

Another important feature of the Convention is that it excludes persons. According to Article 1(b) of the Convention, traffic in transit means the passage of goods including unaccompanied baggage.⁴³¹ The Afro-Asian draft, which textually reproduced the provisions of Article 1 of the Barcelona Statute, did not contain this limitation.⁴³²

Transit state delegates participating in the Committee of Twenty-Four sought to exclude persons from the definition of traffic in transit, arguing that the principle aim of the Convention was to regulate the transit trade of SWA *stricto sensu*. Naturally, SWA did not share this viewpoint. Hence, as a compromise, the Committee adopted the Indian proposal, which authorized the passage of persons necessary for facilitating traffic in transit of SWA in conformity with the laws and regulations of transit states.

Transit states failed, however, to give SWA a satisfactory explanation for the exclusion of persons from the 1965 definition of a traffic in transit in contrast to the 1921 definition of the Barcelona Statute. Consequently, SWA continue to claim that "traffic in transit" means not only the transit of baggage, property, and means of transport through the territory of one or several transit states, but also the transit of persons, as was the case in the Barcelona Statute, provided that this movement does not disturb the security and public order of transit states.

429. *Id.*

430. See generally Barcelona Statute, *supra* note 121.

431. New York Convention, *supra* note 167, art. 1(b).

432. See generally Afro-Asian Draft, *supra* note 169.

The trend of making decisions based on strict compromise rather than on negotiation and understanding has always been very much present in international conventions. This trend explains the regular negative outcome of and recurrent disadvantages found in international agreements with regard to certain groups of states. This has been the case of SWA with regard to access to the sea. The attempt to resolve the problems of access through the New York Convention was less successful than other international agreements mainly because of the sharply divergent interests among state groups. Not only did the groups split on the substantive content of the law, but they also differed on the nature of the international system and on the proper means of negotiating such law. Nevertheless, although not perfect, the New York Convention must be understood as the one — and only — multilateral international agreement focusing solely on resolving the transit problem of SWA.

IV. Continued Development of the Law of Access

Although the right of SWA to access to and from the sea had been accepted by a majority of states, its status as international law remained unclear. Consequently, states demanded a more valid objective and universal enunciation of the right of access. This vacuum was filled by the Third United Nations Convention on the Law of the Sea (UNCLOS III) signed at Montego Bay in 1982.⁴³³

The U.N. Convention on the Law of the Sea lays down rules concerning all aspects of the use of the world's oceans.⁴³⁴ It is a comprehensive and complicated document covering issues ranging from states' rights over foreign ships in their territorial waters to the control of

433. The U.N. Convention on the Law of the Sea was adopted with 130 votes for, four against (USA, Israel, Turkey, and Venezuela), and 17 abstentions. The ceremony for the signing of this document took place at Montego Bay, Jamaica, from December 7 to 11, 1982. During this ceremony, 117 States signed the Convention. The Final Act of the conference, which contains a number of resolutions completing the text of the Convention, was also adopted. The four most important resolutions form Annex 1 of the Final Act. The Conference adopted them along with the Convention, of which they form integral part, on April 30, 1982. 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 (1987) [hereinafter U.N. LAW OF THE SEA]; see also, UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION 39-45 (4th ed. 1988); B.E. CARTER & P.R. TRIMBLE, INTERNATIONAL LAW 925-26 (1991); J.M. SWEENEY ET AL., THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 157-79 (3d ed. 1988); B.H. Oxman, *The Third UN Conference on the Law of the Sea: The Seventh Session (1978)*, 73 AM. J. INT'L L. 1 (1979); B.H. Oxman, *Summary of the Law of the Sea Convention*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 559 (1984); J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 232-52 (1984).

434. CARTER & TRIMBLE, *supra* note 433, at 923.

minerals at the bottom of the oceans.⁴³⁵ Although a large part of UNCLOS III deals with international aspects of the sea, there are important provisions recognizing the jurisdiction of states in a number of areas. It deals with landlocked states in a relatively brief manner by mentioning that they "shall have the right of access to and from the sea" and "shall enjoy freedom of transit through the territory of transit states by all means of transport."⁴³⁶

A. Right of Access under UNCLOS III

The U.N. Convention on the Law of the Sea does not deal solely with landlocked states. It has a more general and universal orientation. However, a few Articles of this Convention concern SWA because they are indirectly or directly linked with the right of access. Specifically, the right of access to and from the sea is outlined in detail in Part X of the Convention.⁴³⁷

1. Transit Rights.—Article 125(1) is quite clear and self-explanatory, providing that

[I]and-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.

The strength of this paragraph is substantially reduced by the remainder of Article 125. Paragraph 2 specifically emphasizes that the terms and modalities for exercising freedom of transit shall be agreed upon by the landlocked and transit states concerned through bilateral, subregional, or regional agreements. Article 125(3) mentions that transit states, in the exercise of 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 to landlocked states shall in no way infringe upon the legitimate interests of transit states.⁴³⁸ Thus, Article

435. *Id.*

436. UNCLOS III art. 125(1).

437. See UNCLOS III arts. 124-32.

438. See STARKE, *supra* note 433, at 272-73 (commenting on effectiveness of Article 125); see also L.C. Caflisch, *Land-Locked and Geographically Disadvantaged States*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 169 (1989).

125 interpreted in its entirety does not move beyond the rights recognized in the New York Convention.⁴³⁹

"Transit state" is defined in Article 124(b) to signify a state, with or without a seacoast, situated between a landlocked state and the sea, through whose territory traffic in transit passes.⁴⁴⁰ Article 124(c) defines "traffic in transit" as the transit of persons, baggage, goods, and means of transport across the territory of transit states, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, where the transit is only a portion of a complete journey that begins or terminates within the territory of the landlocked state.⁴⁴¹

As in the past, "means of transport" signifies rolling railway stock; sea, lake, and river craft; road vehicles; and, where local conditions so require, porters and pack animals.⁴⁴² This paragraph is relatively flexible because landlocked states and transit states may through agreement include as means of transport pipelines and gasline and means not otherwise listed.⁴⁴³

Furthermore, UNCLOS III mentions in Article 129 that where there are no means of transport in transit states to give effect to the freedom of transit or where the existing means (including port installations and equipment) are inadequate in any respect, transit and landlocked states may cooperate in constructing or improving such means of transport. As with previous inadequate conventions, no obligation on transit states exists. In other words, transit states may refuse at any time essential transit to and from the sea.

2. *Other Rights.*—While beyond the scope of this Article, it is important to consider demands SWA made at UNCLOS III beyond those aimed at securing a full right of access to the sea in order to illuminate the comparative and evolutionary aspect of rights concerning SWA.

At UNCLOS III, landlocked states joined with other geographically disadvantaged states (such as those with short and shelflocked coastlines) to form a distinct negotiating group.⁴⁴⁴ Whereas in the past landlocked states were preoccupied only with questions of access to the sea and

439. While Article 125 clearly recognizes the principle involved, in practice the modalities called for in paragraphs (2) and (3) involve substantial qualifications. See I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 216 (1990).

440. See UNCLOS III art. 124(b).

441. *Id.* art. 124(c).

442. *Id.* art. 124(d).

443. *Id.*

444. I D.P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 380 (1984); see also L.C. Caflisch, *Land-locked States and Their Access to and from the Sea*, in 49 *BRITISH YEARBOOK OF INTERNATIONAL LAW* 71-100 (1978).

transit across neighboring territories, their aims at the UNCLOS III were more far-reaching.⁴⁴⁵ They sought to secure for all geographically disadvantaged states (particularly those that are also developing countries) preferential rights in neighboring economic zones and "equitable" treatment involving the sharing of resources in the international seabed.⁴⁴⁶ Thus, after years of negotiation, SWA become more specific and more ambitious in their demands.

These states also attempted to secure a right to share in the nonliving as well as living resources of neighboring economic zones.⁴⁴⁷ Such a right, they argued, rests in part in the notion of the continental shelf as a natural extension not merely of the coastal state but of the land mass as a whole, including countries fated to occupy the hinterland. These attempts were defeated in the UNCLOS III debates.⁴⁴⁸ The right of landlocked states to participate on an equitable basis in the exploitation of living resources of the exclusive economic zones (the EEZ) of coastal states in the same region or subregion was recognized subject to two main qualifications: (1) the right exists only with respect to "an appropriate part of the surplus" and (2) the relevant economic and geographical circumstances of all states concerned must be taken into account along with the generally applicable criteria governing the conservation and utilization of the living resources of the EEZ.⁴⁴⁹

UNCLOS III further adds that the terms and modalities of such participation shall 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 the provisions of this article, is participating or is entitled to participate under existing bilateral, subregional, or regional agreements in the exploitation of living resources of the EEZs of other coastal states;
- (3) the extent to which other landlocked states and geographically disadvantaged states are participating in the exploitation of the living resources of the EEZ of the coastal state and the consequent need to avoid a particular burden for any single coastal state or a part of it;

445. O'CONNELL, *supra* note 444, at 380.

446. *Id.*

447. *Id.*

448. *Id.*

449. UNCLOS III art. 69.1.

(4) the nutritional needs of the population of the respective states.⁴⁵⁰

Moreover, according to UNCLOS III, when the harvesting capacity of a coastal state enables it to harvest the entire allowable catch of the living resources in its EEZ, the coastal state and other concerned states are to cooperate in making equitable arrangements.⁴⁵¹ Such arrangements may be made on a bilateral, subregional, or regional basis.⁴⁵² The arrangements are to allow for participation by developing landlocked states from the same subregion or region in the exploitation of the living resources of the EEZs of coastal states of the subregion or region.⁴⁵³ Again, such arrangements shall correspond to the appropriate circumstances and be on terms satisfactory to all parties.⁴⁵⁴

UNCLOS III distinguishes industrial SWA from developing SWA. Industrial SWA are entitled to participate in the exploitation of living resources only in the EEZs of industrial coastal states of the same subregion or region.⁴⁵⁵ Such participation is limited to the extent which the coastal state, in giving access to the living resources of its EEZ, has taken into account the need to minimize detrimental effects on fishing communities in states whose nationals have habitually fished in the zone.⁴⁵⁶

The above "right to participate" is only for the "appropriate part of the surplus of living resources."⁴⁵⁷ It is well known that the living resources of the sea are negligible compared with its mineral resources for which the provisions of UNCLOS III give no rights to coastally deprived states. Moreover, this prioritization, defined in relation to an elusive "equitable basis" and in respect to a remnant of resources the very nature of which is dependent upon crucial decisions of the coastal state, ensures only an imperfect right.⁴⁵⁸

Another important principle forwarded by UNCLOS III is the concept of a common heritage of mankind.⁴⁵⁹ This term of recent origin reflects the belief that resources of certain areas beyond national

450. *Id.* art. 69.2.

451. *Id.* art. 69.3.

452. *Id.*

453. *Id.*

454. UNCLOS III art. 69.3.

455. *Id.* art. 69.4.

456. *See id.*

457. *Id.*

458. *See* 1 OPPENHEIM, INTERNATIONAL LAW 799 (R. Jennings and A. Watts eds., 1992); *see also* I.J. Wani, *An Evaluation of the Convention on the Law of the Sea from the Perspective of the Landlocked States*, in 22 VA. J. INT'L L. 649 (1982).

459. *See* UNCLOS III art. 136.

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sovereignty or jurisdiction should not be exploited by those few states whose commercial enterprises are able to do so. Instead, such resources constitute the common holding of mankind to be utilized for the benefit of all states. The application of the term to any particular area, and its substantive content in relation thereto, requires elaboration by individual treaties.

Article 137 of UNCLOS III provides 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 of the same.⁴⁶⁰ The content of this Article has, to a large extent, aided SWA in struggling for a right of access. Indeed, to characterize the ocean floor lying beyond the limits of national jurisdiction as well as its resources as the common heritage of mankind and yet deny landlocked and other geographically disadvantaged states a share in the resources of the sea, for which access to the sea serves as a pre-requisite, is to preach one thing while practicing the contrary.⁴⁶¹ But how far does reality deviate from what is written down? How many of the landlocked states can actually — and effectively — participate in this common heritage?

B. Absence of Novel Provisions

UNCLOS III has been heralded 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.”⁴⁶² In the past, the big powers framed and dictated the rules of international law to be observed by the rest of the nations of the world. For the first time in the history of the international law of access, a convention presented a set of rules formulated by the combined will of the great majority of states (approved with 130 votes for, 4 against, and 17 abstentions) in an assembly where equality prevailed as a guiding principle of decisionmaking.⁴⁶³

460. *See id.* art. 137. The concept of benefit to mankind is so vague, however, that it is extremely difficult to derive a clear-cut regime for the deep ocean floor. On the other hand, this concept does set forth an unchallengeable principle that no part of the deep ocean floor should be appropriated by any State. Under this principle, no state may claim or exercise sovereign rights over any part of this area, nor may a state appropriate any part of the area through a claim of sovereignty, use, occupation, or any other means. However, the principle of non-appropriation does not generally lead to the conclusion that exploration and exploitation of the deep ocean floor should come to a halt.

461. *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., 1978).

462. MILAN BULAJIC, *PRINCIPLES OF INTERNATIONAL DEVELOPMENT LAW* 310 (1986).

463. *Id.*

On the whole, UNCLOS III codifies modern customary international law; the law of the sea is thus reflected in written form.⁴⁶⁴ Still, its importance goes far beyond the codification of the modern law of the sea. As stated by one author, UNCLOS III is "not a mere codification of established principles or a compilation of the contents of various documents," but is

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.⁴⁶⁵

Similarly, the requirement of cooperative conduct on the part of the transit states vis-a-vis SWA is also implicit. Most provisions of UNCLOS III contemplate regulation between the SWA and transit states.⁴⁶⁶ Some articles provide for cooperation expressly. Article 129 foresees cooperation between transit states and SWA in constructing means of transport to effectuate freedom of transit.⁴⁶⁷ Article 130 requires cooperation between transit states and SWA in the expeditious elimination of delays or other technical difficulties in traffic in transit.⁴⁶⁸

Despite these admittedly significant achievements, a pragmatic analysis of UNCLOS III shows that most of the rules set forth already appear in earlier conventions. Such is the case, for instance, with the exclusion of MFN treatment;⁴⁶⁹ the exemption from all custom duties, taxes, or other charges;⁴⁷⁰ the guarantee of equal treatment in maritime ports;⁴⁷¹ and the grant of expanded warehousing facilities.⁴⁷² Moreover, UNCLOS III still leaves the granting of free zones and other customs facilities to bilateral agreements.⁴⁷³

In fact, on one point SWA clearly lose out. The 1958 Convention gives to ships flying the flag of a SWA MFN treatment or national

464. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 153 (1989).

465. *Id.* at 311.

466. *See* UNCLOS III arts. 124(2), 125(2), 128.

467. *Id.* art. 129.

468. *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., 1986).

469. UNCLOS III art. 126.

470. *Id.* art. 127.

471. *Id.* art. 131.

472. *Id.* art. 132.

473. *Id.* art. 128.

treatment, whichever is more advantageous.⁴⁷⁴ However, 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 SWA. This clause should have referred to either "most favored nation treatment" or "national treatment," whichever is more favorable for the SWA.⁴⁷⁵

By simply restating contested rules set forth in previous conventions, UNCLOS III continues to leave room for conflict among states, primarily with regard to means of transport, reciprocity, and several other important subjects. The delegate of Pakistan⁴⁷⁶ raised this problem of interpretation by stating that "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."⁴⁷⁷

Most SWA hold negative views toward the achievements of UNCLOS III. The representative of Lesotho noted that UNCLOS III left room for improvement.⁴⁷⁸ The delegate of Zimbabwe expressed displeasure with the provisions dealing with access to and from the sea and the delimitation of the EEZ.⁴⁷⁹ The representative of Paraguay stated that, even after intense negotiations, the text of the UNCLOS III convention satisfied the expectations of SWA only in part.⁴⁸⁰ However, he added that this legal instrument, although still imperfect, constitutes a significant advance over former documents.⁴⁸¹ The delegate of Mongolia expressed more or less the same opinion, stating that the provisions relating directly to the rights of and benefits accorded to SWA were not entirely satisfactory, but Mongolia was prepared to accommodate its own interests and expectations to those of the international community as a whole.⁴⁸²

Czechoslovakia was one of the few SWA to express a positive view of UNCLOS III.⁴⁸³ Its delegate mentioned that

474. See Geneva Convention, *supra* note 143, art. 3(2).

475. See Cafilisch, *supra* note 444, at 71-100.

476. See U.N. LAW OF THE SEA, *supra* note 433, at 98.

477. *Id.*

478. *Id.* at 94.

479. *Id.*

480. *Id.* at 96.

481. U.N. LAW OF THE SEA, *supra* note 433, at 96.

482. *Id.*

483. *Id.*

to landlocked states it 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.⁴⁸⁴

Notwithstanding these general, positive viewpoints on UNCLOS III, a creative approach with regard to SWA cannot be found in the 1982 Convention's provisions. In short, UNCLOS III failed to clarify the position and status of SWA, and thus, one must still consider SWA losers despite its achievements. SWA struggled through long and difficult negotiations merely to obtain a renewal of previously recognized rights.⁴⁸⁵

UNCLOS III cannot be viewed in isolation. It came into force on November 16, 1994, but may well require changes before all major states fully accept it.⁴⁸⁶ It entered into force one year after being ratified by the sixtieth country.⁴⁸⁷

Nevertheless, admittedly an important phase of international negotiations has been completed, although the crucial phase involving the application and execution of the few novel legal concepts introduced still remains. However, nothing hinders those involved in the struggle for the right of access from hoping that this breath of fresh air presages a warm breeze, and that, in a broader context, problems may always be resolved through such peaceful means, through what one might call the law of sagacity.

484. *Id.*

485. From the viewpoint of redistribution of oceanic resources, the biggest losers are non-coastal developing countries. See Magus Wijkman, *UNCLOS and Redistribution of Ocean Wealth*, in *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* (R. Falk et al. eds., 1985); see also I.J. Wani, *supra* note 458, at 651. UNCLOS III may, however, be advantageous for some SWA that are also transit states and that consider the problem differently. But for most of the SWA in Africa, Asia, and South America, UNCLOS III remains a disappointment. SWA in general placed much hope in the attempt of UNCLOS III to improve their transit position, but this hope was in vain.

486. CARTER & TRIMBLE, *supra* note 433, at 923.

487. UNCLOS III art. 308.