FREEDOM OF TRANSIT AND THE RIGHT OF ACCESS FOR LAND-LOCKED STATES: THE EVOLUTION OF PRINCIPLE AND LAW

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States having no direct access to and from the sea are described as land-locked, a geographic status which places these countries at a severe disadvantage relative to their coastal counterparts. For land-locked nations, access to the sea is dependent upon their ability to pass through one or more countries of transit. The availability of suitable transport facilities normally is subject to little or no control by the land-locked State, and countries of transit sometimes have used their strategic position as an economic or political lever against land-locked neighbors. Occasionally, transit has been denied altogether, thereby forcing the land-locked country to seek alternate routes or means for the transport of its goods to and from the sea. Sometimes, goods in transit of landlocked countries have been subjected to seizures for the satisfaction of orders issued in States of transit, and routine impositions on the external trade of land-locked countries include the levy of heavy custom duties for simple movement of goods through territory of

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1 There are thirty such countries in the world today: fourteen in Africa (Botswana, Burundi, Central African Republic, Chad, Lesotho, Malawi, Mali, Niger, Rwanda, Swaziland, Uganda, Upper Volta, Zambia, and Zimbabwe); ten in Europe (Andorra, Austria, Byelorussia, Czechoslovakia, the Holy See, Hungary, Leichtenstein, Luxembourg, San Marino, and Switzerland); four in Asia (Afghanistan, Laos, Mongolia, and Nepal); and two in South America (Bolivia and Paraguay).

2 For example, when Uganda's Minister of Labor announced a policy of replacing unskilled Kenyan workers with Ugandan nationals in 1970, the government of Kenya threatened to refuse handling Uganda's goods at the important port of Mombasa. See Tandon, The Transit Problem of Uganda within the East African Community, in LAND-LOCKED COUNTRIES OF AFRICA 90 (Z. Cervenka ed. 1973).


4 In 1952, for example, the courts of Chile issued an order authorizing the private seizure of tools, equipment, and food being transported through Chilean territory to Bolivia. M.
the transit State, as well as cumbersome and costly formalities of procedure.5

These burdens are a principal cause of land-locked countries' relative poverty.6 As a recent report concludes:

Land-locked developing countries are generally among the very poorest of the developing countries . . . Their lack of territorial access to the sea, aggravated by remoteness and isolation from world markets and the greater difficulties and costs of international transport services, appears to be one of the major causes of their relative poverty, and a serious constraint to their further economic and social development.7

Given these facts, the essential legal issue is whether land-locked countries have a right of access to and from the sea, or whether such access is merely a privilege, i.e., contingent upon terms and conditions unilaterally imposed by countries of transit.

Historic Bases for the Claim of a Right of Access to the Sea for Land-Locked Countries

The claims of land-locked States were originally founded on principles of natural law. It was argued that the right of free transit was conferred on every land-locked country by its very sovereignty,8 a necessary corollary to accepted notions of freedom of the high seas. This view maintained that, because the oceans are open to all nations, littoral and land-locked alike, the latter must be entitled to free transit in exercise of their equal rights within the res communis.9

Another theory supporting this right is derived from the Roman concept of "servitude," a limited right of ownership. Under Roman

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4 The UNCTAD Secretariat has observed that "formalities, procedures and documentation often result in undesirable hindrances to international trade and transport, and . . . these hindrances can be particularly harmful to land-locked countries which are dependent on transit movements through neighbouring countries. They can have a particular impact, in the form of costs, delays and administrative difficulties, on the export trade of those countries . . . ." 14 (1) U.N. ESCOR, Conference on Trade and Development 2, U.N. Doc. TD/B/501 (1974).

5 Of 31 countries identified by the U.N. General Assembly as among the least developed, 15 are land-locked. 2 U.N. GAOR, Conference on Trade and Development 12, U.N. Doc. A/AC. 191/30 (1978).


8 "If the ocean is free to all mankind, it is reasonable to suppose that every people should have access to the shores of the ocean . . . ." Pounds, supra note 3, at 256.
land the owner of a piece of land had the right to use it in any way he chose, so long as that use did not infringe on the rights of hisneighbor. If A's land were located in such a way that it was necessary to cross B's land before he could enjoy his own land, A was said to have a natural servitude across B's property. From this it may be argued that land-locked States have a similar servitude to traverse neighboring States, a logical and necessary extension of the sovereignty they exercise over their own territory. As Clauss has stated:

It cannot be denied that there are in international law relationships which present an analogy to praedial servitudes of the Roman law or to easements of the common law almost amounting to identity, namely those relationships in which a part of the whole of the territory of one State is made to serve the economic needs of another.

In recent years, this argument of fundamental necessity has grown steadily more compelling. Oceans have always provided the most economical means of transporting goods among world markets, and, as States become increasingly dependent on this international commerce, it is obvious that no country may remain isolated without suffering economic stagnation. Even where transit historically has been allowed on an ad hoc bilateral basis, risks of disruption inherent in the absence of a legal guarantee inject added insecurity to investment and development plans. For these reasons alone, advocates have maintained that a right of passage must be recognized, provided only that its exercise cause no damage to interests of the transit State.

Lauterpacht has summarized the prerequisites to legal recognition of the right of free access of a land-locked State in two basic conditions. First, the State claiming the right must be able to justify it under considerations of necessity or convenience; second, the exercise of the right must cause no harm or prejudice to the transit state. The former inquiry is a limited one, however, for:

\[\text{it is doubtful whether it is important to justify or define the}\]

\[\text{10 W. W. Buckland & A. D. McNair, Roman Law and Common Law, a Comparative in Outline 103 (1936).}\]

\[\text{11 H. D. Reid, International Servitudes in Law and Practice 11 (1932) (quoting H. Lauterpacht, Private Law Sources and Analogies of International Law 121 (1927)).}\]

\[\text{12 See S. Pufendorf, De Jure Naturae et Gentium 354 (Classics of International Law trans. 1934).}\]

\[\text{13 Lauterpacht, Freedom of Transit in International Law, in Transactions of the Grotius Society 320 (1958-59).}\]
requirement of 'necessity' . . . . The concept of 'necessity' here envisaged by writers such as Grotius, Pufendorf and Vattel is a wider and more flexible notion than necessity in the sense of immediate or overwhelming urgency. Rather, it is indistinguishable from the idea of 'convenience' conceived as the existence of a bona fide and legitimate interest. It is not an element in this definition that the route sought is the only route available. Clearly, if it is the only route, the claim becomes stronger.14

The established principle of innocent passage through the territorial sea of coastal States15 also has been cited in support of an analogous right of transit for land-locked States. Some writers have maintained that:

the right of land-locked States to free transit over land is the same as recognized in territorial waters as a right of innocent passage. Indeed, both the land and territorial waters are the property of the coastal State and the right of innocent passage over land as well as water in favour of one State and its nationals to use land, sea and air of another State for passage. The reason for the existence of innocent passage in international law is the same as in civil law.16

The cogency of these arguments has increased as other rights of land-locked States have been articulated at the Third United Nations Conference on the Law of the Sea, particularly where it has recognized their right to participate in resources of the exclusive economic zone and the deep sea-bed.17

Counter-Arguments by Countries of Transit

The major obstacle to development of a guaranteed right of access to the sea for land-locked countries has been the claim of territorial sovereignty by coastal States. These nations have consistently argued that principles of state sovereignty allow them to approve or disallow all transit through their territories.18 Their

14 Id.
16 A. H. TABIBI, THE RIGHT OF FREE ACCESS TO THE SEA (1966). Alfred Rubin has also remarked: "If the territorial sea is subject to universal rights of innocent passage in recognition of this universal right of access to the sea, does not the same logic compel recognition of a right of innocent passage across land territory to reach the sea?" Rubin, Land-locked Countries and Rights of Access to the Sea, in Cervenka, supra note 2, at 45.
18 Referring to the history of transit rights for land-locked countries, Pakistan's represen-
position is that rights of access for land-locked countries are not properly resolved through a single international rule, but are instead a matter for bilateral or regional agreements. Countries of transit argue that sovereign jurisdiction over all activities within their territories includes the prerogative of denying the traffic of land-locked countries as a matter of security. Furthermore, some have contended that rights of transit need be granted and enforced only on a reciprocal basis.

*The 1921 Barcelona Conference*

The collective effort of land-locked countries toward global recognition of an assured right of access was begun at the Barcelona Conference of 1921. Representatives at that conference adopted both the Convention on Communications and Transit and the Danube Statute, and agreed also that the annexed Statute of Transit was to form an integral part of the Convention. In article 1, "transit" was defined to include:

Persons, baggage and goods, and also vessels, coaching and rolling stock, and other means of transport... when the passage across such territory... is only a portion of a complete journey, beginning and terminating beyond the frontier of the State across whose territory the transit takes place.

The representative of Kenya at that same session stated that, "[n]o State could allow any other State the right of transit through its territory outside the framework of bilateral or regional arrangements..." Id. at 253. The representative of Pakistan expressed a similar view, id. at 250, as did the delegate from Peru, id. at 251.

As stated by the Kenyan representative, "the transit State's duty to its citizens to maintain law and order would be jeopardized if such an unreasonable right [of transit] were to be recognized." Id. at 253.

A typical expression of this view was that, "on the basis of the established and recognized principle of reciprocity, transit States might, in consideration of the facilities which they accorded land-locked States, require the latter to accord them similar facilities in furtherance of their economic and trade interests." Id. at 250. See also statements by the representatives of Thailand, id. at 254, Kenya, id. at 253, and India, id. at 247.

Efforts of individual land-locked countries are evidenced by numerous bilateral treaties, but these are beyond the scope of this discussion.

*Done* April 20, 1921, 7 L.N.T.S. 11.

*Id.* at 27.
Article 2 of the Statute obliged States party to facilitate freedom of transit "on routes in use convenient for international transit."\textsuperscript{25} Article 5 authorized a contracting State to disallow transit of passengers or goods otherwise prohibited in its territory.\textsuperscript{26} Article 6 removed any obligation for a contracting State to allow freedom of transit to a non-contracting State.\textsuperscript{27} Article 7 empowered contracting States to impose temporary restrictions on freedom of transit "in case of an emergency affecting the safety of the State or the vital interests of the country."\textsuperscript{28} A proposal by Switzerland to have the Statute binding during time of war was rejected by the Conference.\textsuperscript{29} As a compromise, article 8 was substituted, stating that "[t]his Statute does not prescribe the rights and duties of belligerents and neutrals in time of war. The Statute shall, however, continue in force in time of war as far as such rights and duties permit."\textsuperscript{30}

Although the Barcelona Conference provided a promising start for securing an internationally recognized right of transit, from the land-locked States' point of view several deficiencies were evident in its scope and coverage. First, it would have served these countries well had the right of transit been declared of universal application, rather than confined to States party to the convention.\textsuperscript{31} A second major limitation was that the Convention only applies to railway and waterway transport. The failure to address road transport excluded extensive portions of Africa and Asia which are largely dependent on overland routes to and from the sea.\textsuperscript{32}

\textsuperscript{25} Id.
\textsuperscript{26} Id. at 29.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{31} Supra Note 26. One author has observed that this article: imposes on states placing hindrances on transit traffic in time of war the onus of justifying their action by appeal to a recognized principle of the laws of war, and gives to states which suffer by limitations on transit traffic in time of war a right to call for an explanation. If a more definitive provision had been inserted, the Statute would not have been passed.
\textsuperscript{32} Toulmin, supra note 29.

A proposal that the Convention expressly state its universal application was rejected on the grounds that, in allowing States which were not parties to enjoy its benefits, fewer States would then elect to become parties. See Makil, Transit Rights of Land-locked Countries: An Appraisal of International Conventions, 4 J. WORLD TRADE L. 35, 40 (1970).

"The exclusion of road transport from the provision of the Convention is a serious limitation on its usefulness to land-locked developing countries as most of them have to depend mainly upon this means of transport for the export of their goods." Id.
Another criticism of the Convention was directed at the great prominence it accorded transit problems of land-locked countries in Europe, thereby failing to take sufficient account of the distinct position of States in the new world.33

The General Agreement on Tariffs and Trade

After World War II, the General Agreement on Tariffs and Trade (GATT) was adopted to reduce tariffs and other barriers to international trade. Although it made no express reference to the situation of land-locked countries, this Agreement reaffirmed the principles of the Barcelona Convention on freedom of transit, stating in Article V that:

2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties . . . .

6. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party . . . .34

As with the Barcelona Convention, land-locked States would have preferred an express declaration that freedom of transit is a general legal principle applicable to all States.

The Havana Charter

The United Nations Conference on Trade and Employment adopted a Charter at Havana in 1948, article 33 of which was devoted to freedom of transit for land-locked countries.35 While the language was identical to that of article V in the GATT Agreement, this article went well beyond that Agreement in its interpretive provision. Its official commentary read as follows:

If as a result of negotiations in accordance with paragraph 6 a Member grants to a country which has no direct access to the sea more ample facilities than those already provided for in other

33 Id.
paragraphs of article 33, such special facilities may be limited to
the land-locked country concerned unless the Organization finds,
on the complaint of any other Member, that the withholding of
the special facilities from the complaining Member contravenes
the most-favoured-nation provisions of this Charter.\(^\text{36}\)

The insertion of this interpretive note meant that more ample
facilities need not also be accorded a non-land-locked party to the
convention on grounds of the Charter's most-favored-nation
principle.\(^\text{37}\) In addition, Article 10 made a significant step in ex-
pressly providing that "facilities and special rights accorded
by this Convention to land-locked States in view of their special
geographical position are excluded from the operation of the most-
favoured-nation clause."\(^\text{38}\) Thus, although the Convention itself never
entered into force, it nevertheless made an important contribu-
tion to a legal regime of free transit for land-locked countries, a
contribution which was to be carried forward in future conferences.

The Geneva Conference of 1958

In 1956, the United Nations Economic Commission for Asia and
the Far East (ECAFE) adopted a recommendation regarding tran-
sit problems of land-locked countries which urged that "[t]he needs
of land-locked member states and members having no easy access
to the sea in the matter of transit trade be given full recognition
by all member States and that adequate facilities therefore be ac-
corded in terms of international law and practice in this regar."\(^\text{39}\)
This recommendation appears to have started a concerted move-
ment through the United Nations and its agencies to address the
problems of transit for land-locked countries.

At its eleventh session in 1957, the United Nations General
Assembly adopted a similar resolution\(^\text{40}\) and, after considering a
report of the International Law Commission, resolved to convene
an international conference at Geneva to examine the law of the
sea. In particular, the General Assembly recommended that "the

\(^{36}\) Id.
\(^{38}\) Dubey has also remarked that the article "marks a significant advance, inasmuch as
the present Convention is the first international convention which recognizes the special
position of the land-locked States in relation to the operation of the most-favoured-nation
clause." Id.
conference should study the question of free access to the sea of land-locked countries, as established by international practice of treaties.  

At the first United Nations Conference on the Law of the Sea in 1958, the Fifth Committee was designated to address the question of free access for land-locked countries. Several representatives on the Committee expressed a view that new rules on this issue were unnecessary, stating that a recommendation instead should be adopted calling on more States to acced to the existing international conventions on the subject. Others on the Committee maintained that codification of the right of access as a principle of law was essential to its international recognition. Together with the legal principles of freedom of the high seas and equal sovereignty of Member States in the international community, the practical necessity of economic relations between states was emphasized as a reason to codify this right. Eventually, the Fifth Committee’s recommendations were submitted to and accepted by the Conference as general principles of international law, later to be incorporated, in slightly modified form, as article 3 of the 1958 Geneva Convention on the High Seas. It reads in pertinent part:

1. In order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea-coast should have free access to the sea. To this end States situated between the sea and a State having no sea-coast shall by common agreement with the latter, and in conformity with existing international conventions accord:

a) To the State having no sea-coast, on a basis of reciprocity, free transit through their territory;

b) . . .

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 . . . in case such States are not already parties to existing international conventions.

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44 See, e.g., statements by the representatives of Argentina, id. at 3, and Czechoslovakia, id. at 7.
Land-locked countries have objected that this provision requires an agreement with countries of transit before the right of access is recognized; under the language of article 3, no obligation is apparent for countries of transit to accord land-locked States a right of access even when final terms of transit are under negotiation.\(^{46}\)

The right of access is also conditioned by the requirement that a land-locked country grant its neighbor a reciprocal right. If the state of transit has no need of access through the land-locked country, the issue is unresolved whether such a country therefore would withhold the right of transit from its land-locked neighbor. As discussed above, the historic position of land-locked countries has been that their right of access to and from the sea is a fundamental right of sovereign states, not a conditional privilege. Thus they argued that only the modalities of implementation must be agreed upon with countries of transit.\(^{47}\)

**The New York Convention on Transit Trade of Land-locked States**

Efforts that culminated in the 1965 Convention on Transit Trade of Land-locked States\(^{48}\) were begun in 1963. Meeting in Manila, ECAFE issued a statement declaring that, because bilateral agreements regulating trade between land-locked States of the region inadequately protected the rights of land-locked States, there was an urgent need to draft a general convention on the subject.\(^{49}\) Similar concerns were reiterated by ECAFE’s ministerial conference in Teheran, and a note accompanying the resolution adopted by this conference was later transmitted to the Secretary-General of the United Nations by Afghanistan, Laos and Nepal.\(^{50}\) The resolu-

\(^{46}\) The difficulties of such a situation are well illustrated by the impasse which occurred between India and Nepal following expiration of their Treaty of Trade in October of 1970. Before another agreement could be reached, it was alleged that India imposed unreasonable restrictions on trade with Nepal and stopped the supply of even essential commodities to Nepal. The matter was not resolved until some six months later, and then only after personal meetings between King Mahendra of Nepal and Prime Minister Indira Ghandi of India. See Sarup, *supra* note 3, at 294.

\(^{47}\) To this end, delegates from land-locked States also attempted to replace the word “should” with “shall” in the first paragraph of article three. However, some stated that the use of “shall” would give the entire sentence an undesirable imperative force, and suggested that an even milder “may” be used instead. Others objected that either extreme was unacceptable, and consensus was reached that “should” would remain in their final agreement. See 7 U.N. GAOR, Conference on the Law of the Sea (23rd mtg.) 56-58, U.N. Doc. A/Conf. 13/43 (1958).


\(^{50}\) Id.
tion called for a convention effectively ensuring freedom of transit for all land-locked countries, a goal it was hoped could be achieved at the United Nations Conference on Trade and Development (UNCTAD) scheduled to meet the following year. When UNCTAD convened in 1964, a sub-committee was formed to deal specifically with transit problems of land-locked countries. The sub-committee eventually presented a report to the Conference which included a draft convention on transit trade. Its eventual adoption marked the most significant move yet made toward resolution of right of transit issues facing land-locked countries.

The New York Convention on Transit Trade of Land-locked Countries first affirms that “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.” Article 2(1) establishes that “[f]reedom of transit shall be granted under the terms of this Convention for traffic in transit and means of transport,” such traffic to be provided “on routes in use mutually acceptable for transit to the Contracting States concerned.” Article 2(2) provides that other rules governing means of transport also are to be established by agreement among or between the contracting parties concerned. Similar conditions are to be provided for “persons whose movement is necessary for traffic in transit.” Except in cases of force majeure, contracting States must take measures necessary to avoid delays or restrictions of traffic in transit; where such obstacles should arise, the Convention mandates mutual cooperation among the competent authorities for their expeditious removal.

While emphasizing these rights of land-locked States, the Convention also recognizes the essential security interests of countries of transit. In emergency situations endangering its political existence or safety, a contracting State is authorized to deviate from the provisions of the Convention, but only “in exceptional cases and for as short a period as possible... on the understanding that the principle of freedom of transit shall be observed to

51 Id.
52 Convention on Transit Trade of Land-locked States, supra note 48, at 44.
53 Id. at 48 (emphasis added).
54 Id.
55 Id.
56 Id. at 50.
57 Art. 11(4) states that, "[n]othing in this Convention shall prevent any Contracting State from taking any action necessary for the protection of its essential security interests." Id. at 56.
the utmost possible extent during such a period."58 Another article requires that "[t]he provisions of this Convention shall be applied on a basis of reciprocity."59

Land-locked countries already enjoying greater rights than the Convention would provide, particularly those of Europe, sought to include a clause safeguarding their position. The Convention therefore allows a contracting party to avail itself of greater transit rights than those provided.60 On the other hand, a land-locked State not a party to the Convention may assert its rights under the Convention "only on the basis of the most-favoured nation clause of a treaty between that land-locked State and the Contracting State, granting such facilities and special rights."61

The New York Convention goes somewhat beyond previous instruments in recognizing land-locked States' rights of transit to and from the sea. However, a number of the limitations in previous instruments are also present in this Convention. By the operation of article 15, for example, land-locked countries must grant reciprocal rights of transit to countries of transit.62 As with its predecessors, this clause has been the object of criticism that the Convention thereby fails to differentiate between "the needs for transit arising from the geographical location of States having no sea coast, and any other transit serving only to facilitate transport and communication in general."63 Furthermore, while the Convention relies for its raison d'être on principles of economic necessity and the right of land-locked States "to enjoy the freedom of the seas on equal terms with coastal States,"64 it does not proclaim these principles as international law.

Among the breakthroughs of the 1965 Convention are the provisions of articles 4 and 7. Article 4 requires States to provide not only "adequate means of transport," but also adequate handling equipment for the movement of traffic "without unnecessary delay."65 Article 7 enjoins the competent authorities of transit States to cooperate with those of land-locked States to eliminate delays

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58 Id.
59 Id. at 58.
60 Id. at 54.
61 Id.
62 Supra note 59.
64 Convention on Transit Trade of Land-locked States, supra note 48, at 52.
65 Id. at 50.
or difficulties arising in the transit process. As John Freid has observed:

Transit trade involves many goods, many individual transactions and innumerable details. Problems, mistakes, complications, misunderstandings are bound to crop up. The important principle here stipulated is that these day-to-day matters be dealt with simply, directly, and with as little red tape as possible. Disputes should be nipped in the bud. There should, for example, be no need for Embassies and Foreign Offices to exchange notes about them. Hence, the key-word here is cooperation between the "competent authorities", meaning the officials on both sides (or conceivably, more than two sides) who actually deal with these matters. They can greatly improve transit trade and facilitate their own work, by cooperating with their counterparts in quickly eliminating delays and difficulties on their working level.64

Despite these hopeful signs, the practical impact of the Convention has been limited, for few countries of transit have signed or ratified the Convention.67 Land-locked countries have noted this fact,68 and continue to seek solutions at the Third United Nations Conference on the Law of the Sea.

The Third United Nations Conference on the Law of the Sea

Among the topics originally approved for consideration by the Seabed Committee was "[f]ree access to and from the sea: freedom of transit, means and facilities for transport and communications."69

In 1973, seven land-locked States submitted a proposal to the Committee "with the intention to contribute to the work of the Committee in adopting articles relating to land-locked States."70 These draft articles were not to stand alone, but were intended to form "an inseparable part of the law of the sea to be fitted at

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67 As of this writing, only 22 coastal States have either signed or ratified the Convention, some of which, by virtue of their geographic situation, may not be termed transit States within the Convention's definition. On the other hand, 21 land-locked States have either signed or ratified the Convention. See U.N. Doc. ST/Leg./Ser.D/13 at 280 (1980).
68 "The practical impact of the New York Convention on Transit Trade of Land-locked States has not been great, for the number of its parties has remained rather limited. Moreover, they are mostly land-locked States or such coastal States which are not typical transit countries." Explanatory paper on the draft articles relating to land-locked States, supra note 51, at 207.
69 Id. at 206.
appropriate places into a comprehensive convention relating to the law of the sea." The term "traffic in transit" was defined to mean "transit of persons, baggage, goods and means of transport across the territory of one or more transit States, when the passage across such territory, with or without transshipment, warehousing, breaking bulk or change in the mode of transport is only a portion of a complete journey which begins or terminates within the territory of the land-locked States." "Means of transport" was defined to include: railway stock, seagoing and river vessels, and road vehicles; porter and pack animal where local circumstances so require; pipelines and storage tanks where used for traffic in transit; and other means of transport when necessary, subject to appropriate arrangements.

The fundamental precepts of the proposal were:

Article II
1. The right of land-locked States to free access to and from the sea is one of the basic principles of the law of the sea, and forms an integral part of the principles of international law.
2. In order to enjoy the freedom of the seas and to participate in the exploration and exploitation of the sea-bed and its resources on equal terms with coastal States, land-locked States irrespective of the origin and characteristics of their land-locked conditions, shall have the right of free access to and from the sea in accordance with the provisions of this Convention.
3. The right of free access to and from the sea of land-locked States shall be the concern of the international community as a whole and the exercise of such rights shall not depend exclusively on the transit States.

Article III
1. Transit States shall accord free and unrestricted transit for traffic in transit of land-locked States, without discrimination among them, to and from the sea by all means of transport and communication, in accordance with the provisions of this Convention.

In language similar to that of the New York Convention, provisions of the proposal regarding customs duties stipulated that traffic in transit is "not to be subject to any customs duties, taxes or other charges except charges levied for specific services rendered

"Id.
"Id. at 2.
"Id.
"Id. at 2, 3.
in connexion with such traffic."\textsuperscript{76} Where a transit State's port installations, equipment, or means of transport and communication are used primarily by one or more land-locked States, tariffs, fees or other charges levied for services rendered must be agreed upon among the States concerned.\textsuperscript{76} In addition, under this draft as well, the means of transport in transit used by land-locked States are not to be subject to taxes, tariffs or charges higher than those levied on means of transport by nationals of the transit State.\textsuperscript{77} Another provision reminiscent of the 1965 Convention stated that, except in cases of force majeure, States of transit should avoid delays or restrictions in transit traffic; should such difficulties arise, the competent authorities of the transit and land-locked States are to cooperate toward their expeditious elimination.\textsuperscript{78}

The draft also included provisions relating to the right of access to and from the sea along rivers. It was proposed that "[a] land-locked State shall have the right of access to and from the sea through navigable rivers which pass through its territory and the territory of transit States or form a common boundary between States and the land-locked State."\textsuperscript{79} Another article granted land-locked States the right to use one or more alternate routes or means of transport for purposes of access to and from the sea.\textsuperscript{80}

Several articles related to the correlative rights of transit States. In maintaining full sovereignty over its territory, a transit State retained the right "to take all indispensable measures to ensure that the exercise of the right of free and unrestricted transit shall in no way infringe its legitimate interests."\textsuperscript{81} Once again, the right of a contracting State to deviate from its obligations under the Convention was expressly recognized, although the privilege was limited to exceptional cases where an emergency threatens the security or other vital interests of the State of transit; in no event should an interruption exceed the minimum duration of such a crisis.\textsuperscript{82} On the question of reciprocity, however, these concessions to the interests of transit States were balanced by the assertion in the draft that "since free transit of land-locked States forms

\textsuperscript{76} Id. at 3.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 4.
\textsuperscript{79} Id. at 5.
\textsuperscript{80} Id.
\textsuperscript{81} Id (emphasis added).
\textsuperscript{82} Id.
part of their right of free access to and from the sea which belongs
to them in view of their special geographical position, reciprocity
shall not be a condition of the free transit of land-locked States
required by transit States but may be agreed between the parties
concerned."^{83}

At the Caracas session of the Conference in 1974,^{84} the States
which had submitted the above proposal also issued an explanatory
statement.^{85} This document emphasized that adequate legal
guarantees of a right of access to the sea are essential to the equal
participation to which the land-locked States are entitled in the
resources and uses of the oceans. Previous conventions were cited
for their contributions to the struggle for recognition and develop-
ment of a right of access, yet the view was expressed that, as to
many of the issues involved, their promise was only partially
fulfilled.

At its spring session in 1975, the Conference adopted a proposal
that the chairmen of the three main committees prepare an infor-
mal single negotiating text (SNT) on the issues which had been
entrusted to their negotiation. In this text, designed to take ac-
tount of all discussions and proposals, both formal and informal,
undertaken by each committee, articles 108 through 116 were
devoted to land-locked States, their right of access to the sea, and
terms of transit.^{86}

Article 108 defined various terms. Definitions for "traffic in tran-
sit" and "means of transport" were taken directly from the draft
proposal. Land-locked status was recognized for all states having
no seacoast; a transit State was defined as one "with or without
a seacoast, situated between a land-locked State and the sea through
whose territory 'traffic in transit' passes."^{87} By these definitions
a land-locked State is also a transit State if goods of another land-
locked State pass through it to and from the sea.^{88}

Article 109 accorded to land-locked States:

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^{83} Id.
^{85} Explanatory paper on the draft articles relating to land-locked States, supra note 63,
at 168.
^{86} Informal Single Negotiating Text, 4 THIRD UNITED NATIONS CONFERENCE ON THE LAW
^{87} Id.
^{88} Uganda, for example, though land-locked itself, is also a transit State for land-locked
Rwanda; similarly, Rwanda and Uganda are both States of transit for land-locked Burundi;
neighboring Kenya, a coastal State, is a State of transit for all three.
the right of access to and from the sea for the purpose of exercising the rights provided for in the present Convention including those relating to the freedom of the high seas and the principle of the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territories of transit States by all means of transport.

... terms and conditions for exercising the freedom of transit shall be agreed between the land-locked States and the transit States concerned through bilateral, sub-regional or regional agreements, in accordance with the provisions of the present Convention.99

The sovereignty of transit States over their land territories was then recognized as "the right to take all measures to ensure that the rights provided for in this part for land-locked States shall in no way infringe their legitimate interests."90

Article 110 excluded application of the most-favored-nation clause to provisions of the Convention, or to any special agreements regulating exercise of the right of access, or to those establishing rights and facilities based on the particular position of land-locked States.91 Under article 111, customs duties, taxes or other charges unrelated to specific services rendered in connection with transit traffic were prohibited. The means of transport employed by a land-locked State were also immunized from taxes, tariffs or charges higher than those levied on facilities used by nationals of the transit State.92 Article 112 provided for free zones and other customs facilities at ports of entry and exit in the transit State through agreement between it and the land-locked State.93 To facilitate development of transit trade, article 113 called for the cooperation of land-locked States with States of transit in construction and improvement of means of transport, including port installations and equipment.94 Article 114 stipulated that, except in cases of force majeure, transit States were obliged to take all measures necessary to avoid delays or restrictions on traffic in transit. Should delays or other difficulties arise, the competent authorities of the transit and land-locked States were bound to cooperate in their expeditious elimination.95 Finally, article 115 guaranteed treatment.

99 Supra note 86.
90 Id. note 86.
91 Id.
92 Id.
93 Id.
94 Id.
95 Id.
equal to that accorded other foreign ships for vessels of land-locked States,96 and article 116 allowed land-locked States a role in the exploitation of resources in the exclusive economic zone of adjoining coastal States.97

In revising the SNT to reflect comments which had been made by the Conference, no major changes were made in its provisions relating to freedom of transit for land-locked States. However, former article 110 was removed from this section, and a new article 117 relating to the grant of greater transit facilities was introduced.98 It stated that:

[t]he present Convention does not entail in any way the withdrawal of transit facilities which are greater than those provided for in the present Convention and which are agreed between States Parties to the present Convention or granted by a State Party. The present Convention also does not preclude such grant of greater facilities in the future.99

When the informal composite negotiating text (ICNT) was released in 1977, these issues were addressed in Part X, articles 124 through 132.100 Discussion of the ICNT focussed largely on objections of the land-locked States directed at several of its provisions taken from the SNT. For example, in its definition of "means of transport," article 124(d) was criticized for failing to enumerate civil aircraft. Some delegates believed that it was absurd to include pack animals and porters as means of transport in modern times, while refusing to recognize civil aircraft for the same purpose. On the other hand, transit States argued that it was inappropriate to include such aircraft because the right of overflight was already regulated by other conventions. Land-locked States also objected to treating pipelines differently from other means of transport; by its requirement that land-locked and transit States agree to include this as a covered means of transport, the ICNT allegedly prejudiced the former's rights to such transit.

In article 125 of the ICNT, land-locked States maintained that the word "free" should be inserted to clarify the nature of the right granted, that is, access free from all impositions outside those

96 Id.
97 Id.
99 Id.
levied for specific services rendered by the transit State. It was also held that “freedom of transit” in the following sentence would be more aptly described as “free and unimpeded transit.” The requirement that terms and modalities for the exercise of this right be agreed upon between land-locked and transit States also was criticized as placing the former at a disadvantage. It was suggested that the words “terms” be deleted altogether, on grounds that a failure to agree on the modalities of transit should not operate to bar exercise of the right. Where article 125 empowered the transit State to take “all necessary measures” in protection of its sovereign interests, land-locked States argued that substitution of “indispensable measures” would introduce more objective considerations, rather than allowing the transit State unlimited license in a subjective determination of “necessity.” However, none of these suggestions were reflected in subsequent revisions of the ICNT, nor were they incorporated in the original draft Convention, nor do they appear in the present draft Convention.

Summary

In summary, articles 124 through 132 of the present draft Convention now address the rights of access and free transit of land-locked States. Article 124 defines relevant terms, and article 125 establishes the general principles of access and free transit. The

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101 Article 125(1) would then have read as follows:

... Land-locked States shall have the right of free access to and from the sea for the purpose of exercising the rights provided for in the present Convention, including those relating to the freedom of the high seas and the principle of the common heritage of mankind. To this end, land-locked States shall have free and unimpeded transit through the territories of transit States by all means of transport. (emphasis added)

See Report of the Drafting Committee of the Special Group of 77 on Transit and Resources, Document (3) 76-202009 (circulated at 1976 summer session in New York).

102 The amended second paragraph would have read:

Modalities for exercising the free and unimpeded transit shall be agreed between the land-locked States and the transit States concerned through bilateral, subregional or regional agreements, in accordance with provisions of the present Convention.

However, absence of such agreement may not be invoked by a transit State to deny a land-locked State the free and unimpeded transit through the territories of the transit States.

Id.


right is accorded for the express purpose of exercising other rights provided in the Convention, "including those relating to the freedom of the high seas and the common heritage of mankind." 

Transit States are authorized to take "all measures necessary"\(^\text{107}\) in protection of their legitimate sovereign interests.

Article 126 excludes application of the most-favored-nation clause to privileges accorded under the Convention, and also immunizes all agreements granting special rights of access or facilities based on the geographic position of land-locked States. Article 127 exempts traffic in transit from customs duties, taxes or other charges, with the exception of fees levied for specific services provided. In addition, the means of transit and facilities provided for land-locked States are not subject to taxes or other charges higher than those levied on transport of the transit State.

Article 128 allows the provision of free zones or other customs facilities at ports of entry and exit in the transit State when agreed upon by the States concerned. Article 129 importunes transit States to cooperate with their land-locked neighbors in construction or improvement of means of transport in the transit State.

Article 130 obligates transit States to take "all appropriate measures to avoid delays or other difficulties of a technical nature in traffic in transit"\(^\text{108}\) if delays or difficulties should occur, the competent authorities of both States are required to cooperate in their expeditious elimination. Article 131 states that ships flying the flag of land-locked States are to enjoy treatment equal with that accorded other foreign ships in maritime ports. Finally, article 132 provides for continued operation of existing facilities greater than those mandated by the Convention, if the parties so desire, and grants of greater facilities in the future also are not precluded.

**Conclusions**

It is apparent from this review that there exists a general consensus on certain fundamental principles. First, as a matter of economic necessity, and to enable their participation in the common heritage of mankind, a *right* of access to the sea must be recognized for land-locked States. Second, implicit to meaningful recognition is the proposition that general principles governing

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\(^{107}\) *Id.*

\(^{108}\) *Id.* at 48.
exercise of this right must be provided in a single internationally binding legal instrument.

The present draft Convention on the Law of the Sea is a positive step toward these goals. To realize this promise, it is widely believed that the Convention must be adopted as a package, and critical that States party be restrained from placing reservations to its central provisions. In particular, ratifying transit States would be bound to recognize and respect the rights of access and freedom of transit guaranteed land-locked States.

It is obvious that the success of any eventual Convention will be measured in large part by the number of participants it attracts, and this is particularly true when evaluating the potential effectiveness of provisions for freedom of transit. Without the support of a significant majority of transit States, the right of access recognized in the current draft Convention will prove an empty and cynical gesture for many land-locked States. However, even with universal acceptance of an international rule, details for the day-to-day administration of transit trade necessarily must be agreed upon between the individual land-locked and transit States concerned. The scope of such bilateral agreements nonetheless should be limited to an accommodation of local circumstances and facilitation of trade to implement the broader purposes of the Convention. Absence of agreement on these terms may not legally justify the suspension or abrogation of an otherwise valid right of access.

Pursuant to provisions of the draft Convention allowing establishment of greater transit facilities than mandated, land-locked countries could seek agreement with transit States for the grant of international servitudes. An international servitude is "a real right, whereby the territory of one State is made liable to permanent use by another State, for some specified purpose." Such servitudes might include the actual grant of a corridor linking the territory

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109 This reality has never been denied by supporters of an international rule, nor does it necessarily contradict their position. As observed by the Economic Commission of Africa, the functions of a globally recognized right of access and bilateral or regional implementing agreements are complementary:

The principles of freedom of transit, established on an international basis, do not and cannot be expected to provide all the details for day-by-day traffic. This is best achieved by bilateral agreements between interested countries, especially if such agreements take into consideration the principles established by international law.


110 Reid, supra note 11, at 25.
of the land-locked country with the sea, or a right to use existing rail, road or river systems on a permanent basis. These arrangements would further protect a land-locked country from suspension or abrogation of its right of access to the sea because, once granted, a servitude attains in international law "an existence independent of the agreement which created it, so that [it] is not abolished with the cancelling of the agreement." Several arrangements of this nature have already been implemented.

Finally, it must be remembered that assured access to the oceans for land-locked States is but one focal point in a broad spectrum of legal and economic issues facing the international order today. Expanding use of the sea, and a concomitant heavier reliance on its resources, is inevitable in the coming years. The needs of developing countries, particularly those with no natural access to the sea, demand legal recognition if a new international economic order is to be realized. Implementation of the widest possible right of access is essential if these States are to attain their goals of economic development and enhanced quality of life for their people.

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111 Id. at 20 (quoting Clauss, Die Lehre von den Staatsdienstoarbeiten, 118 and 146). Pounds has noted the additional, practical advantages of such an arrangement:

It is inevitable that a state would prefer to control a corridor rather than to have transit rights or the freedom to use a river. While theoretically all should be equally protected in international law, in fact, any attempt to close a corridor would be a violation of national sovereignty, while interference with right of passage might be more easily condoned or excused.

Pounds, supra note 3, at 258.

112 See generally Reid, supra note 11.