

From Barcelona to Montego Bay and Thereafter: A Search for Landlocked States' Rights to Trade through Access to the Sea – A Retrospective Review

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I. INTRODUCTION

Thirty-seven states in the world are landlocked states (LLS), without access to and from the sea.¹ Because they do not possess a coastline, their international trade is non-competitive. For them, this non-competitiveness of trade is directly linked with the issue of free access to the sea along with the question of transit. Goods originating in LLS directed toward the coasts, or those entering LLS from the sea, must traverse the territories of bordering countries. The access of these states to the principal maritime ways is always indirect since they are obliged to rely on transit through the territories of other states.

Modern economic development requires rapid, reliable and cost-effective international trade. The freedom of transit is thus vital for LLS that are engaged in economic development. The indirect link to the sea and the resultant high cost of transportation are obstacles to foreign trade for most such countries.² In addition, since the

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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 South America; Austria, Hungary, Liechtenstein, Luxembourg, San Marino, Switzerland and the Vatican in Europe. In the nineties, after the dismemberment of the former USSR, as well as political changes in the surrounding regions, other LLS have come into existence. These 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 which was itself landlocked), Republic of Macedonia (created after the political changes in Yugoslavia), and Ethiopia, which became landlocked after the secession of Eritrea. For details, see World Bank Atlas (1999) and generally, Martin Ira Glassner, *Access to the Sea for the Developing Landlocked States* (1970).

2 R. Makil, "Transit Right of Landlocked Countries: An Appraisal of International Conventions" (1970) 4J. World Trade L. 35.

import/export trade of LLS must traverse foreign territories, it implies legal, administrative and political hurdles,³ thus entailing a series of economic and political problems. Doubly-landlocked countries (i.e. those surrounded by other landlocked countries) are in a worse situation, because their international relations are further complicated by having to deal with several transit countries at one time.⁴ In general, the trade exchange between LLS and their transit neighbors are not significant because their economies do not complement each other. Rather, they enter into competition with each other in the international market.⁵ Here the handicap of being without access hinders the trade of LLS. In addition, LLS must face increased costs resulting from the necessity of warehousing stocks, delays in the ports, and often payment of a portion of their transport costs in convertible currencies.⁶ The dependence of LLS trade on transit through a third country is thus critical and, as a result, the LLS depend heavily on the transport policies of transit states.⁷ In addition to the lack of access, the majority of these states suffer from all the major obstacles encountered by the least developed countries.⁸ 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, generally entailing a balance of payments deficit.⁹ These characteristics determine the posture LLS take in the international arena and explain why, for decades, several LLS have formed a distinct bloc of nations within the international system.

3 *Id.*

4 The two doubly-landlocked countries are Uzbekistan (surrounded by the landlocked Kazakhstan, Kyrgyzstan, Tajikistan, Afghanistan and Turkmenistan) and Liechtenstein (surrounded by the landlocked Switzerland and Austria).

5 Such is not, however, the case of Bhutan and Nepal, which are both heavily dependent on India, or of Lesotho which is dependent on South Africa. Also, some LLS like Zambia, Swaziland or Uganda, which possess raw materials that have a high demand in the international market, are exceptions. See Economic Commission on Africa (ECA), *Transit Problems of African Landlocked States*, U.N. Doc. E/CN.14/TRANS/29 (24 Aug. 1966).

6 See generally UNCTAD, *Transport Strategy for Landlocked Developing States*, U.N. TDBOR, at 6, U.N. Doc. TD/B/453/Add.1, Rev.1 (20 July 1973) (hereinafter UNCTAD Transport Strategy).

7 The heavy dependence on transit countries and the negative impact thereof have also been emphasized by Professor Jeffrey Sachs for whom; "a landlocked country is in the distant, distant periphery [of economic development]. Being landlocked is a major barrier to international trade because the costs are simply much higher." Professor Sachs further notes: "[G]enerally, coastal countries don't like to help their landlocked neighbors. The weaker the better is often the reasoning, from a military point of view. So they don't build the roads, they don't give access to the ports", See *Jeffrey Sachs, Making Globalization Work*, Jama Lecture, The Elliott School of International Affairs, George Washington University (25 Feb. 2000).

8 UNCTAD Transport Strategy, at 6.

9 See generally *id.*

II. THE EVOLUTION OF INTERNATIONAL LAW

Traditionally, the efforts of LLS have been towards obtaining the right of free access to the sea in order to participate in international trade. This focus on transit and access to the sea for trade is much broader than the classical focus on the right of navigation only.¹⁰ For classical jurists, the oceans constituted the essential support for *jus communicationis*.¹¹ But the rapid technological development actually provoked a diversification of maritime uses. Seas constitute now a means of communication, a source of food and ample treasure of unexploited resources.¹² As the utility of the sea has broadened, its role also has evolved: from the sea as a medium for communications to the sea as a reservoir of wealth.¹³ A new relationship with the sea and its valuable resources has developed.¹⁴ For many years, free access to the sea, based on the freedom of sea passage, constituted the principal claim of LLS. But today, in addition to the question of transit, another problem confronts LLS: that of their access to the resources of the sea on the same terms and conditions as coastal states. Indeed, public international law is an evolving body of norms and is constantly undergoing change. The growing participation of developing countries in international fora reinforces further its dynamic nature. As soon as a solution to a particular problem is proposed, new questions, along with economic, political and sociological data arise to complicate the discussions and keep the questions unsettled by positive law.¹⁵

The most important question for LLS has been the freedom of access to the sea, for which reason, they have demanded recognition by the international community of a fundamental right of access and vouched for a universal treaty on this matter.¹⁶ As a result, throughout

10 See R.J. Dupuy, "Les contradictions du droit de la mer", *Revue Française de l'Énergie* (Feb. 1973), at 187; see also Bernard H. Oxman, "Transit of Straits and Archipelagic Waters by Military Aircraft", (2000) 4 *Sing. JICL* 377.

11 R.J. Dupuy and A. Piquemal, "Les appropriations nationales des espaces maritimes", *Colloquium Mont Pellier* (May 1972), at 113.

12 See generally Juraj Andrassy, *International Law and the Resources of the Sea*, (Columbia University Press: 1970), at 15–31. For a detailed account of the evolutionary feature of international law in the area, see generally Kishor Uprety, "Landlocked States and Access to the Sea: An Evolutionary Study of a Contested Right" (1994) *Dick. J. Int'l L.*, at 401–496.

13 Dupuy and Piquemal, *supra* note 11, at 13; see also Rene-Jean Dupuy, *The Law of the Sea: Current Problems* (1974), at 24–45.

14 See M. L. Sarin, "The Asian-African States and the Development of International Law", in *The Future of International Law in a Multicultural World* (1989), at 130.

15 The term positive law is used in a narrow sense meaning a norm, which has formal source and derives existence from an act of creation. Indeed, thus, it is opposed to natural law. For a detailed discussion on the different views and evolution of legal positivism, see Roberto Ago, "Positivism", in 3 *Encyclopaedia of Public International Law* (North Holland: 1997) at 1072–1080.

16 See N.Q. Dinh, et al., *Droit International Public*, 4th ed. (1992), at 1031.

the decades, several international instruments have been prepared: treaties with general coverage which referred to the status and rights of LLS by implication, those that dealt with the rights of LLS from different technical perspectives, and those that attempted to deal exclusively with the problems of LLS within a specific mandate.

A. *Freedom of Transit for Trade: The Barcelona Statute & the GATT*

The Covenant of the League of Nations, which required member states to make necessary provisions securing and maintaining freedom of communication and transit,¹⁷ established a technical organ—the Organization of Communication and Transit (OCT)—, and charged with proposing appropriate measures to ensure the freedom of communication and transit. As a result of the OCT's work, the First General Conference on Communication and Transit adopted the texts of a series of conventions, one of which was the Barcelona Statute relating to the freedom of transit.¹⁸ The Barcelona Statute primarily aimed at altering the economic consequences of the principle of nationalities, which had been adopted as *strictum jus*, in the Versailles Treaty. It had become necessary to prepare an international regime of transit in order to guarantee the communication amongst the European LLS that had emerged after the dismemberment of the Austro-Hungarian Empire.

The Barcelona Statute provides a framework for agreements dealing with transit. It requires that all contracting states facilitate the freedom of transit by rail or internal navigable waterways. This requirement includes routes in use across territories under their jurisdiction that are convenient for international transit.¹⁹ The contracting states are permitted to apply reasonable tariffs on the traffic in transit, regardless of the point of departure or destination of the traffic. But these tariffs must be fixed so as to facilitate international traffic. Moreover, the taxes, facilities, or restrictions may not depend directly or indirectly upon the nationality or ownership of vessels, or means of transport utilized for a journey.²⁰ Clearly, the regime established by the Barcelona Statute confirms the intention of states to recognize, for LLS, a right of transit in the bordering territories.

Although the freedom of transit must be observed, parties to it can depart from that principle. In the case of serious events affecting the

17 See League of Nations Covenant, art. 23(e).

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

19 *Id.*, art. 2.

20 *Id.*, art. 4.

security or vital interests of the transit country, for instance, a state may disregard the provisions of the Statute for a limited time. A state may also refuse the transit of goods or passengers for public health or public security reasons, and may refuse transit under the authority of general international conventions or pursuant to decisions of the League of Nations.

It should be noted that the Barcelona Statute concerns only water and rail transport; it is not applicable to non-rail overland or air transport. Moreover, it does not deal with the “right” of free access. It only deals with the “freedom” of access. It appears that the Statute tried, within the framework of a treaty, to establish equilibrium between the principle of freedom and the principle of sovereignty of states. Commenting on this, one scholar noted that this equilibrium illustrated the contradictions of a fragile legal regime built in a protectionist context, where the transit is presented as a privilege rather than as a real right.²¹ Despite its deficiencies, the Barcelona Statute can be considered as an important step toward the formation of a set of “minimum standards” in favour of LLS.²²

Unlike the Covenant of the League of Nations, the U.N. Charter did not include any specific provision governing communication and transit, as at the time of its drafting, it was not possible to draw any common line of conduct in this institution.²³ The U.N. Economic and Social Council (ECOSOC) which is charged with coordinating the activities of member states in the field of economic and social cooperation, held, in 1946, an international conference in London to examine a project for creating an international trade organization. The London conference prepared a draft proposal to establish the United Nations International Trade Organization, which was submitted in August 1947 to another conference held in Geneva.²⁴ A follow-up conference held in Havana, from 21 November 1947 to 24 March 1948 developed a definitive text known as the Havana Charter.²⁵ Twenty-seven instruments of ratification were needed for it to come into force,

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

22 Also, the Statute on the Free Navigation of International Waterways adopted by the Barcelona Convention, on 20 April 1921, and the Convention on the International Regime of Maritime Ports and on the International Regime of Rail, adopted by the Geneva Convention on 9 December 1923, recognized that LLS had rights equal to those of coastal states for the access to maritime ports.

23 Marion, *supra* note 21, at 382; see also *The History of UNCTAD 1964–1984* (New York: United Nations, 1985) at 53–56.

24 D. Carreau et al., *Droit International Economique* (1990), at 95.

25 See *Charter of the International Trade Organization*, U.N. Conference on Trade and Employment, U.N. Doc. E/Conf.2/78 (1948).

but only two states ratified it. The International Trade Organization, as foreseen in the 1947 draft, therefore, never came into force.²⁶

On the other hand, the General Agreement on Tariffs and Trade (GATT), which did not require ratification, entered into force in 1948.²⁷ Article 5 of the GATT deals with “freedom of transit”. In so doing, although not specifically dealing with LLS, it reaffirms the principles laid down by the Barcelona Statute.²⁸ In comparing GATT with the Barcelona Statute, one important difference can be noted: “the word *sovereignty* does not appear in the seven paragraphs of the GATT Article, while at each moment, the Barcelona Statute refers to the sovereign right of states.”²⁹

Also, under the Barcelona Statute, freedom of transit was limited to the utilization of railways and waterways, but the GATT also covered overland transport, and thus provided contracting states greater facilities than those provided by the Barcelona Statute. However, compared with the Barcelona Statute, the GATT, in connection with the transit of persons, remained incomplete, as it did not include the circulation of persons. This exclusion is justifiable due to the limited objectives of GATT, as well as its priority, which was trade in general.³⁰

B. *Reciprocity to Right of Access: The Convention on the High Seas*

During its eleventh session, the United Nations General Assembly recommended that a study be conducted on the problem of free access to the sea of LLS.³¹ The Geneva Conference of 1958³² established a committee, for that purpose (the Fifth Committee). The Fifth Committee was asked to examine the regime of free access to the sea, and to prepare a draft-convention with a view to including it in the general codification of rules relating to the regime of the sea.³³ This Committee had two documents at its disposal to base its work. The first was

26 See Carreau et al., *supra* note 24, at 95–96.

27 See for detail, Gunther Jaenicke, “General Agreement on Tariff and Trade (1947)”, in *Encyclopaedia of Public International Law* Vol. 3 (North-Holland, 1997), at 502–503.

28 See GATT, art. 5.

29 Marion, *supra* note 21, at 387.

30 The U.N. Secretariat had summarized, in its study on “Question of free access to the sea of LLS”, the principal provisions of Article 5 of the GATT as related to LLS. See, for detail, *Memorandum Concerning the Question of Free Access to the Sea of Landlocked Countries*, U.N. Doc. A/Conf.13/29 and Add. 1 (1958) (hereinafter *Memorandum Concerning the Question of Free Access*).

31 See Glassner, *supra* note 1, at 29.

32 The U.N. Conference on the Law of the Sea, held at Geneva from 24 February to 27 April 1958. It resulted in the *Geneva Convention on the High Seas*, done at Geneva, 29 Apr. 1958, 450 U.N.T.S. 82 (hereinafter *Convention on the High Seas*).

33 See *Memorandum Concerning the Question of Free Access*, *supra* note 30.

a memorandum prepared by the U.N. Secretariat,³⁴ which included the deliberations of the U.N. on the questions of free access to the sea of LLS and the different theories about the right of access to the sea,³⁵ and listed the several bilateral and multilateral treaties dealing with solutions to problems of access to the sea faced by states deprived of a coastline.³⁶ The second document was an excerpt of the Final Act of the Economic Conference of the Organization of American States, held in Buenos Aires in 1957, which described the position of American states on the question of access to the sea.³⁷

The discussions of the Fifth Committee centered on two draft texts. The first of these texts, proposed by nineteen states (among which eleven were LLS), reconsidered the seven principles dealt with by the preliminary conference.³⁸ The LLS asserted that these principles had to be part of the future convention. Whilst most of the principles were admitted by transit states without protest to be positive law, some pertaining to the full recognition of right of access were not. Coastal states were not prepared to recognize a real right of access for LLS.

The second text proposed by three coastal states, Italy, the Netherlands, and the United Kingdom,³⁹ which displayed the reluctance of coastal states to recognize a real right of access, included two suggestions. The first suggestion consisted of extending the applicability of the Convention to both coastal and non-coastal states, thereby treating each and every state (even coastal states) as being without access. The second suggestion consisted of recommending the adoption of a non-binding “resolution” on the free access to the sea of LLS, rather than a “convention” with binding effect.

Soon the Fifth Committee arrived at an impasse and after an effort to integrate a single text on the basis of the two available texts, decided to consider a draft compromise presented by Switzerland. This Swiss text became Article 3 of the Convention on the High Seas.⁴⁰ It must

34 G.A. Res. 1105(XI), UN GAOR, 11th Sess. Supp. No. 17, at 54 (1957).

35 See *Memorandum Concerning the Question of Free Access*, *supra* note 30.

36 *Acts of the U.N. Conference on the Law of the Sea* (Preparatory Document, 1958), Vol. 1 (hereinafter *Acts of the Conference*), at 308.

37 See generally Economic Conference of the Organization of American States, *Transportation and Economic Growth: The Plata River System*. Doc. 11 (Buenos Aires, 1957).

38 See for the principles, *Acts of the Conference*, *supra* note 36, at 84–85.

39 *Id.*

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

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

b) To ships flying the flag of that state treatment equal to that accorded to their

be noted with regard to Article 3 that the Fifth Committee did not adhere to the thesis of LLS (the *right* of free access), but rather that of coastal states (the *possibility* of access). In other words, the 1958 General Conference on the Law of the Sea failed to satisfy the demand of LLS for a “general law for free access”.

C. *Free Access versus Territorial Sovereignty & the New York Convention*

The origin of the New York Convention,⁴¹ the only multilateral treaty attempting to prescribe solutions to the specific problems of LLS, lies in an initiative sponsored by four Asian LLS (Afghanistan, Laos, Mongolia, and Nepal) during the ECAFE Ministerial Conference on Economic Cooperation in Asia held in Manila in December of 1963.⁴² The Conference adopted a resolution supporting the need for recognizing the right of free transit to the sea for LLS.⁴³ This was quite an achievement since it was the first time that the word “right” of free transit was inserted in an international resolution concerning LLS. The earlier resolutions only referred to the “needs” of such states.⁴⁴ ECAFE adopted another resolution during its 1964 meeting in Tehran recommending that the problem of free access be favorably considered during subsequent meetings of UNCTAD.⁴⁵ In the following meeting, a draft of the Convention Relating to the Transit Trade of Landlocked Countries was presented by Afghanistan, Laos, and Nepal, which was seconded by eight African states. This draft constituted the basis of an effort to obtain guarantees from UNCTAD for freedom of access to the sea. Although the question was not completely apposite to UNCTAD’s

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.”

See Art. 3, *Convention on the High Seas*.

41 *Convention on Transit Trade of Landlocked States*, done at New York, 8 July 1965, 597 U.N.T.S. 42-58 [hereinafter *New York Convention*].

42 See T.M. Franck, M.E. Beradei & G. Aron, “The New Poor: Landlocked, Shelflocked and Other Geographically Disadvantaged States” (1974) 7 N.Y.U. J. Int’l L. & Pol. 53.

43 See the Resolution on Asian Economic Cooperation adopted by the Ministerial Conference (3–6 December, Manila) in *U.N. ECAFE Regional Economic Cooperation in Asia and the Far East, Report of the Ministerial Conference on Asian Economic Cooperation*, E/CN.11/641 U.N. 1964, at 2. The Conference also decided unanimously to request ECAFE Secretariat to 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 referred to as the *Afro-Asian Draft*).

44 See, for instance, ECOSOC Off. Doc., 22nd Sess. Supp. No. 2 E/2821, para. 270.

45 See generally, U.N. ECAFE 20th Session (2–17 March 1964), Tehran (E/CN.11/657), at 2.

primary purpose, a sub-committee constituted within the framework of the Fifth Committee was entrusted its study. The sub-committee was asked to consider a number of other drafts originating from different countries. The LLS were pressing for a convention specifically dealing with their problem, while the transit states were attempting to deviate by stating that UNCTAD lacked legal expertise and information to conclude such a convention. As a compromise the sub-committee adopted eight principles that were subsequently adopted by UNCTAD in its plenary session.⁴⁶ The principles adopted by the 1964 UNCTAD were inspired by the principles established by the preliminary conference of LLS in Geneva in 1958.

1. *The 1964 Principles and Continued Debate*

In 1964, an UNCTAD recommendation asked the U.N. Secretary General to constitute a Committee of Twenty-Four members, chosen on the basis of equitable geographical distribution that would prepare a new draft convention on transit trade of LLS.⁴⁷ The Committee of Twenty-Four was asked to refer to the propositions presented to the 1964 UNCTAD Conference by the African and Asian LLS, to the principles of international law, conventions and existing agreements in force, as well as to the solutions proposed by individual governments. Finally, it invited the U. N. to organize a conference in 1965 to examine the draft prepared by the Committee of Twenty-Four and to adopt a convention on transit trade of landlocked countries. This Committee, which met in October and November of 1964 in New York, essentially based its work on the draft prepared by Afghanistan, Laos, and Nepal on behalf of the African and Asian LLS (the Afro-Asian Draft), which was transformed into a draft Convention on the transit trade of landlocked countries, to be discussed by the Conference of Plenipotentiaries, the next summer.

The Conference of Plenipotentiaries met on 7 June 1965 and completed its work one-month later. During the conference, delegates discussed whether free access to the sea was a natural right of LLS and thus was to be reaffirmed by the Transit Trade Conference; or whether

46 For the Principles Relating to Transit Trade of Landlocked Countries, see 2 *International Law of Development: Basic Documents*, A.P. Mutharika, ed. (1978), at 801–802.

47 This Committee, appointed by the U.N. Secretary General, following a request from the 1964 UNCTAD Conference, comprised of 24 members representing landlocked, transit and other interested states, and was mandated to prepare a new draft convention dealing with the transit trade of LLS. See *Proceedings of the UNCTAD*, Geneva, 23 March–16 June 1964, Vol. I Final Act and Report, U.N. Doc. E/Conf 46/39, E/Conf 46/141 Vol. I. See also, Annex A VI. 1 on Preparation of a Convention Relating to the Transit Trade of Landlocked Countries, *id.*

its duty was merely to solve the technical problems of transit transport of these states. During the examination of the Afro-Asian draft in the Committee of Twenty-Four, the representatives of Bolivia and Paraguay proposed the insertion of a new article in the New York Convention.⁴⁸ The proposed insertion aimed at reaffirming the right of all LLS to free access and free and restrictionless transit throughout the territory of states situated between the LLS and maritime coasts. In demanding the inclusion of these principles either in the preamble or in the main body of the New York Convention, the Bolivian delegate declared that the importance of these principles had been clearly recognized by UNCTAD.⁴⁹ The delegate maintained that LLS expected these principles to be incorporated into an international convention that would establish them as elements of positive law.⁵⁰

In support, certain members of the Committee of Twenty-Four indicated that these principles were already recognized by international law and had been codified in general international conventions, namely in the Convention on the High Seas.⁵¹ Other delegates, mostly from transit states, opposed the inclusion of the phrase "as recognized principles of international law." According to them, these principles were only economic principles and not principles of international law. Moreover, for them, mere repetition of a clause in different treaties did not mean that it became a general rule of international law.⁵² The opposition of transit states was relatively strong during both the 1958 and 1965 conferences. The Pakistani delegate went so far as to declare, in the Committee of Twenty-Four, that the draft presented by the two Latin American LLS was based on a fallacious hypothesis: "It invokes the principles of international law which do not exist, and confuses the principles of economic cooperation with legal principles."⁵³ In the end, upon pressure of the transit states, the LLS had to withdraw their demand claiming the right of free access as a recognized principle of international law.

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

49 *Id.*

50 *Id.*, at 19.

51 *Id.*, at 20.

52 See generally *Proceedings of the Meetings of the Committee of Twenty-Four in UNCLOS: Fifth Committee Report (Questions of Free Access to the Sea of Landlocked Countries)*, U.N. GAOR, Summary Records of Meetings and Annexes, Geneva, Doc. A/Conf.13/43, 24 Feb. 1958 (hereinafter *Fifth Committee Summary Records*).

53 See for detail, *Proceedings of the UNCTAD*, *supra* note 47; see also, for the attitude of some coastal states, UNCLOS I Off.Rec. (U.N. Doc. A/Conf. 13/C 5 SR 1-25, 1958), at 1-63.

2. *Analysis of the New York Convention*

The New York Convention on the Transit Trade of Landlocked States signed on 8 July 1965 entered into force on June 9, 1967. The main purpose of the New York Convention was to incorporate into treaty law the rights and obligations of landlocked states and their neighbors with regard to the movements of goods in transit, and generate universal acceptance therefor. To avoid undermining its “universality” objective, the Conference adopted the proposal of transit states to reaffirm, in the preamble, the principles adopted by the Geneva Conference of 1958. After discussions about their eventual form, particularly dominated by LLS asking for their inclusion in the main body of the Convention, which would give binding force, and the Transit states opposing the proposal, the Conference decided to insert these principles in the preamble only. The acceptance of this transitional solution by LLS was actually their second concession (the first was non-retention of the amendment presented by Bolivia and Paraguay). Certainly the incorporation of these principles in the preamble, the force of which is substantially weaker than the articles of a convention, reduced their juridical value.

In spite of substantial concessions from LLS, the New York Convention attempts to proclaim the freedom of access to the sea by reaffirming the principles of the 1964 Geneva Conference. 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.”⁵⁴ This is further enhanced in the fourth principle, which states that, in order to promote fully the economic development of land-locked countries, all states must grant to LLS access to international and regional trade in all circumstances and for every type of goods *on the basis of reciprocity, free and unrestricted transit*.⁵⁵

The proclamation of these two principles, already weak in substance, is further undermined by the inclusion of the fifth principle. This principle declares that a transit state, “while maintaining full sovereignty over its territory, shall have the right to take all indispensable measures to ensure that the exercise of the right of free and unrestricted access shall in no way infringe its legitimate interests of any kind.” It also stipulates that these principles are interdependent, and each one must be interpreted with due consideration to

⁵⁴ See Principle 1, Principles Relating to Transit Trade of Landlocked Countries.

⁵⁵ See Principle 4 [Emphasis added by author].

others.⁵⁶ As in the context of negotiations of the previous international instruments, the main obstacle in the New York Convention to the recognition of the right of access resided in the territorial sovereignty of transit states. Simply, the right of access could be granted to their neighbors only if the transit states' sovereignty was guaranteed. To some extent, this explains the contradiction between the first and fifth principles of the preamble of the New York Convention.

The New York Convention starts with a relatively long preamble that reproduces the excerpts of the resolution of the 11th U.N. General Assembly,⁵⁷ the eight principles of the 1964 UNCTAD, and Article 3 of the 1958 Convention on the High Seas. Most of the clauses originate from the Barcelona Statute, and in some cases they are identical. What distinguishes it from the Barcelona Statute is that its scope of application is more specific than that of the Barcelona Statute. The Barcelona Statute deals with transit in general, without specifically referring to LLS, whereas the New York Convention exclusively deals with the access to and from the sea of LLS.

The New York Convention is applicable only between LLS and maritime ports.⁵⁸ The traffic in transit is further defined as the passage of goods "throughout the territory of contracting states, between a LLS and the sea, when this passage is a portion of a complete journey comprising a sea transport which precedes or follows directly the passage."⁵⁹ The most significant provision is in the first sentence of Article 2. It states that the freedom of transit shall be granted in conformity with the provisions of the present convention for traffic in transit and the means of transports. Such traffic must be admitted by mutually acceptable means, and must not be discriminatory.⁶⁰ However, it also mentions that the rules governing the use of means of transport shall be established by common accord between concerned states, without ignoring the international treaties to which the states are party.

Paragraph 3 of Article 2 deals with the passage of persons whose movement is essential for transport in transit. This passage accords respect to the laws of concerned contracting states. The traffic in transit throughout the territorial water of the Transit State is authorized in conformity with the principles of customary international law, provisions of applicable international conventions, and internal

56 See generally the Interpretative Note of the Principles Relating to Transit Trade of Landlocked Countries.

57 UNGA. Resolution 1028 on the landlocked countries and the expansion of international trade.

58 See art. 1 of the Convention.

59 *Id.*

60 See art. 2 (1) of the Convention.

regulations. According to Article 3 of the New York Convention, the Transit State must not levy any customs duties or other taxes on transit traffic except the dues corresponding to the expenses for supervision and administration necessitated by the traffic in transit.⁶¹ As a means of protecting LLS, Article 4 obligates transit states to provide the means of transport so that the traffic in transit may be effectuated without unjustified delays, and requires that the tariff for such facilities be equitable.

The New York Convention also contains several technical details. For instance, the transit states must use simplified documentation and special procedures with regard to traffic in transit.⁶² They must provide warehousing facilities,⁶³ and by mutual agreement with LLS, they may grant free zones or similar facilities.⁶⁴ The New York Convention also includes situations allowing the prohibitions on access for LLS. Such prohibitions may be imposed by transit states for reasons related to public order, for the protection of their essential security interests,⁶⁵ in the occurrence of some serious events (this being defined as a situation endangering the political existence and the safety of contracting state),⁶⁶ in case of war, or due to obligations deriving from international or regional treaties to which the contracting transit state is a party.⁶⁷

No doubt, the New York Convention has the merit of being the first multilateral agreement that deals exclusively (through a single instrument) with the specific problems of transit trade.⁶⁸ It does not, however, contain any significant innovation, and the influence of former international conventions is clear and evident. Hakim Tabibi, a contributor to the elaboration of the New York Convention, wrote, "in view of LLS, the legal recognition of their rights on a universal level presents a victory they searched for during forty years." Tabibi added that the New York Convention created not only an atmosphere of cooperation between LLS and their transit neighbours, but also stimulated the foreign trade of LLS, the majority of which are situated in Africa and Asia.⁶⁹ R. Makil noted that the New York Convention was the first international agreement to recognize the special position of LLS. In his words, "the recognition of a special status for LLS derives

61 Art. 3.

62 Art. 5.

63 Art. 6.

64 Art. 8.

65 Art. 11.

66 Art. 12.

67 Art. 13.

68 See generally Franck, Baradei & Aron, *supra* note 42, at 55.

69 A.H. Tabibi, *The Right of Free Access to the Sea* (Kabul, 1966), at 19.

from Article 10 of the New York Convention in so far as the exclusion of special rights from the scope of application of MFN clauses granted by it is concerned.” Makil added that the international regulations on the rights of LLS, dispersed in a number of bilateral and multilateral agreements, have definitively acquired legal status, and such clauses were now included in a single Convention.⁷⁰

On the other hand, C. Palazzoli’s reaction was more subdued. Based on his comparison of the New York Convention with the Barcelona Statute, he concluded that the former simultaneously represents progress, stagnation, and regression.⁷¹ Ravan Fahardi was more critical. Fahardi said the New York Convention satisfied mostly the transit states and effectively ended further debate on issues of importance to LLS. The LLS were not likely to reopen the issue either. However, the New York Convention retained its juridical importance as a legal document, even if not signed by a number of states.⁷²

To sum up, although the New York Convention contains few weak elements, which resulted from the intransigence of transit states, it does attempt to deal specifically with the transit problems of states deprived of access to and from the sea. Furthermore, although it has been criticized, the New York Convention shows that enforceable rules for transit rights of landlocked states can indeed be formulated in the framework of a multilateral convention intended to be universal in scope.⁷³

D. Right to Secure Access under UNCLOS III

Although the existence of the right of LLS to access to and from the sea had been acknowledged by a majority of states in the several earlier treaties, its internationally binding status, particularly from the aspects of practicality of enforcement, still needed improvement. The LLS therefore continued to demand a formulation that was more valid, objective, and universal. In this context, attempts towards reformation of the status of the right of access were made by the Third United Nations Convention on the Law of the Sea (UNCLOS III), signed at Montego Bay in 1982.⁷⁴

70 Makil, *supra* note 2, at 46.

71 C. Palazzoli, “De quelques developpements recents du droit des gens en matiere d’access a la mer des pays depourvus de littoral”, (1966) *Revue Generale de Droit International Public*, at 734.

72 R. Fahardi, (Interview) 5 July 1967, cited by Glassner, *supra* note 1, at 16.

73 L.C. Cafilisch, “Land-locked States and their Access to and From the Sea”, (1978) 49 *British Y.B. Int’l L.* 85.

74 The U.N. Convention on the Law of the Sea was adopted on April 30, 1982, by 130 votes against four (USA, Israel, Turkey, and Venezuela), with 17 abstentions. For

The UNCLOS III has a more general and universal orientation and regulates all parts and virtually all uses of the oceans.⁷⁵ It is a comprehensive and complex document that covers issues ranging from a state's rights over foreign ships in its territorial sea to who controls minerals at the bottom of the ocean.⁷⁶ It is not meant to be addressing the problems of LLS solely. 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."⁷⁷ Whilst the rights of access to and from the sea are outlined in detail in Part X of the Convention,⁷⁸ few other provisions, indirectly linked with the right of access, are also included in the Convention, which will be touched upon only to the extent necessary to facilitate the comparative and evolutionary aspect of this study as well as to assess the weaknesses of the Convention.

1. *Transit and Ancillary Rights*

Insofar as the transit rights are concerned, Article 125(1) of the UNCLOS III is quite clear and self-explanatory. It reads:

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

detail on the genesis, peculiarity and the organization of different sessions of the Conference, see United Nations, Law of the Sea, *Rights of Access of Land-locked States to and from the Sea and Freedom of Transit: Legislative History of Part X, Articles 124 to 132 of the United Nations Convention on the Law of the Sea* (New York, 1987) (hereinafter *U.N. Law of the Sea*). For a more general account, see B. E. Carter and P.R. Trimble, *International Law* (1991), at 925–926. See also, for details on the seventh session, B.H. Oxman, "The Third U.N. Conference on the Law of the Sea: The Seventh Session (1978)", (1979) 73 Am. J. Int'l L. and B.H. Oxman, "Summary of the Law of the Sea Convention", in *International Law: A Contemporary Perspective*, R. Falk, F. Kratochwil and S.H. Mendlovitz, eds. (1984), at 559–570. See also J.G. Starke, *Introduction to International Law* (1984), at 233–52, Center for Oceans Law & Policy, University of Virginia, *United Nations Convention on the Law of the Sea 1982*, at 206 and generally, Rene Jean Dupuy and Daniel Vignes, *A Handbook on the New Law of the Sea* (Martinus-Nijhoff, 1991).

75 Carter & Trimble, *supra* note 74, at 923. See also Rene-Jean Dupuy, "The Convention on the Law of the Sea and the New International Economic Order" in *Impact of Science on Society*, (1983) UNESCO, N03/4.

76 *Id.*

77 Art. 125, para. 1, Part X, UNCLOS III.

78 See arts. 124 to 132, Part X, UNCLOS III.

However, the force of this seemingly straightforward paragraph is substantially reduced by the provision of Article 125(2), which specifically emphasizes that the terms and modalities for exercising freedom of transit shall be agreed upon by the landlocked states and the transit states concerned through bilateral, subregional, or regional agreements.

In addition to the above curtailment of rights, the principle of state sovereignty dominates the remaining text. Article 125(3) mentions that transit states, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this part to landlocked states shall in no way infringe the legitimate interests of transit states.⁷⁹ Thus Article 125 does not grant any new rights to LLS.⁸⁰ "Transit state" is defined to signify a state, with or without a seacoast, situated between a landlocked state and the sea, through whose territory traffic in transit passes.⁸¹ Similarly, "traffic in transit" is defined as the transit of persons, baggage, goods, and means of transport across the territory of transit states, with or without transshipment, warehousing, breaking bulk, or change in the mode of transport where only a portion of a journey begins or terminates within the territory of the landlocked state.⁸² As in the past, the "means of transport" means rolling railway stock; sea, lake, and river craft; road vehicles; and, where local conditions so require, porters and pack animals.⁸³ This paragraph is relatively flexible because landlocked states and transit states may, by agreement, include as means of transport pipelines and gaslines and means of transport other than those included above. Furthermore, where there are no means of transport in transit states to give effect to the freedom of transit or where the existing means (including the port installations and equipment) are inadequate in any respect, the transit states and landlocked states concerned may cooperate in constructing or improving such means of transport.⁸⁴ As with previous conventions, the transit states are not obligated to ensure transit for LLS. Essentially a convenient transit for LLS may be refused, at any time by transit states.

79 For effectiveness of this article, see Starke, *supra* note 74, at 272–273. See also L.C. Caflisch, "Land-Locked and Geographically Disadvantaged States", in *Encyclopedia of Public International Law* (1989), at 169–74.

80 This Article constitutes, indeed, a clear recognition of the principle involved. In practice, however, the modalities called for in paragraphs (2) and (3) must involve substantial qualifications, see I. Brownlie, *Principles of Public International Law*, 4th ed. (1990). At 216.

81 See art. 124(b), UNCLOS III.

82 *Id.*, art. 124(c).

83 *Id.*, art. 124(d).

84 *Id.*, art. 129.

The landlocked states had joined forces with other geographically disadvantaged states to form a distinct negotiating group at the UNCLOS III.⁸⁵ In the past, the landlocked states were preoccupied only with the questions of access to the high seas and transit across neighboring territories, but their aims at the UNCLOS III were more far-reaching.⁸⁶ They wanted to secure for all geographically disadvantaged states preferential rights in neighboring economic zones and “equitable” treatment in the sharing of the resources of the international seabed.⁸⁷ Thus, over the course of time, not only did the number of demands grow, but the pattern of demands also changed. The LLS, having become more articulate and ambitious in their quest for transit rights by means of international law, attempted to secure a right to share in the nonliving as well as the living resources of neighboring economic zones.⁸⁸ Such a right, it might be argued, rests in part on a conception of the continental shelf as a natural extension not merely of the coastal state but of the landmass as a whole, including the countries fated by history to occupy the hinterland. Attempts to clarify this right were defeated in the UNCLOS III debates.⁸⁹ The right of landlocked states to participate, on an equitable basis, in the exploitation of the living resources of the exclusive economic zones (the EEZ) of coastal states was recognized subject to two main qualifications: (1) that the right exists only in respect of “an appropriate part of the surplus,” and (2) that the relevant economic and geographical circumstances of all states concerned must be taken into account along with the generally applicable criteria governing conservation and utilization of the living resources of the EEZ.⁹⁰

As noted above, under the UNCLOS III, the landlocked states also have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the EEZs of coastal states in the same subregion or region, taking into account the relevant economic and geographical circumstances of all the states. The terms and modalities of such participation shall be established by the states concerned through 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 is participating or is entitled to participate in

85 D.P. O’Connell, 1 *The International Law of the Sea* (1982) (reprinted 1984), at 380. See also Caflisch, *supra* note 73.

86 *Id.*

87 O’Connell, *supra* note 85, at 380.

88 *Id.*

89 *Id.*

90 *Id.* See also, for detail, D.J. Attard, *The Exclusive Economic Zone in International Law* (1987), at 192–208.

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; and (4) the nutritional needs of the population of the respective states.

Moreover, 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 shall cooperate in the establishment of equitable arrangements. Such arrangements may be made on a bilateral, subregional, or regional basis. The arrangements will 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. More importantly, such arrangements shall correspond to the appropriate circumstances and be on terms satisfactory to all parties.

UNCLOS III distinguished the industrial from developing LLS. Industrialized LLS are entitled to participate in the exploitation of living resources only in the EEZs of industrial coastal states of the same subregion or region. Such participation is limited to the extent to which the coastal state, in giving access to other states 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. The above noted "right to participate" is only for the "appropriate part of the surplus of living resources."⁹¹ 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 right at all. Moreover, this prioritization, defined in relation to an elusive "equitable basis," and in respect of a remnant of resources, the very nature of, which is dependent upon crucial decisions of the coastal state, ensures only an imperfect right.⁹²

This issue needs to be read in conjunction with another important feature of UNCLOS III, the concept of a common heritage of mankind.⁹³ This term reflects the belief that resources of certain areas beyond national 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

91 See generally, art. 69, UNCLOS III.

92 See Oppenheim, *International Law*, 9th ed., Vol. 1, Sir R. Jennings and Sir A. Watts, eds., at 799. See also I.J. Wani, "An Evaluation of the Convention on the Law of the Sea from the Perspective of the Landlocked States", (1982) 22 *Virginia J. Int'l L.* 649.

93 See art. 136, UNCLOS III.

to any particular area, and its substantive content in relation thereto, requires elaboration by individual treaties.

Article 137 stipulates that no state shall claim sovereign rights over any part of the deep ocean or its resources, nor shall any state or natural or juridical person appropriate any part thereof.⁹⁴ The content of this Article has, to a large extent, helped to assert the right of LLS to access to and from the sea. Indeed, to characterize the area of the ocean floor that lies beyond the limits of national jurisdiction, together with the resources thereof, as the common heritage of mankind and yet deny the 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 and to practice the contrary.⁹⁵ Rights offered are largely theoretical, as the majority of the landlocked states cannot effectively participate in this common heritage.

2. *Absence of Novel Right and Guarantees*

Sentiments about UNCLOS III are mixed. It has been referred to as “a triumph of the conscience of mankind in the field of international law,” and as “a historic milestone in the progressive development of international law.”⁹⁶ In the past, the rules of international law were framed and dictated by only few countries, 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, regardless of size or power, in an assembly where equality and freedom in the making of decisions prevailed as a guiding principle.

Some scholars consider UNCLOS III “not a mere codification of established principles or a compilation of the contents of various documents,” but “as 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.”⁹⁷ In essence, it codifies modern customary international law; the law of the sea is thereby reflected in

94 See art. 137, UNCLOS III.

95 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*. R. P. Anand, ed., at 3.

96 Milan Bulajic, *Principles of International Development Law* (1986), at 310.

97 *Id.*, at 311.

written form.⁹⁸ Similarly, the requirement of cooperative conduct on the part of the transit states vis-a-vis LLS is also implicit. Most provisions of UNCLOS III contemplate regulation between the LLS and transit states.⁹⁹

Some articles provide for cooperation expressly. Article 129 foresees cooperation between transit states and LLS in constructing means of transport to give effect to the freedom of transit of LLS or in imposing such means of transport. Article 130, moreover, requires cooperation between a transit state and a LLS in the expeditious elimination of delays or other difficulties of a technical nature in traffic in transit.¹⁰⁰ However, a pragmatic analysis of the provisions of UNCLOS III shows that most of the rules set by the convention could already be found in the earlier treaties. Such is the case, for instance, of the exclusion of application of the MFN clause;¹⁰¹ exemption from all custom duties, taxes, or other charges;¹⁰² equal treatment in maritime ports;¹⁰³ and the grant of greater warehousing facilities.¹⁰⁴ Similarly, UNCLOS III still leaves the role of granting free zones or other customs facilities to bilateral agreements, and states that appropriate measures should be taken by transit states to avoid delays or other difficulties of a technical nature in traffic in transit.¹⁰⁵ These provisions already existed in the New York Convention, Geneva Convention and at least partially in the Barcelona Statute.¹⁰⁶

In some respect, LLS lost ground with UNCLOS III. The 1958 Convention gave to the ships flying the flag of a LLS most favored nation treatment or national treatment, whichever was more advantageous,¹⁰⁷ but Article 131 of UNCLOS III only gives "equal treatment." The interpretation of Article 131, which specifies that "ships flying the flag of landlocked states shall enjoy treatment equal to that accorded to other foreign ships in maritime ports," can easily be used to give *least* favored treatment to LLS. This clause should have referred to "either most favored nation treatment or national treatment, whichever is more favorable for the LLS".¹⁰⁸

98 Mark W. Janis, *An Introduction to International Law* (1989), at 153.

99 See arts. 124(2), 125(2) and 128 of the Convention.

100 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*, A. Bos and H. Siblesz, eds., (1986), at 140.

101 Art. 126.

102 Art. 127.

103 Art. 131.

104 Art. 132.

105 Art. 128.

106 See generally the Barcelona Statute and the New York Convention.

107 See art. 3(2), Convention on High Sea.

108 For details, see Caflich, *supra* note 73.

The contested rules laid in previous conventions were not reformulated; thus there is still potential for conflict among states, primarily with regard to means of transport and other legitimate interests of transit states. The problem of interpretation had already been raised by the Pakistani delegation, for which “another area of concern is the possible interpretation of the question of access to the sea, which is believed to be only a notional right to be governed by bilateral agreements regarding transit.”¹⁰⁹

Most LLS had negative views about the achievements of UNCLOS III. The representative of Lesotho said of the draft that there was still room for improvement. The delegate of Zimbabwe seemed unhappy about the provisions dealing with access to and from the sea and the delimitation of the EEZ. Similarly, for the representative of Paraguay, even after eight intensive negotiations, the text of the UNCLOS III satisfied the expectations of LLS only in part. The delegate noted that the legal instrument was still imperfect but reflected a great advance over former documents. A more or less similar opinion was expressed by another LLS, Mongolia. According to the Mongolian delegate, the provisions relating directly to the rights and benefits of LLS were not entirely satisfactory, but Mongolia was prepared to accommodate its own interests and expectations to those of the international community as a whole.¹¹⁰

Czechoslovakia was one of the few LLS to have expressed a positive view of the UNCLOS III. The Czech delegate, referring to the convention, mentioned that “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.”¹¹¹

Whatever may be the views of the delegates in the international fora, the UNCLOS III offers little that is new to the issue of transit rights for LLS. It has failed in particular to clarify the position and status of LLS. These States went through a long and difficult period of negotiation to obtain merely a renewal of previously recognized rights. This explains why the representatives of a number of developing countries have criticized part of the UNCLOS because it gives “some states much too much and others little or nothing at all.”¹¹² More precisely, and from

109 For details, see *United Nations Convention on the Law of the Sea*, *supra* note 74, at 98.

110 *Id.*, at 94-96.

111 See generally *id.*, at 96.

112 Bulajic, *supra* note 96, at 310.

the viewpoint of redistribution of oceanic resources, the biggest losers are non-coastal, developing countries.¹¹³

Possibly UNCLOS III may be advantageous for some LLS that are also transit states and have a different perspective,¹¹⁴ but for most of the LLS in Africa, Asia, and South America, it remains a disappointment. In general, LLS had a vital interest in the attempt of UNCLOS III to improve their transit position, but this has been in vain.¹¹⁵ Finally, UNCLOS III cannot be viewed in isolation. It came into force on 16 November 1994, one year after the sixtieth ratification,¹¹⁶ but may well require changes before it is fully accepted by all major states.¹¹⁷

E. *Facilitating the Application of the Right of Access under the International Instruments*

“[P]erhaps the element of municipal law most conspicuously lacking in the international system is effective machinery for enforcing the law.”¹¹⁸ LLS, it appears, convinced with the adage that “international law is typically enforced by self-help” have continuously tried to make the rules applicable. In order to ensure access to the sea for LLS, it is necessary to guarantee the application of their right to access. Similarly in order to ensure continuity and efficiency in transit traffic, they must have access to all such necessary facilities without which the exercise of the right of access would be hindered. The different conventions have, in their own way, attempted to provide for particular facilities to LLS.

1. *Convenient Routes*

A LLS is different from other countries because it can approach the international market only by borrowing the means of transportation of a foreign country. Consequently, the coastal states must provide concessions in order to facilitate the passage of goods of LLS. Article 2

113 See for detail, Magus Wijkman, “UNCLOS and Redistribution of Ocean Wealth”, in *International Law: A Contemporary Perspective*, R. Falk, F. Kratochwil and S.H. Mendlovitz, eds. (1985). See also I. J. Wani, *supra* note 92, at 651.

114 For instance, Austria and Switzerland are transit States as well. They are interested in securing guaranteed rights of transit across the State whose territory separates them from the sea and at the same time they are transit countries for each other and for land-locked Liechtenstein.

115 For a dimmer view of the real achievement of the Conference in general, see Arvid Pardo, “The Convention of the Law of the Sea: A Preliminary Appraisal”, in *Third World Attitudes Toward International Law: An Introduction*, F.E. Snyder and S. Sathirathai, eds. (1987), at 737–49.

116 Art. 308 of the Convention.

117 Carter & Trimble, *supra* note 74, at 923.

118 J. G. Merrills, *Anatomy of International Law* (1981), at 32.

of the Barcelona Statute stated that traffic in transit by rail or waterway shall be organized on routes in use convenient for international transit. The GATT ensured freedom of transit throughout the territory of contracting parties for the traffic in transit to or from the territory of other contracting parties via the routes *most convenient* for international transit.¹¹⁹ The New York Convention appeared less demanding than the Barcelona Statute, as it stated that the contracting states shall facilitate the transit on routes in use mutually acceptable for transit.¹²⁰ This results in leaving the LLS without any right to claim particular means of communication to support their traffic in transit.¹²¹ The issue of securing specialized means of communication are left unresolved, with the understanding that while providing for most appropriate and mutually acceptable communication routes, the issue will be resolved in ways that are compatible with the sovereignty-concerns of transit states. In reality, however, transit states always determine the means. For political and economic reasons, these states do not always authorize the utilization of the easiest means of transport.¹²² With regard to transport facilities, the New York Convention as well as the UNCLOS III establish a compromise between LLS that favored the inclusion of all means of transport necessary for their transit trade, and transit states that opposed these demands.¹²³

2. Ports and Administrative & Customs Facilities

The New York Convention deals with the modalities of warehousing goods in transit, transport facilities and installations in relatively general terms. It states that the entry point, exit point, and the intermediary stages of transit may be fixed by agreement between concerned parties,¹²⁴ and 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. In addition, the contracting states undertake to provide in entry and exit points,

119 Art. 5(2), GATT.

120 Art. 2(1), New York Convention.

121 See also the Advisory Opinion delivered by the Permanent Court of International Justice (PCIJ) in the case of Railway traffic between Lithuania and Poland, Series A/B No. 42, 1931.

122 Such has been, for instance, the case of India vis-a-vis Nepal. For illustration, see Amrit Sarup, "Transit Trade of Landlocked Nepal" (1972) 21 ICLQ 289. See also Sachs, *supra* note 7.

123 See art. 1(D), New York Convention which enumerates, in a restrictive manner, specific means of transport available to LLS, including railway stock, seagoing and river vessels, road vehicles, as well as porters and pack animals when the local situation requires them.

124 Art. 6, New York Convention.

and at required points of transshipment, adequate means of transport and sufficient handling equipment to effectuate transit without unnecessary delay. On the other hand, the Barcelona Statute lays down a simple precept. All measures for regulating and forwarding traffic across territory taken under the transit state's sovereign power and authority shall facilitate free transit¹²⁵ by rail or waterway, on routes in use that are convenient for international transit. Article 5 of the GATT is slightly progressive and requires that the traffic in transit would not be subjected to unnecessary delays and restrictions,¹²⁶ and requires the Contracting parties to grant treatment no less favorable than that given to transit traffic with any third country with respect to all charges, regulations, and formalities in connection with transit to or from the territory of any other contracting party.¹²⁷

The New York Convention, respecting the territorial sovereignty of transit states, did not adopt the proposals of LLS, which, included in Article 12 of the Afro-Asian draft, recommended the adoption of simplified documentation and methods of expediting customs and other administrative procedures regarding transit. LLS insisted that Article 12 identify the principles applicable in that connection.¹²⁸ The transit states proposed the deletion of Article 12, because the provisions featured detailed administrative formalities,¹²⁹ which in their opinion, was not appropriate to be included in a convention dealing with general principles, and accordingly could be regulated through bilateral agreements.

Following the opposition of transit states, a new text was presented by the Committee of Twenty-four to make Article 12 less objectionable.¹³⁰ This text introduced several modifications and mentioned that, as a general rule, the examination of goods in transit shall be confined to summary examination and to test-checks.¹³¹ Nevertheless the method included in the first paragraph of Article 5 of the New York Convention was still imprecise: the contracting states agreed to apply only those administrative and customs measures permitting free and uninterrupted traffic in transit. If necessary, they would undertake negotiations to agree on measures to ensure and facilitate transit.¹³² The second paragraph was a little more explicit.

125 Art. 2.1.

126 Art. 5, para 3, GATT.

127 Art. 5, para 5, GATT.

128 See *UNCTAD: Report of the Committee*.

129 See discussions by the representatives of India, Czechoslovakia, Switzerland, in *UNCTAD: Report of the Committee*, at 57-62.

130 *Id.*, at 60.

131 *Id.*

132 Art. 5(1), New York Convention.

It required the concerned states to use simplified documentation and expeditious methods with regard to customs, transport, and other administrative procedures relating to traffic in transit for the entire transit journey on their territory, including any transport as may take place in the course of such journey.¹³³

3. *Tariff Simplification*

Undoubtedly, the most serious obstacle to the freedom of access to the sea is the incurring of customs duties and other taxes during the passage of goods in transit. During the Barcelona Conference, the Romanian delegate praised transit as the weapon of economic protectionism.¹³⁴ The British delegate, H.O. Mange, held a different view.¹³⁵ For Mange, the freedom of transit did not imply the right to enter a state, but only to cross its territory.¹³⁶ Every state remains a master at home, but it abstains from abusing its geographical position by refusing to grant, or granting only under costly conditions, the right of passage for the normal obligatory traffic crossing its territory.¹³⁷

Fortunately for LLS, international law has evolved along the views echoed by Mange. States abandoned the practice of subjugating goods of LLS in transit to customs duties or other taxes. Most international agreements respect the principle of exemption of special duties for transports in transit and non-discrimination. The objective of the conventions have been to prohibit transit states from taking advantage of their geographical position through the collection of duties and taxes during transit. In fact, this rule was already established by the Barcelona Statute, which mentioned that the traffic, because of transit, shall not be subjected to any special dues,¹³⁸ and by the GATT which affirmed that the traffic in transit shall be exempted from customs

133 Art. 5(2), New York Convention. Also, many bilateral treaties contain provisions referring to administrative formalities. In the Nepal–Pakistan Treaty, for example, the two governments agreed to reduce to a minimum all transit formalities, see the *Nepal–Pakistan Agreement on the Regulation of Traffic in Transit*, January 28, 1963. See also *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*, U.N. Doc. 138/37, 11 June 1971, at 41. Similarly, the Afghan–Soviet Agreement provided that customs formalities in the territories of the contracting parties shall be reduced to a minimum with respect to goods in transit, see particularly art. 7, *Agreement between the Government of the USSR and the Government of the Kingdom of Afghanistan Concerning Transit Questions, Moscow of June 28, 1955*, U.N.T.S. 240, at 260–64.

134 First session of the Plenary Commission, Document C 662 M 265.

135 *Id.*

136 *Id.*

137 L'Oeuvre de Barcelone, *Expose Par Quelques Uns de Ses Auteurs* (Paris: Payot, 1922).

138 See art. 3, Barcelona Statute.

duties.¹³⁹ Article 3 of the New York Convention is also based on established international practice. Reconsidering Article 3 of the Barcelona Statute and developing Paragraph 2 of the fourth principle of its own Preamble, the New York Convention affirms that, upon the territory of a transit state, the goods in transit shall not be subjected to customs duties or taxes chargeable by reason of importation or exportation, nor to any special dues in respect of transit.¹⁴⁰

The principle of exemption of customs duties and transit taxes applies with one exception: the remunerative dues. All international agreements relating to transit authorize the imposition of charges for expenses borne by the passage state for all traffic in transit. As a matter of principle, a LLS must share the expenses incurred by its coastal neighbor in facilitating the passage of its goods in transit. Article 127 of UNCLOS III and Article 3 of the New York Convention allow transit states to levy dues on traffic in transit with the only objective of defraying expenses of supervision and administration entailed by the particular transit. The rules laid down by these two conventions are based on a generally established practice; similar provisions were made by the Barcelona Statute, the GATT, and the 1958 Geneva Convention.

That a transit state receives remuneration for services rendered is legitimate. But the danger lies in that states may abuse of this right and apply excessively high tariffs in an effort to recover lost customs duties. Given this hypothesis, it is always necessary to remain cautious that these tariffs do not indirectly become a tax levied on goods in transit, and to prevent transit states from converting these remunerative charges into a real transit tax by means of deliberately maneuvered discrimination, in order to favor their trade, which has detrimental effect on trade of neighboring LLS.

4. *National or Most-Favoured Nation Treatment*

During the Barcelona Conference, the LLS recommended the insertion of the principle of national treatment in the Barcelona Statute. However, the Conference retained the principle of nondiscrimination between transit states.¹⁴¹ The question was discussed at length in the Conference of New York, but the New York Convention did not satisfy the demands of the LLS either. It limits tariffs and charges on traffic in transit to those that are reasonable in their rates and in the method of their application. It states that these tariffs shall be established in

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

140 See art. 3, New York Convention.

141 See generally Barcelona Statute, arts. 2 and 3.

order to facilitate the traffic in transit.¹⁴² It avoids the principle of national treatment and instead uses a formula according to which tariffs shall not be greater than those applied by the contracting states on transports throughout their territory, of goods of coastal states.¹⁴³ Finally, it stipulates that these measures are applicable to traffic in transit using facilities operated or administered by the state and by firms or individuals. In such cases, the tariffs or charges are fixed by the contracting transit state.¹⁴⁴

The promotion of access to the sea does not affect the most-favored nation (MFN) rights. The right of access to the sea deriving from the principle of freedom of the seas constitutes a specific right for LLS that is linked to its geographical position. Therefore, a transit state that grants special advantages in support of free access to the sea need not grant the same concessions to a third state by virtue of MFN treatment. The non-application of MFN treatment under Article 10 of the New York Convention reinforces the specific nature of the right of free access.¹⁴⁵

In this context, it is particularly important to note that LLS lost ground with UNCLOS III. The 1958 Convention gave to the ships flying the flag of a LLS MFN treatment or national treatment, whichever was more advantageous, but Article 131 of UNCLOS III only gives “equal treatment.” The interpretation of Article 131, which specifies that “ships flying the flag of landlocked states shall enjoy treatment equal to that accorded to other foreign ships in maritime ports,” can easily be used to give least favored treatment to LLS. This clause should have referred to “either most favored nation treatment or national treatment, whichever is more favorable for the LLS.”

III. SECURING ACCESS THROUGH “SPECIAL INITIATIVES” AND “SOFT LAW”

Even after the UNCLOS III was adopted, LLS continued to work towards improving their status and, in the different regions adopted a variety of legal instruments, all with the objective of securing access to the sea and facilitating their international trade. Also their efforts to obtain the right to trade by ensuring access to the sea and by eliminating the numerous administrative and physical obstacles to access

142 See art. 4(2), New York Convention.

143 *Id.* Normally, under a national treatment clause, foreigners are accorded the same rights as those accorded to nationals, see Black’s Law Dictionary.

144 See art. 4(2), New York Convention.

145 The first paragraph of Article 10 of the New York Convention, which in fact builds on the seventh principle of the Preamble, states that the contracting states accept to exclude from MFN treatment the facilities and special rights granted to LLS in accordance with the convention.

continued to be in the agenda of different international meetings. Such efforts, both regional and universal in scope, have resulted in many international normative instruments.

A. *Global Framework for Facilitating Access*

In the aftermath of the UNCLOS III, a series of meetings, with representatives from the developing transit countries, LLS and the donor community (called triangular meetings) were held.¹⁴⁶ Such triangular meetings, first convened in 1993, attempt to bring together all the main parties whose joint undertakings are indispensable for promoting cooperative efforts. The second meeting, held in 1995, resulted in the adoption of the Global Framework for Transit Transport Cooperation Between Landlocked and Transit Developing Countries and the Donor Community (the "Global Framework").¹⁴⁷ The third triangular meeting, held in New York in June 1997, reviewed the progress made in the development of transit systems and explored the possibility of formulating specific action-oriented measures. A study carried out by UNCTAD on the implication of globalization and liberalization of the world economy for the development prospects of landlocked developing countries was also discussed at the June 1997 meeting. During the meeting ways to accelerate further the Global Framework implementation were also identified. Indeed, while the development of cost effective transit systems is crucial for the land-locked developing countries, only a few cooperative programs have been instituted by such countries with their transit neighbors. These programs attempt to

¹⁴⁶ The group of landlocked developing countries was established in 1995 and has its organization in New York. It has the duty to follow international meetings that consider issues concerning landlocked countries. The group now has thirty countries as members. See Embassy of the Lao People's Democratic Republic, *News Bulletin*, March/April 1999, at 9.

¹⁴⁷ The Global Framework endorsed by the General Assembly at its 50th session, is the most comprehensive document aimed at fostering cooperation both at the international and national levels for developing transit transport systems in landlocked and transit developing countries. The Global Framework Recommendations cover fundamental transit transport policy issues, sectoral issues and the role of the international community. With regard to the transit transport issues, it contains specific provisions on developing physical transit transport infrastructure, liberalizing transit services, strengthening bilateral and sub-regional cooperative arrangements, developing alternative routes, establishing institutional mechanisms to monitor the implementation of agreed transit rules and procedures, encouraging regional and sub-regional trade, improving training facilities, and preventing environmental degradation. With regard to sectoral issues, it emphasized the need to encourage more efficient management of all modes of transportation that would ensure the commercial viability of transit traffic operations, promote privatization in the transit sector, and involve the private sector in formulating transit traffic policies. See U.N. Doc. TD/B/42(1)11-TD/B/LDC/AC.1/7. Annex I.

reduce the physical and administrative barriers for transit transportation. Effective implementation of the Global Framework provisions would indeed be needed to make a tangible practical contribution to not only improve the situation of LLS, but also to serve the interest of the global trading possibilities for all the countries in the world.

The implementation of the provisions of the Global Framework should also be viewed in the context of WTO, which aims at integrating the world economy by eliminating barriers in trade and investment, and is thus expected to accentuate economic growth and provide impetus for competitiveness. Introducing international norms in transit facilitation, cargo clearance and simplification of document processing, as well as adoption of Integrated Transit System (ITS) and Automated Systems of Customs Data (ASYCUDA) would all be very useful steps towards facilitating the international trading activities of landlocked states.¹⁴⁸

It is also in the interest of LLS to enter into agreements with transit countries after analyzing carefully their access corridors and determining the generalized costs incurred by using each of these corridors: i.e. the overall economic cost which includes transport cost, loss and damage, inventory costs due to delays in transit, and the shipping costs to the ports of exit/entry that are incurred when there is an important shipping rate differential between the ports serving each route. In addition, ways should be found to simplify customs clearances, and mechanisms should be developed to avoid trucking delays at roadblock and borders. Therefore, it is crucial to determine transit times from origin of goods to destination and especially the "dwell time" at ports, customs borders and any transfer terminals. Indeed, every single day wasted in transit adds to inventory costs. Since goods are already paid for, the consignee (the person to whom the goods are destined) is either out of stock or could have been earning interest with the money invested in the goods, which are en route.¹⁴⁹

148 In Africa, two success stories are in the making: the Common Market of Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC), where programs aimed at the establishment of a regional customs transit system, the consolidation and extension of computerized customs procedures and transport information systems, and the setting up of joint inspection border posts has been launched. Similarly, acting under the auspices of COMESA, Eastern and Southern African countries have applied harmonized road transit charges that remove discriminatory practices, such as entry fees and fuel surcharges on foreign vehicles, and facilitate forward planning by transport operators. See *Cargo Info, Freight & Trading Weekly* (3 September 1999 Edition), <http://rapidftp.co.za/cargo/ftw/99/99se03aa.html>.

149 Jorge Rebelo, "Landlocked Countries: Evaluating Alternative Routes to the Sea", *Infrastructure Notes, World Bank*, September 1992, Transport No. OT-2.

B. *International "Soft Law"*

The complexities of the development problems faced by LLS increasingly require a comprehensive approach to dealing with them. Many international resolutions have made recommendations to that effect. Although not always with success, these resolutions attempt to strike a balance between the right of access of the LLS and the legitimate interests of the transit countries, while simultaneously recognizing the importance of free and unrestricted access in international trade.

1. *ECOSOC Resolution*

The importance of access of LLS to the sea for trade purposes was acknowledged, in the context of the countries of Asia and the Pacific, by the ECOSOC through a resolution on Restructuring the Conference Structure of the Economic and Social Commission for Asia and the Pacific.¹⁵⁰ Through the resolution it decided to retain and invigorate the Special Body on Least Developed and Landlocked Developing Countries (the Special Body), which was created earlier, to act as the focal point on LLS issues.¹⁵¹

The ECOSOC Resolution includes the terms of reference of the Special Body.¹⁵² According to the terms of reference, this body is expected to generally provide a focused forum for addressing the special issues and problems facing these groups of countries in the spirit of regional cooperation. It is responsible for reviewing and analyzing the economic and social progress in the least developed and landlocked developing countries and undertaking in-depth reviews of economic, social and environmental constraints on their development. It is also expected to serve as a mobilizer of ideas and a catalyst for action to identify and promote new policy options at the international levels for the removal of constraints on the economic and social development efforts of these countries, with emphasis on the adoption of measures for increased mobilization of domestic and foreign resources, trade and private sector development, or public sector reform, and as economic advisor to governments with limited internal capacity. In the same vein, this body is responsible for enhancing the national capacities of LLS particularly in relation to the formulation of development strategies, and fostering and strengthening inter-country cooperation arrangements for exchanges of experience and technical cooperation

¹⁵⁰ Res. 1997/4, adopted during its 34th plenary meeting on 18 July 1997.

¹⁵¹ The Special Body was already established. The decision to retain and invigorate it is noteworthy of the understanding of the problems of LLS by the international community, see para 2 of the Resolution 1997/4.

¹⁵² See Annex VII of the Resolution 1997/4.

between and among the least developed and landlocked countries as also as other countries in the region.¹⁵³ Also this body, if needed, can review and analyze the special transit trade and transport problems of Asian landlocked developing countries, recommend suitable measures for solving these problems in accordance with international legal instruments, and encourage the Asian landlocked developing countries and their transit neighbors to deal with problems within the context of bilateral cooperation.¹⁵⁴ Finally it also ensures liaison with different development partners, private sector organizations, and non-governmental organizations to develop and carry out activities for their benefit.¹⁵⁵

In this context, it is worth noting that, in November 2001, China and five ASEAN members adopted a Mekong basin development plan.¹⁵⁶ The plan calls for investments in infrastructure and technology, which are intended to bridge growth gaps among countries of the Mekong basin as regional markets become more accessible. River navigation talks were conducted amongst Burma, China, Laos and Thailand in April 2001.¹⁵⁷ Tentative agreement was reached in January 2002, to improve navigation in the upper reaches of the Mekong, which is now accessible for only part of the year. Under the first phase of this agreement, China is spending about 5 million dollars to blast reefs and deepen waterways in the Mekong. The Mekong basin passes north-to-south through south-western China, Burma, Laos and Thailand, Cambodia and culminates in Vietnam's extensive Mekong delta. For centuries, isolation, war and inter-state rivalry have precluded the area's economic development. Also, Vietnam and Laos are upgrading the road network running east-west across Laos to the Vietnamese coast. While this is aimed at providing Laos with further sea access, it is also intended to provide a transit route for trade between Vietnam and Thailand. In July 2002, Vietnam and Laos signed a transport cooperation agreement. At the heart of this was the extension of a 38 million dollar loan by the Vietnamese government for improvements to Highway 18B in Laos and granting Laos access to the sea at Vung Anh port in Vietnam's Ha Tinh province. The agreement follows on from another transport accord signed in 1996 and amended in 2001. According to this document, which details proposed cooperation in the transport

153 *Id.*

154 *Id.*

155 *Id.*

156 See Oxford Analytica Brief, [www.oxweb.com] 30 July 1999 and 27 November 2002.

157 *Id.*

sector until 2010, the aim is eventually to upgrade all highways leading to the ten border crossings between Laos and Vietnam.¹⁵⁸

2. General Assembly Resolutions

In the same vein, in 1997, the United Nations General Assembly adopted a Resolution on Specific Actions Related To The Particular Needs And Problems Of Landlocked Developing Countries.¹⁵⁹ Recalling the provisions of several of its earlier resolutions¹⁶⁰ as well as the relevant parts of the Agenda for Development, the Resolution noted that measures to deal with the transit problems of landlocked developing countries required closer and more effective cooperation and collaboration between LLS and their transit neighbors. The Resolution reaffirmed the right of access of landlocked countries to and from the sea and freedom of transit through the territory of transit States by all means of transport in accordance with international law, and also reaffirmed that transit developing countries, in the exercise of their full sovereignty over their territory, have the right to take all measures necessary to ensure that the rights and facilities provided for landlocked developing countries in no way infringe upon their legitimate interests. The Resolution called upon both the landlocked and transit countries to implement measures to strengthen further their collaborative efforts in dealing with transit issues, *inter alia*, by improving the transit transport infrastructure facilities as well as agreements to govern transit transport operations, developing joint ventures in the area of transit transport, strengthening institutions and human resources dealing with transit transport, and promoting South-South cooperation.

In addition, the Resolution recommended all States and international organizations to implement, as a matter of urgency and priority, the specific actions related to the particular needs and problems of landlocked developing countries agreed in the resolutions and declarations adopted by the General Assembly and the outcomes of the major United Nations conferences relevant to landlocked developing countries, as well as in the Global Framework. Finally, the Resolution also invited donor countries, the UNDP and multilateral financial institutions to provide these countries with appropriate financial and technical assistance in the form of grants or concessional loans for the construction, maintenance and improvement of their transport,

¹⁵⁸ *Id.*

¹⁵⁹ Res. 52/183, adopted on 18 December 1997, U.N. Doc. A/52/626/Add.2.

¹⁶⁰ In particular, Resolution 44/214 of 22 December 1989, 46/212 of 20 December 1991, 48/169 of 21 December 1993 and 50/97 of 20 December 1995.

storage and other transit-related facilities, including alternative routes and improved communications, and to promote subregional, regional and interregional programs.¹⁶¹

That certainly was not the first time that the international community was making pronouncements in favor of international cooperation. During its 86th plenary meeting in December 16, 1996, the UNGA adopted a resolution in favor of Central Asian countries, which highlighted the importance of cooperation for developing trade and access.¹⁶² In the Resolution, the General Assembly recognized that the overall socioeconomic development efforts of newly independent and developing landlocked States, seeking to enter world markets through the establishment of a multi-country transit system, are impeded by a lack of territorial access to the sea as well as by remoteness and isolation from world markets. The Resolution further stated that the problems of transit transport facing the Central Asian region needed to be seen against the backdrop of economic changes and the accompanying challenges, including especially the impact of those changes on their international trade. To be effective, therefore, a transit transport strategy for such countries should incorporate actions that address both the problems in the use of existing transit routes and the early development and smooth functioning of new alternative routes. The Resolution also invited the Secretary General of UNCTAD and the governments concerned to continue elaborating a program for improving the efficiency of the transit environment in the newly independent and developing landlocked States in Central Asia and their transit neighbors, and the donor communities, within their mandates,

161 In this context, a Special Fund for Landlocked Developing Countries was created in late 1976. See UNGA Res. 31/177 (21 Dec. 1976), U.N. Doc. A/31/335/Add.1. Although the responsibility of defining and executing projects is to be shared with the UNCTAD, the Fund is under the supervision of UNDP. Contributions are voluntary and pledged in conjunction with the U.N. Pledging Conference for Development Activities. Altogether 21 projects have so far been approved, with 13 of these already completed. In view of the very limited resources available, the main function of the fund has been to conduct studies and provide small scale assistance—primarily in the fields of transportation and trade—relevant to the 19 landlocked developing countries. The repeated refusal of the major donors to contribute to the Special Fund reflects their belief that groups of developing countries should not be singled out for special treatment. Since this attitude has not changed in the eight years of the fund's existence, and most of the current contributions are coming from the landlocked developing countries themselves, UNDP is willing to dissolve the fund. This pragmatic attitude is not shared by UNCTAD and is not likely to be welcomed by the majority of members in UNDP. Hence the fund is likely to continue at its current level, with its administrative and bookkeeping costs (which are absorbed by UNDP) just about balancing its annual income, see UNDP 1985.

162 Res. 51/168, dated 16 December 1996 on Transit Environment in the Landlocked States in Central Asia and Their Transit Developing Neighbors, U.N. Doc. A/Res/51/168 (21 Feb. 1997).

to provide such countries with appropriate financial and technical assistance for the improvement of the transit environment.¹⁶³

As a sequel to the aforementioned Resolution, the U.N. General Assembly further adopted another resolution,¹⁶⁴ which focused particularly on the problem of trading of LLS. In particular, it recognized that the overall socioeconomic development efforts of the LLS in Central Asia seeking to enter world markets through the establishment of a multi-country transit system are impeded by a lack of territorial access to the sea, by remoteness and isolation from world markets, and by lack of adequate infrastructure in the transport sector in their transit developing neighbors. While emphasizing the need of access to the sea, it also reaffirms that transit countries, in the exercise of their full sovereignty over their territory, have the right to take all measures necessary to ensure that the rights and facilities provided for landlocked countries in no way infringe upon their legitimate interests.¹⁶⁵

In order to facilitate overall access to international trade markets, the Resolution finally invited donor countries and multilateral financial and development institutions, to continue to provide the newly independent and developing landlocked States in Central Asia and their transit developing neighbors with appropriate financial and technical assistance for the improvement of the transit environment, including construction, maintenance and improvement of their transport, storage and other transit-related facilities and improved communications.

Based on the above, it can safely be noted that international instruments do recognize the practical difficulties of enforcing the LLS right of access to and from the sea, which would enable them to participate in international trade and economic development activities. Although recognized by international instruments, the access to the sea, still remains theoretical for many LLS, who rely heavily upon the decisions

163 *Id.*, at para. 3.

164 Res. 53/171, dated 15 December 1998, bore the same title: Resolution on Transit Environment in the Landlocked States in Central Asia and their Transit Developing Neighbors, see U.N. Doc. A/Res/53/171 (15 Jan. 1999).

165 See Preamble of the Resolution. Also, it should be noted in this context that there have been a number of important developments at the subregional and regional levels, including the signing of a transit transport framework agreement among States members of the Economic Cooperation Organization at Almaty, Kazakhstan, on 9 May 1998, the signing on 26 March 1998 by the heads of State of Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan, the Economic Commission for Europe and the Economic and Social Commission for Asia and the Pacific of the Tashkent Declaration on the United Nations Special Program for the Economies of Central Asia, the implementation of the expanded Transport Corridor–Europe–Caucasus–Asia program and the signing of the Baku Declaration on 8 September 1998. See Preamble, Resolution 53/171, dated 15 December 1998, *supra* note 164.

of their transit neighbors who give priority to their own sovereignty and strategic interests and not the interests of LLS necessarily.

IV. CONCLUSION

This study has made it clear that most landlocked countries have been overwhelmed by a series of critical problems because of their inability to secure access to seaports. In turn, these problems have engendered underdevelopment, and, in most cases, acute poverty. The states without access to the sea have sought to meet these challenges through successive legal innovations. Although these innovations, in the form of conventions and resolutions, acknowledge the “sovereign rights” of each LLS to trade and economic security, in practice, their truly independent status has at no time been clearly established and the real, “acquired” rights of these countries, theoretical as well as practical, still remain difficult to enforce. However, the multilateral conventions have been successful in helping LLS to better focus and define their problems, and at least to some extent, have given LLS the potential to resolve their unique difficulties. This is what justified the legal and strategic “confutation” of successive demands originating from the group of LLS, a group that still considers itself the most seriously neglected by the world today.

The interpretation of international law by the LLS and its misunderstanding, intentional in some cases, by the transit countries have caused the LLS much confusion and agony. LLS suffer systematically from the unilateral decisions made by the transit states. Although the problem of transit for many LLS has long been solved, considerable problems remain for other developing LLS in Africa, Asia and also South America. This is perhaps why a certain selflessness could be noted amongst the developed LLS regarding the transit problems of developing LLS. While it may be admitted that with the signing of the UNCLOS III, an important phase of international negotiations has been completed, the crucial phase - that of application or execution of the few novel legal concepts introduced by the convention—still remains to be proven. Certainly, the many resolutions and declarations of the nineties, emanating from the international meetings organized under the UN auspices, help the LLS ameliorate their access to the sea and thus to international trade. However, many more negotiations will need to be conducted and operational mechanisms to be devised to let the LLS obtain, through hard as well as soft law means, appropriate and badly needed transit rights to improve their trade performance!