



Title

“Right of access of land-locked state to the sea by the example of bilateral agreement between land-locked state- Nepal and port state – India”

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1. Introduction

The ocean cover more than two third of the surface of the earth and constitute a vast area of communication, a sources of living and nonliving resources and an object of scientific research. In this world there are 42 states have no sea coast.15 in Africa, 13 in Europe, 12 in Asia and 2 in Latin America. Apart from land locked countries, the many of other country also deficient in natural land resources and suffer from the lack of direct access to the sea and its resources. In addition, there are number of state which are said to be geographically disadvantaged as far as the sea is concerned, since their coastline is very short in proportion to the size of their land territory.

However, the right of land-locked countries to fly their own flag on the seas could only be effective if at the same time they also enjoy the right to have access to the seas. In the same way, landlocked states also can be flag states and enjoy the right of free navigation. This problem had for a long time been of major concern too land lacked states. No wonder that in previous centuries land-locked states had striven to fain direct territorial access to the sea. Under contemporary circumstances, the only generally acceptable way to solve this problem appears to be by way of bilateral or multilateral treaty arrangements on transit rights.¹

1.1 Historical background:

During the nineteenth century the first attempts were made by the nationals of land-locked states to participate on their own in the uses of the seas as means of communication. In the course of the World War I, land-locked states like Switzerland clearly felt the great disadvantages of not having ships under their own flag in order to safeguard the supply of their population. After the close of the war the number of land-locked countries in Europe increased and thus further aggravated this problem. The Paris peace treaties first recognized the rights of land-locked countries of fly their flag on the seas; this was later confirmed by the “Declaration of Barcelona of 1921 recognizing the right to a flag of states having no sea-coast.” Furthermore, the Barcelona Convention and Statute on Freedom of Transit-1921 suffered from inherent deficiencies as well as from a limited number of ratifications.²

In the process of decolonization in the last three decades, there have been largely increased the land locked countries; they were newly-independent, developing and poor countries. In that contrast, their legitimate demands shed new light on the question of transit to the sea for different purpose.

1. The Geneva Conventions on the Law of the Sea (1958) and the Convention on Transit Trade of Land-Locked States (1965):

The Geneva Conventions on the Law of the Sea of 1958 and the convention of transit Trade of Land-Locked states of 1965: both were based on draft articles

¹ Helmut TUERK and Gerhard HAFNER, Law of the Sea, *the library of essays in international law*, edited by Caminos, Hugo, The Cromwell Press, 2001, P.357

² Ibid

complicated by the international law Commission. There was lack of status of landlocked countries in the matter of maritime status. However Switzerland played a vital role to convene a conference of the land-locked states preceding the first UN conference on the law of the sea in 1958. This pre-conference also contributed to an intensified consciousness of land-locked states with respect to their meticulous situation and led to a general arrangement of these states at the conference.

Ten among a total of ninety states that participated in the 1958 conference on the law of the sea, were land-locked. A special commission dealt with this particular problem. The article 3 states that 'in order to enjoy the freedom of the seas on equal terms with coastal states, states having no sea-coast should have free access to the sea'. This article was in favor of land-locked states however it depended on contingent agreement and on the good will of the coastal states concerned. In retrospect, it is quite clear that the most important decision concerning maritime resources taken at the 1958 conferences was preserved in the convention on the Continental Shelf.

In 1965 the pressing demands of newly-independent land-locked states led to the elaboration within the framework of UNCTAD of the Convention on Transit Trade of Land-Locked States. This Convention in its preamble sets forth a number of principles reflecting the main aspirations of the land-locked countries, including inter alia free access to the sea, identical treatment for vessels flying the flag of land-locked states to those of coastal states, free and unrestricted transit-however, once again on the basis of reciprocity.³

2. The Third United Nations Convention on the Law of the Sea of 1982: At UNCLOS III no separate committee to deal with questions relating to land-locked and geographically disadvantaged states was established: instead such questions were discussed in each of the conference's three main committees. In order to try to improve their negotiating position at the conference, the land-locked and some geographically disadvantaged states formed themselves into a group comprising 55 states (about a third of the total conference membership). Although the states which were members of this group were very diverse politically, economically and geographically, they agreed on trying to obtain at UNCLOS III confirmation of the existing navigational rights of land-locked states; transit rights through states lying between land-locked states and the sea; access to the resources of neighboring coastal states' EEZs; and proper recognition of their interests in the international sea bed regime.⁴

1.2 Purpose of the thesis

To clarify the effectiveness of implementation of the part X of the UNCLOS 1982 to the sub-regional level: 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 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

³ Id

⁴ Churchill and Lowe, *Law of the Sea*, third edition, Manchester University Press (1999), P. 434

means of transport⁵ further more the term and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit states concerned through bilateral, sub regional or regional agreements⁶. For this purpose I would like to examine and clarify the effectiveness of implementation of the part X of the UNCLOS to the sub-regional level with the references of Land-locked country Nepal and the port state India. (I am not going to discuss about the right of geographically disadvantage states,⁷ since my main concern with references Nepal is land locked state)

1.3 Objectives of the Thesis:

- 1) Identification of the Global legal status of land locked state in exercise of its right of access to the sea;
- 2) Examination of bilateral agreement between land locked state- Nepal and port state-India

1.4 Method:

For this purpose and Objectives, the research method has been followed as analysis. The method applied is determined by the legal questions and the relevant material. It has been analyzed that Global legal status of land locked state in exercise of its right of access to the sea. On the other hand, Implementation of the global legal rules regarding determination of the right of access of land locked states to the sea by the example of bilateral agreement between land locked states- Nepal and port state-India

1.5 Brief description of the thesis's structure:

This thesis has been divided into 4 broad topics:

- i) International legal sources relating to the regulation of the land-locked state's right of access to the sea: In this topic the international legal sources such as Treaties, customs, General Principles of law, judicial decisions, and teachings have been analyzed.
- ii) Global legal status of land locked state in exercise of its rights of access to the sea: In this part the various terms like land-locked state, transit state etc have been defined. Similarly right of the land-locked state of access to the sea and freedom of transit by the land-locked state have also been analyzed.
- iii) This part is the central part of the this thesis, where the implementation of the global legal rules regarding determination of the right of access of land locked states to the sea by the example of bilateral agreement between land locked state-Nepal and port state-India has been examined. The bilateral agreement between Nepal and India has been taken as references for this part.

⁵ Art. 125 (1) of UNLOSC 1982 (Global and European treaties, Edited by Ole Kristian Fauchald and Bård Dverre Tuseth, Published with support from the University of Oslo and Selmer advokatfirm, 2007)

⁶ Art. 125 (2) of UNLOSC 1982

⁷ Art. 70 of UNLOSC 1982

- iv) **Conclusions:** In this last part, the findings of the thesis (effectiveness of implementation of global legal rules to the sub-regional level) have been pointed.

1.6 Topicality of issue

The global and regional status of the land locked states in the law of the sea came into force more substantially after 1982 of UNLOSC. Where as it is still not updated issue in global and regional level. This thesis is a try to light this issue and find the implementation and effectiveness of global treaty in sub-regional level bilateral and multilateral).

2. International legal sources relating to the regulation of the land-locked state's rights of access to the sea:

- 2.1 Treaties:** As a sources to regulation of the land locked states rights of access to the sea there are number of Treaties/convention available. The natures of treaties are global, regional and sub-regional (Bilateral).

As global level treaties these treaties have been playing vital role as a sources:

- 2.1.1 UNLOSC III:** The 1982 United Nations Convention on the Law of the Sea Convention is an international agreement dealing with all traditional aspects of ocean governance and uses. It was signed on December 10, 1982 after 14 years of negotiations to which more than 150 countries representing all regions of the world participated. The Convention entered into force on November 16, 1994.

The Convention has often been referred to as a “package deal” because of the circumstances in which it was negotiated, including the many different issues covered as well as the conflicting interests cutting across traditional political and regional alignments that the Convention sought to balance in light of the great number of States that participated.⁸

A series of conferences were held in the 1950's that led to the four 1958 Conventions on the Law of the Sea (The 1958 Convention on the Territorial Sea and the Contiguous Zone, the 1958 Convention on the High Seas, the 1958 Convention on Fishing and Conservation of Living Resources and the 1958 Convention on the Continental Shelf).⁹

Article 69 describes about the right of land locked state as right to participate on equitable basis in the exploitation of the living resources of the EEZ with the establishment by the state concerned through bilateral or regional agreement.

Further more, part 10 of LOSC III brief the provision about “the right of access of land-locked states to and from the sea and freedom of transit.”

⁸ Tatjana Rosen, *‘Environmental law, International environmental issues and oceans’* , Edited by Saundry (last updated-Nov. 30 2006)

⁹ Ibid

Since UNLOSC 1982 is a global treaties (convention) and it has binding ness among its member states there for it is regarded as the main sources relating to the regulation of the land-locked stares right of access to the sea.

- 2.1.2 **MARPOL Convention:** The MARPOL Convention is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. It is a combination of two treaties adopted in 1973 and 1978 respectively and updated by amendments through the years.

The Convention covers all the technical aspects of pollution from ships, except the disposal of waste into the sea by dumping, and applies to ships of all types, although it does not apply to pollution arising out of the exploration and exploitation of sea-bed mineral resources. The Convention has two Protocols dealing respectively with Reports on Incidents involving Harmful Substances and Arbitration; and five Annexes which contain regulations for the prevention of various forms of pollution: pollution by oil (EIF 2/10/83); pollution by noxious liquid substances carried in bulk (EIF 06/04/87); pollution by harmful substances carried in packages, portable tanks, freight containers, or road or rail tank wagons, etc (EIF 01/07/92).; pollution by sewage from ships (EIF not yet); and pollution by garbage from ships (EIF 31/12/98t)¹⁰. Since this is global convention and it is equally binding to land-locked countries as well as other countries.

- 2.1.3 **SOLAS Convention:** SOLAS convention is for the safety of life at sea. Its first version of the treaty was passed in 1914, prescribed number of lifeboats and other necessary equipment along with safety procedure (after the sinking of the Titanic) as well as continuous radio watches. After that newer versions were adopted gradually in 1929, 1948, 1960 and 1974.

The SOLAS conventions have covered many aspects of safety at sea. The industrial revolution of the eighteenth and nineteenth centuries and the upsurge in international commerce which followed resulted in the adoption of a number of international treaties related to shipping, including safety. The subjects covered included tonnage measurement, the prevention of collisions, signaling and others. By the end of the nineteenth century suggestions had even been made for the creation of a permanent international maritime body to deal with these and future measures. The plan was not put into effect, but international co-operation continued in the twentieth century, with the adoption of still more internationally-developed treaties. By the time IMO came into existence in 1958, several important international conventions had already been developed, including the International Convention for the Safety of Life at Sea of 1948, the International

¹⁰ <http://rod.eionet.europa.eu/instruments/498> (date: 2010/5/25)

Convention for the Prevention of Pollution of the Sea by Oil of 1954 and treaties dealing with load lines and the prevention of collisions at sea. IMO was made responsible for ensuring that the majority of these conventions were kept up to date. It was also given the task of developing new conventions as and when the need arose.

The creation of IMO coincided with a period of tremendous change in world shipping and the Organization was kept busy from the start developing new conventions and ensuring that existing instruments kept pace with changes in shipping technology. It is now responsible for nearly 50 international conventions and agreements and has adopted numerous protocols and amendments.¹¹ This convention is a legally binding source for all countries including land locked.

2.2 Regional treaties

The international regional regime regulating the land-locked states' right of access to the sea is represented by the set of regional treaties covering the particular relationships of the coastal and land-locked states such as navigation through the international rivers, marine pollution from land-based sources, etc. For instance, the Convention regarding the regime of navigation on the Danube, 1948 (1948 Danube Convention) establishes the regime applied to the navigable part of the Danube River that crosses a set of land-locked states in the Eastern Europe including, inter alia, Hungary, Slovakia and Serbia. In accordance with article 1 of the 1948 Danube Convention navigation on the Danube shall be free and open for the nationals, vessels of commerce and goods of all States, on a footing of equality in regard to port and navigation charges and conditions for merchant shipping. In this context the considered regional regime explicitly provides the exercise of right of access of land-locked states to the sea guaranteed by the provisions of Part X of the UNCLOS.

Another issue that can be developed in the context of the role of land-locked states in international law of the sea is a cooperation for the prevention, reduction and control of pollution to marine environment from the land-based sources. The obvious example of the regional international treaty related to the given issue is the Convention for the Protection of Marine Environment of the North-East Atlantic, 1992 (OSPAR Convention). The article 3 of the OSPAR Convention provides the obligation of the states regardless whether they are coastal or land-locked, to take all possible steps to prevent and eliminate pollution from land-based sources. Moreover, taking into account the existence of transboundary watercourses laying through the land-locked states such as Switzerland, Liechtenstein, Austria and Luxembourg crossed by the Rhine and its tributaries,

¹¹ http://www.imo.org/Conventions/contents.asp?header=false&topic_id=148&doc_id=637 (2010/5/25)

the role of land-locked states in the international cooperation under the regime of OSPAR Convention is essential.

The regional international treaties which were discussed previously specify the global provisions regulating an international legal status of the land-locked states in the maritime matters and can be continuously detailed through the bilateral agreements between the states.

2.3 Sub-regional/bilateral treaties:

The right to navigation through the territorial sea and EEZ and on the high seas is of limited benefit to landlocked states unless they also have the right of access to the sea across the territory of states lying between landlocked states and the sea. Right of access are, however, granted under bilateral treaties of friendship, commerce and navigation and, for the forty States parties to it (which includes six landlocked states), under the 1923 Convention and statute on the international regime of maritime ports.¹²

There are number of bilateral treaties between landlocked and port states for transit. For instance in the Europe the agreement of 1958 on international transport by road concluded between Austria and Belgium, and the agreement of 1964 on certain categories of international passenger transport by road. Likewise in 1959 an agreement on transport of goods and on non-scheduled bus services was also concluded between Austria and the Netherlands. There are also treaties between Hungary and Yugoslavia in 1962 for establishing regulation for the transport of goods by lorry or similar motor vehicle and related customs procedures and in 1965 concerning cooperation and mutual assistance on customs matters. There is also a treaty in 1963 between Czechoslovakia and Hungary on trade and navigating on the Danube.

There is one agreement between Nepal and India in 1960 and one with 1963 with Pakistan. By this agreement Nepal can enjoyed certain privileges beyond the right of transit, like specific customs procedure and storage facilities at the Port of Calcutta. The agreement with Pakistan provides for freedom of transit. Indo-Nepal Treaties of Trade, of Transit and agreement for co-operation to control unauthorized trade 1991 has given certain rights to land-locked county Nepal to access to the port of India. It has been discussed later about the key provision and the evaluation of Indo-Nepal transit treaty with the UNLOSC III.

In Africa some bilateral agreement like one in 1963 one agreement concluded between Mali and Senegal which allows for the use of Senegal port facilities for transit traffic to and from Mali. And another for regulates pubic road transport including transit to the sea between Upper Volta and Ghana.

In the Latina America a number of treaties exist between Bolivia and other South American states regard to the right of access to the sea. A treaty between Bolivia and Argentina of Nov. 19, 1937 recognizes the; principle of free transit' by road, rail or sea. Another agreement of sep. 19, 1964 provides for a free zone for Bolivia in the port of Barranqueras in Argentine; similar treaties of April 22, 1966 and Dec. 11,

¹² Supra note 4, P. 435

1968 provide for such free zones in the ports of San Nicholas and Rosario.¹³ Similarly the treaties of March 29, 1958 between Bolivia and Brazil also concern Numbers “free Zones” in various ports.

2.4.1 Judicial decisions: Judicial decisions are considered as precedent and applicable for the similar case. Actually judicial decision fulfill the vacuum of law. For the international legal sources relating to the regulation of the land –locked state’s right of access to the sea here are some judicial decision as references:

Right of passage case -1960: the case concerning right of passage over Indian Territory (Portugal V. India) was referred to the court by an application filed on 22 Dec. 1955. In that application the government of Portugal stated that its territory in the Indian Peninsula included two enclaves surrounded by the Territory of India, Dadra and Nagar. It was in respect of the communications between those enclaves and the coastal district of Daman, and between each other, that the question arose of a right of passage in favor of gal through Indian Territory and of a correlative obligation binding upon India. The prevented Portugal from exercising that right of passage and that Portugal was thus placed in a position in which it becomes impossible for it to exercise its rights of sovereignty over the enclaves.

Even though both India and Portugal were bound by GATT at the time of the dispute and thus India should, under GATT have allowed transit right for at least some traffic from the Portuguese enclaves. It is difficult to see why Portugal’s Council did not rest the claims of transit on the explicit provisions in GATT, but perhaps the complexities of the contractual agreements within the international community are such that rights of transit embodied in a vast multilateral agreement, presumably as rights of secondary importance, were overlooked.¹⁴

2.5 Customs

Customary law is one of the important regulators in determination of the legal status of land locked state in exercise of its right of access to the sea. Among the authors there has been continuing a dispute about the issue whether the right of transit of the land-locked state through the territory of the coastal states has become a part of international customary law or not. The analysis of the legal literature on this theme can provide a dominative point of view to this problem. The most of the legal researchers consider that the right of the transit of the land-locked state has not become the custom¹⁵. The same position is also supported by R.R. Churchill and A.V. Lowe¹⁶. However, a brief overview of the time when the vast majority of the discussed legal works have been written, leads to the

¹³ Ingrid Delupis, “*Land-locked states and the law of the sea*” © Stockholm institute for Scandinavian Law 1957-2009

¹⁴ *ibid*

¹⁵ The review of the legal works is presented in R.R. Churchill and A.V. Lowe, *The law of the sea*, Manchester University Press, Manchester, UK, third edition, 1999, p. 441.

¹⁶ *Ibid.*, p. 441.

conclusion that the given articles being written more than 30-40 years ago does not reflect the current legal situation.

Since that time there has been adopted the UNCLOS, 1982 having formulated a freedom of transit through the territory of transit states in its article 125 (1). The UNCLOS has become internationally spread and wide implemented global legal act regulating maritime issues. To the present time among the more than 190 states the UNCLOS has been ratified by the 160 states including many land-locked states such as Austria (1995), Slovakia (1996), Mongolia (1996), Nepal (1998), etc. By this way the provisions of the UNCLOS granting right of transit to the land-locked states has been enforced through the regional and bilateral agreements and state practice. To the reason of the world implementation of the article 125 of the UNCLOS the right of transit across the territory of transit states can be considered now as a part of current international customary law.

The role of the custom in the regulation of the relationships between the land-locked states and transit states (mostly, coastal states) is increasing from the global level of regulation to the regional and local levels. It can be explained by the detailed character of the direct intercourses between the states that makes a ground for developing informal rules and then, the local customs. The demonstrative example of the local custom can be given by the Right of Passage case¹⁷ considered by the International Court of Justice in 1960. In this case the Court confirmed the Portuguese right of transit through the Indian territory as based on the local custom.

2.6 General principles of law

In accordance with article 38 (1) (c) of the UNCLOS, the general principles of law recognized by civilized nations are one of the sources of international law. The general principles are seldom applied to the disputing situation directly. More often are the cases when the principles act through the concrete treaty or customary provisions. In this respect the general principles of law vector the development of law and give a legal sense to normative sources. However, in some cases the principles can be applied directly. Mostly it is related to the situations of lack of treaty and customary rules to resolve the disputing moments between the states. In such cases the general principles of law fulfill the legal gaps in international normative regulation playing the role of sufficient source of international law. In other cases the principles can be used for interpretation of already existing international norms which due to the different reasons are considerably uncertain to be applied.

The general principles which can be related to the formulation of the status of land-locked states with regard to their right of transit across the territory of transit states include, inter alia, basic principles of human rights, need for good faith, principle of good neighborliness, etc.¹⁸ The last mentioned principle is quite essential in the relationships between the land-locked and transit states. In this regard the principle of good neighborliness stimulates the productive conduct of

¹⁷ Right of Passage case

¹⁸ See in details P.W. Birnie, A.E. Boyle and C. Redgwell, *International Law and the Environment*, Oxford University Press, New York, USA, third edition, 2009, p.p. 26 – 28.

the states in the process of formalizing the access of the land-locked state to the sea and promotes the consistent state practice under the rules of international law and its general principles.

3. Global legal status of land locked state in exercise of its right of access to the sea.

Terms (Land locked state, transit state.....)

Leaving aside technical issues relating to statehood, the term 'land-locked state' gives rise to no particular problems of definition. In both law and geography, it connotes a State which has no sea-coast and which must, therefore, rely on one or more neighboring countries for access to the sea.¹⁹ It follows from LOSC Article 124 (1) that a "land-locked States" means a state which has no sea-coast"

Evidently, the main point of unity among land-locked states is their remoteness from the sea. However, even in this respect, it should not be assumed that there are no substantial differences among land-locked countries. Remoteness from the sea is largely a question of degree, and for this reason it may be said that some land-locked states are less geographically handicapped than other.²⁰

Land-locked states need the access to the sea through the other states which is called transit states. Art. 124 (1)(b) of LOSC 1982 says that "Transit state" means a state, with or without a sea-coast, situated between a land-locked state and the sea, through whose territory traffic in transit passes. For instance- Nepal is land locked country and India, Bangladesh are transit states for Nepal, for Mali; Senegal is transit state, for Bolivia; the other South American states including Argentina is transit states. Land locked states seeks transit state facility to access to the sea.

3.1 Right of land locked states of access to the sea

The question is often asked that whether land-locked states have any general right to reach the sea or weather there is scope of the right of access of land-locked state to the sea? As far as the law of the sea concern, land locked states rises three main question:

1. the right of landlocked states' ships to navigate on the sea
2. the access of landlocked states in marine resources;
3. the access of landlocked states to the sea²¹

¹⁹ Stephen C. Vasciannie, *Land-locked and Geographically disadvantaged states in the international law of the sea*, Clarendon Press Oxford, 1990 P. 4

²⁰ Ibid P. 5

²¹ Supra note 4, p. 433

However, my main concern is in the third question, since other questions are relatively important after the third is defined. It means, once the rights of land locked states to access to the sea is clarified then 1 and 2 question come afterwards.

There are no general rights for foreign merchant ships of entry into ports in customary law, but the position in treaty law is very different, for many treaties confer rights of entry. Mainly these treaties we can find in bilateral treaties of ‘friendship, commerce and navigation’,²²

However one case where there is a clear customary law right of entry to ports concerns ships in distress. If a ship needs to enter a port of internal waters to shelter in order to preserve human life, international law gives it a right of entry this was recognized in cases such as the *Creole* (1853) and the *Rebecca* or *Kate A. Hoff* case (1929)²³

3.2 Transit and Access in the 1982 Convention

Part X of the 1982 LOSC (Article 124-132) specially a number of rules concerning the right of access of land-locked states to and from the sea. The main provision in this regard is to be found in Article 125 of the 1982 convention. It provides that: “

1. Land-Locked states shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, Land-Locked states shall enjoy freedom of transit through the territory of transit states by all means of transport.
2. The terms and modalities for exercising freedom of transit shall be agreed between the Land-Locked states and transit states concerning through bilateral, sub-regional or regional agreements.
3. Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take to all measures necessary to ensure that the rights and facilities provided for in this Part for Land-Locked states shall in no way infringe their legitimate interests.”

This article does four key effects. First, it guarantees the right of free access to and from the sea to landlocked states. Second, it also guarantees to them freedom of transit without any prerequisite if this freedom is to be exercised in relation to the right of free access to and from the sea. Third, it does not require a bilateral treaty with the transit state to be able to exercise the right of free access and freedom of transit. Only the detailed provisions of a technical character regarding the terms and modalities provisions of a technical character regarding the terms and modalities for exercising freedom of transit have to be agreed upon with the transit state. However, the actual right to exercise this freedom is itself no longer dependent on a bilateral agreement with the transit state, fourth, breaking from the Barcelona tradition, it eliminates the requirement of reciprocity.²⁴

²² Ibid P.63

²³ id

²⁴ Surya P. Subedi, *Dynamics of Foreign Policy and Law* (A study of Indo-Nepal Relations), Oxford University Press-2005, P.68

The provision of the Convention are however not trouble free in regards of landlocked states. For example, it still leaves undefined the concept of the legitimate interests of transit states. Under the pretext of the protection of legitimate interests, transit countries can critically challenge the rights and freedoms of landlocked countries. The term *legitimate interests* can be and has been interpreted by transit states according to their convenience. For instance, during UNCLOS III, India states that in endorsing the right of landlocked states, ‘the legitimate interests of the coastal or transit state should also be borne in mind. Such interest might relate to the determination of routes and the protection of the security interests of the transit states’. Accordingly, India used this approach to seriously impede Nepal’s access to and from the sea in 1989 when Nepal and India had some difference on other trade and political issues that had very little to do with the exercise of Nepal’s transit rights.²⁵

Articles 124 through 132 of the present draft Convention now address the rights of access and free transit of land locked states. Article 124 defines relevant terms, and article 125 established the general principle of access and free transit. The right is accorded for the express purpose of exercising other rights provided in the Convention, ‘including those relating to the freedom of the high sea and the common heritage of mankind’. Transit states are authorized to take “all measures necessary” in protection of their legitimate sovereign interests. Article 126 excludes application of the most-favored-nation clause to privileges accorded under the convention, and also immunizes all agreements granting special rights of access or facilities base on the geographic position of Land-Locked states. Art. 127 exempts traffic in transit from customs duties, taxes or other charges, with the exception of fees levied for specific service provided. In addition, the means of transit and facilities provided for Land-Locked states are not subject to taxes or other charges higher than those levied on transport of the transit state. Art. 128 allow the provision of free zones or other customs facilities at ports of entry and exist in the transit state when agreed upon by the states concerned. Art. 129 importune transit states to cooperate with their Land-Locked neighbors in construction or improvement of means of transport in the transit state. Art. 130 obligate transit states to take ‘all appropriate measure to avoid delays or other difficulties of a technical nature in traffic in transit’. If delays or difficulties should occur, the competent authorities of both states are required to cooperate in their expeditious elimination. Art. 131 states that ships flying the flag of Land-Locked states are to enjoy treatment equal with that accorded other foreign ships in maritime ports. Finally, Art. 132 provides for continued operation existing facilities greater than those mandated by the convention, if the parties so desire, and grants of greater facilities in the future also are not precluded.²⁶

Part X of the convention, in setting out particular features of the right of access, indicates that provisions in favour of Land-Locked states shall not be subject to the most-favored-nation clause, and that traffic in transit shall not be subject to customs duties, taxes or

²⁵ Ibid p. 69

²⁶ A. Mpaszi Sinjela, *Freedom of transit and the right of access for Land-Locked states: the evolution of principle and law*, Heinonline—12 Ga. J. Int’l & Comp. L. 50 1982

other charges save for charges levied for specific services; similarly, the means of transport in transit and other facilities provided for and used by Land-Locked states shall not be subject to taxes or charges higher than those levied for the use of means of transport of the transit state. Part X also allows transit states to establish, by agreement, free zones and other customs facilities for the benefit of Land-Locked, and contemplates that transit states and their Land-Locked counterparts may co-operate in the construction or improvement of transportation facilities in transit states. Transit states are required to take appropriate measures to avoid delays and technical problems for traffic in transit, and ships flying the flag of Land-Locked states shall enjoy treatment equal to that accorded to other foreign ships in maritime ports. Finally, the 1982 convention as a whole does not derogate from any greater rights in respect of transit that Land-Locked states may have, by agreement, with particular transit states.²⁷

But the article still leaves the landlocked countries in an unsatisfactory position. The key concepts are couched in ambiguous and inconsistent language. Which the landlocked countries are recognized to have a 'right' of access to the sea, transit is called a 'freedom'. On the other hand, transit states have the 'right' to take all necessary measures to protect their legitimate interests. Yet the terms and modalities for the exercise of the freedom of transit are left for agreement between the landlocked and transit states. In specific terms, therefore, what does the article guarantee land-locked countries? In order to understand the problems that the article presents it is necessary to explore the meaning of its provisions in depth.²⁸

Specifically, it is to be noted that part X describes access to the sea as a enforceable against states parties to the LOSC. The particular form of words used in Article 125(1) of the 1982 convention (quoted above) also reflects a significant shift away from the terminology of the High Seas Convention, in favour of land locked states. Article 3 of High Seas Convention indicates that states without coastlines 'should' have free access to the sea, but it fails to specify in definite terms whether this means that states parties to the High Seas Convention are legally bound to provide access for their land-locked counterparts, or whether they have only a moral obligation to do so. This point of uncertainty has been removed with respect to land locked and transit states that are party to the 1982; it remains for states that are party only to the High Seas Convention. If a transit state is party to neither the LOSC nor the High Seas Convention, then, the rules of customary international law would apply: the better view is that the rules set out in the High Seas Convention reflect customary international law on the point of access to the sea for land-locked states.²⁹

Thus, the LOSC sets out a legal rule in favour of transit rights for land-locked states. On the other hand, it is not altogether clear that land-locked states have a legal right of access to the sea across the territory of transit states that have ratified only the High Seas

²⁷ Dr. Stephen Vasciannie, *Land-Locked and Geographically disadvantaged states*, Heinonline—31 commw. L. Bull. 60-60, 2005

²⁸ Ibrahim J. Wani, *An evaluation of the convention on the law of the sea from the perspective of the landlocked states*, Heinonline—22 Va. J. Int'l L. 641 1981-1992

²⁹ Supra note 27

Convention, or across the territory of transit states that have ratified neither the law of the sea convention nor the High Seas Convention³⁰. This issue should be discussed in further.

3.3 Practices

The terms and modalities for exercising the freedom of transit are left to agreement between the landlocked and transit state. Perhaps by using the word 'shall' the convention suggests an obligation to enter into an agreement. Indeed, the UNLOSC, which is the latest word on the right of free access to and from the sea of landlocked states, speaks of the need for regional and sub-regional cooperation agreements for the implementation of the rights secured under the convention. One cannot agree more with Professor Glassner when he states that economic cooperation 'short of complete economic and /or political integration' among landlocked and their transit states, 'is the only way that the handicap of landlocked ness can be overcome.³¹ But this raises some difficulties. Can an international convention impose such an obligation without an express statement to that effect? If the transit state refuses to enter into such an agreement impossible, or creates conditions that make agreement impossible, what remedy would the land locked states have? This obligation seems to be in the category of an 'imperfect right' incapable of being enforced against the will of the state possessing the territory. If that is so, it would be without substance.³² To avoid problems these could have been defined in more specific language, as in the case of the provisions on innocent passage in the convention (Art. 21 specially allows the coastal state to establish laws and regulations relating to "the prevention of infringements of the customs, fiscal, immigration or sanitary laws and regulation of the coastal state"). Some provisions for compulsory dispute settlement should also have been considered for disputes arising under this part of the convention. Like Art. 297 enumerates the cases when "the exercise by a coastal state of its sovereign rights or jurisdiction provided for in this convention, shall be subject to" compulsory dispute settlement. Id. Art. 297 there is no reference to transit across the coastal state so it would be a fair inference that the issue of transit is excluded from compulsory dispute settlement.³³

Like any other group at UNCLOS III the landlocked countries lacked political homogeneity (the developed land-locked countries of Western Europe do not have the same problem of access and transit as the developing countries since the interests of the landlocked states in Western Europe have been guaranteed, either in regional and bilateral agreements, or as a matter of regional custom. The result was that the developed members of the group less priority to the question of transit and access than to the exclusive economic zone (EEZ) resources issue.)³⁴

African members of the Group were much more cohesive, and their policy preferences more reflective of coalition position than were, for instance, Middle Eastern members. Clearly, each region had its own agendas, driven, in part, by the fact that the African region comprises a large number of both land-locked and shelf countries, while the

³⁰ Ibid

³¹ Glassner, 'Introduction to the Fourth Edition', in his Bibliography on landlocked states, P. 7

³² Supra note 28, P. 643

³³ Supra note 31

³⁴ Supra note 28, P. 629

Middle East has no land-locked states and, therefore, has traditionally concerned itself very little with land-locked issues.³⁵ The ability of any negotiating group to influence a negotiation must be some function of their cumulative political strength. The conspicuous lack of such strength critically hindered the landlocked states in their efforts at these LOS negotiations. Even though certain members clearly did have influence beyond the group (the Federal Republic of Germany, for instance), their interests were, for most part, very different from those of the Group's least-developed members and their actions and policy preferences reflected this.³⁶

3.4 Future opportunities

It is argued here that, while there were some gains at UNCLOS III (reciprocity was eliminated from the Treaty provisions; the special needs of land locked states are acknowledged in numerous article of the convention), the emphasis in the future will clearly have to be in bilateral and multilateral arrangements. Considering the negotiations at the 1965 conference on Transit Trade of Land-Locked Countries and the UNCLOS III, it is fairly certain that the land-locked states' goal of international guarantees of access to coastal resources are viewed similarly to transit issues. The treaty grants to the coastal state sovereign rights to resources within its exclusive economic zone. Although certain treaty articles describe generally access provisions for land-locked states, it is unlikely that such provisions will impact directly the relations between them and resource- rich coastal states.

History and geography have forced on the land-locked states an uncertain future, in which they will continue to be overly dependent on transit and coastal states for access to the sea and its bounty. Certainly the guidance offered by existing international instruments will supply them with leverage when bargaining with other countries, but it will still be the reasoned relations between states, and not the strength of those instruments, that will continue to dominate their international relations (particularly those of land-locked states) for the foreseeable future.³⁷

Conclusion

The LOSC must be adopted as a package deal and a positive step toward these goals. Certainly, the success of the LOSC will be measured in large part by the number of participants it attracts, and this particularly true when evaluating the potential effectiveness of provisions for freedom of transit. Without the help of majority of transit states, the right of access recognized by the LOSC will be an empty and cynical gesture for many land locked states. The agreement between land locked states and transit states concern must be agreed with universal acceptance of an international law, for the daily administration of transit trade. The scope of the bilateral agreements nonetheless should be limited of an accommodation of local circumstances and facilitation of trade to implement the broader purpose of the convention. These terms may not be justifying this suspension of an otherwise valid right of access with absence of agreement.

³⁵ Robert E. Bowen, *The land-locked and geographically disadvantaged states and the law of the sea*, political geography quarterly, Vol. 5 NO. 1, January 1986 P66

³⁶ Ibid P 68

³⁷ id

Finally, it must be remembered that assured access to the oceans for land-locked states is but one focal point in a broad spectrum of legal and economic issues facing the international order today. Expanding use of the sea, and a concomitant heavier reliance on its resources, is inevitable in the coming years. The needs of developing countries, particularly those with no natural access to the sea, demand legal recognition if a new international economic order is to be realized. Implementation of the widest possible right of access is essential if these states are to attain their goals of economic development and enhanced quality of life for their people.³⁸

4 Implementation of the global legal rules regarding determination of the right of access of land locked states to the sea by the example of bilateral agreements between land locked state-Nepal and port state-India.

Historically, Nepal had pro-actively encouraged *entrepôt* (trading post where merchandise can be imported and exported without paying import duties) trade between Tibet and India and promoted self-reliant economy and political independence. Kathmandu Valley served as an urban economy and society which produced metal works, cloths and small industrial production and traded these products between Tibet and India.

Nepal's northern neighbor, China has never been a transit state for Nepal for third country trade and the movement of people and goods. High Himalayas in the north of Nepal pose formidable barriers, Tibet is sparsely populated and the great distances between Nepal and china's industrial heartland cities make trade highly costly. In fact, "China industrial heartland is on its eastern sea-bound, 5,000 km away by the train from Tibet". So far, Nepal has not signed any transit agreement with China.³⁹

Nepal-India transit treaty was signed in 1971. With the signing of this treaty, Nepal transit warehousing company limited (NTWC) have been established by the government to provide transit facilities for Nepalese exports and imports to and from abroad. This transit agreement with India is periodically renewed. Nepal has only one dry port at Birjung. Bangladesh has also offered Nepal an access to its seaports Chittagong, Khulna and Chalna. Nepal and Bangladesh are separated by a narrow piece of India territory of about 15 Km in the southeast. To promote trade between Nepal and Bangladesh, Nepal has been given Radhikapur route and importers and exporters have to liaison with Indian authorities. Bangladesh at the request of Nepal has constructed an Inland Container Depots (ICDs) at Banglaband.⁴⁰

³⁸ Supra note 26 P.52

³⁹ Tara Dahal, *Nepal as a Transit state: Emerging possibilities*, (<http://www.ifa.org.np/pdf/new4.pdf-27/7/2010>)

⁴⁰ Ibid

4.1 The Indo-Nepal problem from a legal perspective

In January 1956 when Economic Commission for Asia and Far East (ECAFE) considered the problems of its three landlocked members- Nepal, Afganistan and Laos, its recommendations specified the ‘needs’ of these countries, not their rights. In October 1964 on the recommendation of UN conference on Trade and Development (UNCTAD) a committee on preparation of a Draft Convention relating to the transit trade of landlocked countries convened its first conference. It was for the first time an international law making conference had dealt unequivocally with the question of landlocked countries’ access to the sea. During 1967-82 in the in the United Nations third law of he sea Conference (UNCLOS/III) landlocked states tried to achieve guaranteed rights of free transit to and from the sea and access to the resources of the sea by Article 125 of the 1982 LOSC.

Despite these provisions (Art. 125 of the LOSC), bilateral negotiation and agreements between Nepal and India govern the implication of the right of access to and from the sea. Recently, landlocked countries have joined the group of ‘Small and Vulnerable Economic’ of the UN in a bid for improved trade and transit access. The current WTO provisions on ‘freedom of transit’ have aimed to strengthen and operationalize the improved access of landlocked developing countries to world markets through their transit neighboring in the most effective and cost-effective manner. It also said that the transit service should be further liberalized to encourage competition and transit rules and regulations should be simplified, harmonized, streamlined and made transparent. The WTO provisions also provide technical assistance for the capacity building of landlocked states. (UN,2005:1). At the UN landlocked countries are binding solidarity and articulating their collective voices for self-revitalization and enhancement of competitiveness.⁴¹

As both countries are signatory to the 1982 convention, which inter alia, gurantees the right of free access for landlocked states (Art. 125 of LOSC-III), it could be argued that the signatories are obliged, under art. 18 of the 1969 Vienna Convention on the Law of Treaties, to which both Nepal and India are party, ‘to refrain from acts which would defeat the object and purpose’ of the convention. The states are obliged to implement and interpret the right of transit set out in the LOS Convention in good faith. Moreover, in the view of the mandatory character of Art. 125 (1) of the LOSC, and the approval of this provision by consensus during the UNCLOS III, the right of the free access as embodied in the 1982 convention could now be regarded as part of customary international law.⁴²

In so far as our discussion is concerned, India implicitly acknowledged during the 1989/90 crisis that the absence of an agreement did not excuse it from the obligation to provide access. Although P.V. Narasimha Rao, the then Indian parliament on 26 April 1989, states that as India was party neither to the 1965 convention on landlocked states nor to the 1982 convention on the LOS, ‘matter of transit, India has, strictly speaking, no

⁴¹ Id

⁴² Supra note. 24, p. 102

obligation towards Nepal'. He, nevertheless, acknowledged during the same speech that 'In the field of transit, a landlocked country has a right only to one transit route the sea under international law' (emphasis added).⁴³ Its was a proof that even in the lack of a transit treaty India allowed under very restrictive conditions and only through 15 transit route which were used by Nepal prior to the expiry of the old treaty for export and imports to and from third country. On this restriction Nepal had lunched a publicity campaign to gain support from the third countries to solve the problem with India, Indian officials were making strenuous efforts to convey the message that is had not any intention to deny Nepal rights of transit to the sea even in the absence of a transit treaty.⁴⁴ In this case the question could be rise that transit treaty should be treated as such under a separate treaty, because in absence of treaty where the transit is a necessary permanent condition for international trade for landlocked. Then one might ask, should the transit treaty be of permanent character? The answer can be both yes and no. 'Yes' in this sense because freedom of transit is recognized in international law, which should be incorporated in a permanent treaty whereby a change of government or mind of transit state would not affect the transit facilities of the landlocked country. Being landlocked is a permanent condition a treaty dealing with this condition, should also be of permanent character. 'No' in this sense that neither economic activities nor the population of the landlocked countries are static, and their requirement of transit facilities tend to expand. The legal provisions have to keep pace with the change in technology and science. Truly legal point of view too, a permanent transit treaty is not necessary if we accept the freedom of transit is established in international law. A freedom which has been already established does not need new documents to establish it. As India recognized Nepal's right of free access and freedom of transit under international law, there is o need to seek India's commitment through a permanent transit treaty.⁴⁵

Although it may be helpful to insert a clause on freedom of transit in a bilateral treaty of permanent character spelling out the basic nature of the overall relationship between the two countries, a transit treaty that also deals with the terms and modalities of transit cannot be of permanent character. Alternatively, the transit right may be incorporated in a permanent transit treaty, provided that the treaty contains only the basic principles of transit and the details on the terms and modalities of the exercise of this right are

⁴³ *Foreign Affairs Record*, 35/5 (New Delhi: May 1989), pp.131-3. here it should be noted that at the UNCLOS III, proposal were put forward by the Group of Landlocked and Geographically Disadvantaged states maintaining that the absence of a bilateral transit treaty could not be invoked by transit states to deny the right of free access to landlocked states . proposals dard 28 April 1976 (in R. Platzorder *Third United Nations Conference on the Law of the Sea: Documents* 4 [Oceana Publications 1984], p. 332) and *ibid.* (28 June 1977), 381 at p. 387. as none of these proposals was incorporated in the LOSC, India could have argued that it is not obligated to grant transit facilities to Nepal in the absence of a transit treaty with India but it did not adopt this approach. This may be due to her convection that transit is a right of a landlocked Nepal as well as the principle, as Freid writed, that 'international law does not permit, except for reasons recognized by it, to harm or, in the extreme case, a sit were, to blockade another country by cutting off its transit trade'. John H.E. Fried, 'The 1965 Convention on Transit Trade of Land-Locked states', *Indian Journal of International law* 6 (1966) 9-30 at 16.

⁴⁴ Times of India (17 April 1989).

⁴⁵ *Supra* note 24 P.108

incorporated in the protocols attached to it which could be reviewed periodically without affecting the main treaty.⁴⁶

4.2 Nepal's Transit Arrangements with India

Back ground

After India achieved freedom in 1945 from England, a treaty of trade and Commerce was concluded by Nepal with India in 1950. India recognized in favour of Nepal 'full and unrestricted right of *Commercial transit*' under this transit.⁴⁷ The facilities provided for such transit were generally favorable to Nepal although this right was restricted to commercial transit. The trade and transit treaty of 1960 between the two countries replaced the 1950 treaty of trade and commerce.

On 31 October 1970 when this treaty expired, Nepal wanted to conclude two treaties, one governing the right of transit and the other dealing with bilateral trade. India, however, wanted both these subjects to be dealt with within a single treaty, maintaining that both were interrelated. As the differences could not be sorted out, Nepal proposed that the status quo of the expired treaty be maintained for another year to enable both side to hold more talks towards concluding a new treaty. India declined this plea too and, according to Nepalese officials resorted to pressure tactics by imposing restrictions on the export-import trade with Nepal and even stopped the supply of essential commodities to her. In Nepal, this action's on India's part was characterized as 'economic blockade'.⁴⁸

Nepal and India concluded on 17 March 1978 two separate treaties, after expiry of the 1971 treaty of trade and transit, one governing transit facilities and the other governing trade. With the adoption of the treaties Nepal achieved some advantage. Like, first Nepal had secured a special treaty on transit, its long –standing demand. Second, the new transit treaty recognized that 'Nepal as a land locked country needs access to and from the sea to promote its international trade.'⁴⁹ Third Nepal got the necessary overland transit facilities through Indian Territory (Radhika Pur route) which provided by consent of India. Fourth, the transit treaty was for 7 years while the trade treaty was concluded for 5 years. It was assumed that this understanding would make future consultation easier and matters of bilateral trade would not creep in during negotiations for a transit treaty.

4.3 Key Provisions of the 1991 Transit Treaty

It is said that the 1991 Indio-Nepal transit treaty is repeats with minor amendments and alterations, the provision of 1978.⁵⁰ 'To promote Nepal's international trade, it needs access to and from the sea of India' this has been recognized by the preamble of the Treaty. But this recognition is thinned by the insertion in the treaty of the principle

⁴⁶ ibid

⁴⁷ Art.1 of the treaty. See Bhasin, p. 124

⁴⁸ Supra note 24, P. 109

⁴⁹ Preamble to the treaty of transit. See, for text of the treaty, Surya P. Subedi, Land-locked Nepal and International Law (Kathmandu: 1989), pp. 85-112.

⁵⁰ For an assessment of the 1978 Transit Treaty, Sudip, op.sit.ch.3.

reciprocity. Moreover, this treaty has lack to point out that Nepal as a landlocked country has the right to free access to and from the sea or needs access to and from the sea to enjoy the self-determination of the high seas. Under Article I of the Transit Treaty 1991, the contracting parties Nepal and India agreed that:

The contracting parties shall to 'traffic in transit' freedom if transit across their respective territories through routes mutually agreed upon. No distinction shall be made which is based on flag of vessels, the places of origin, departure, entry, exit, destination, ownership of goods or vessels.

According to this article Nepal's transit rights is subject of reciprocity, which is not reliable with the concept of a right of free access of landlocked states. According to Art. 125 of the LOSC, the right of free access to and from the sea is not subject to reciprocity but is unilaterally and solely available to landlocked states.⁵¹

Art. III of the Transit Treaty defines the term 'traffic in transit' however the definition is narrower than that provided for in the Barcelona statute on Freedom of Transit, let alone the LOSC. Among other things, the definition excludes persons, accompanied baggage and most essentially the means of transport. Art. IV explains traffic in transit from customs duties or other charges except reasonable charges for transportation and such other charges as are commensurate with the costs of services rendered in respect of such transit'. In article V for convenience of traffic-in-transit, the contracting parties agree to provide at point or points of entry to exit, on such terms as may be mutually agreed upon and subject to their relevant laws and regulations prevailing in either country, warehouses or sheds, for the storage traffic-in-transit awaiting customs clearance before onward transmission. According to Art. VII in order to enjoy the freedom of the high seas, merchant ship sailing under the flag of Nepal shall be accorded, subject to Indian law and regulations, treatment no less favorable than that accorded to ship of any other foreign country in respect of matters relating to navigation entry into and departure from the ports, use of ports and harbor facilities as well as loading and unloading dues, taxes and other levies, except that the provisions of this article shall not extend to coastal trade. Even Nepal does not have any warship in present; this article should have extended this facility to all ships flying the Nepal flag as Nepal may in the future need warship to protect its commerce and fishing vessels in the high seas and the Indian and may be Bangladesh's EEZ under Art. 69 of the LOSC when it enters into force.⁵²

Article II, VIII and IX of the Transit Treaty 1991, these oblige several types of restriction in the freedom of transit accord to traffic in transit. Whereas limitations of Art. VIII and IX seem Justifiable as being generally in line with international practice, the limitations imposed under Art. II raise a few queries. It follows from this article that:

⁵¹ Supra note 24 p. 111

⁵² Surya P. Subedi, 'the Marine Fishery Rights of Land-locked states with particular Reference to the EEZ', *International Journal of Estuarine and Coastal Law* 2/4 (1987), 277-39.

- (a) Each Contracting Party shall have the right to take all indispensable measures to ensure that such freedom, accorded by it on its territory does not in any way infringe its legitimate interests of any kind.
- (b) Nothing in this treaty shall prevent either Contracting Party from taking any measures which may be necessary for the protection of its essential security interests.

The vague words ‘all indispensable measures’ and ‘legitimate interests of any kind might allow an obdurate government, and especially during friction between two countries, to impose unnecessary limitations on Nepal’s transit rights: they should be more specific in ‘measures’. In the lack of any sign of what may be regarded as ‘indispensable measure’ and ‘legitimate interests’, India may reflect on itself free to impose any restrictions deemed ‘necessary’ by it to defend its ‘legitimate interests’. In reality, the limitation imposed under Art. II (b) suffices to cover the key purpose of limitations. It is arbitrary, undesirable and ambiguous, the limitation imposed under Art. II (a). As the boundaries imposed under Art. VIII and IX of the transit treaty are intended to protect those interests of India which could properly be called ‘legitimate interests’. It is not apparent what other interests are intended to be protected under Art. II (a).⁵³

4.4 Additional Port facilities in India

The protocol of treaty of transit designates 15 routes for Nepal’s traffic in transit. This permits Nepal to use Indian roads and rails facilities as well.

At present, the Exim (Export-Import) trade of Nepal with third countries is being routed through the port of Kolkata and Haldia, situated on the East Coast of India. But due to draft limitation at these Ports, the containers are being transhipped en route and transported by feeder vessels resulting in unduly long transit time and high transportation cost lowering the trade competitiveness of Nepal. In the view of these, the Government of Nepal requested India to provide a second transit point in addition to Kolkata Port. The Government of India agreed to consider utilization of Jawaharlal Nehru Port for Nepal’s use for canalizing its transit cargo and asked Nepal for a rational, including projection of traffic and the related details. In the recently held inter-governmental committee (IGC) meeting in New Delhi, avenues have been opened to consider pre-feasibility of other ports of India also. Against such a backdrop, a team headed by the Joint Secretary, Ministry of Commerce and supplies, has been constituted for conduction the study and submitting a report.⁵⁴

Out of the above, the Birjung-Raxual border point handles a large chunk of the trade.the connectivity at this border point are Birjung-Raxual (road) and Raxual-ICD Sirsia (rail), being the only rail connectivity between the two countries at present. At the ICD, the container traffic of the third countries as well as bilateral traffic with India is handled. Hence the traffic handled at the ICD has been taken as the basis for the study. The rail service agreement between ministry of railways, government of India and ministry of

⁵³ Supra note 24 p. 112

⁵⁴ Report of the Nepal international transport development board, *Additional port facilities in India for Nepal’s Exim trade with third countries*, 2009 p. 9

industry, commerce and supplies, government of Nepal for operating and managing the rail service between Kalkata/Haldia ports in India and Birjunj in Nepal via Raxaul in India for transit traffic and between stations on Indian Railways and Birjung Via raxaul for bilateral traffic.⁵⁵

4.5 Evaluation of the Indo-Nepal transit treaty in the light of the right of access to sea set forth in the LOS Convention

In contrast to the stance taken by New Delhi during the Indo-Nepal stalemate that under international law Nepal was permitted to only one transit route, Nepal seems to have achieved a reasonable transit treaty with India as the latter approved to the Nepalese stipulate for a separate treaty on transit and for 15 transit route. For Nepal's trade with or via Bangladesh, India approved to continue to endow with overland transit facilities through Radhikapur. This could well be hailed as a achievement. But, the truth is that the entire work out on the right of landlocked states during UNCLOS III and the integration in the resulting 1982 Law of the Sea Convention right of free access of landlocked states does not seem to have prejudiced the latest treaty. Nor, apparently, has account been in apply of other requirements of the LOSC in landlocked states. For example, the transit treaty ignores not only Art. 125(1), but also Art. 126 of the LOSC. India's recognition neither of Nepal's 'right' of free access to and from the sea nor Nepal has secured simplified exports and imports procedures.⁵⁶ No new allowance protected and no new conveniences have been added. Most prominent of all is the incorporation in the treaty of the principle of reciprocity. The abolition of the condition of reciprocity in part X of the LOSC represented a major breakthrough for the landlocked states, but if a bilateral transit treaty accomplished virtually ten years after the conclusion of the LOSC still embodies the principle of reciprocity it could be regarded, for the international law point of view, as disastrous.⁵⁷

Along with other deficiencies of the 1991 transit treaty is the absence of a dispute decision provision. As the transit dispute has frequently soured the entire Indo-Nepal correlation as a whole, it was high time to provide for a dispute resolution instrument in the treaty. As both Nepal and India are party to the Barcelona Convention and the statute on freedom on transit, any dispute arising from matters covered by the statute could be taken for negotiation before the international court of justice (ICJ) in according with Art. 13 of the statute, which provides that disputes relating to the interpretation or application of the statute could be brought before the former Permanent Court International Justice (PCIJ), and Art. 37 of the statute of the International Court of Justice, to which both Nepal and India are party, which states that whenever a treaty or convention in force provides for reference of a matter to the PCIJ, the matter shall, as between the parties to the present statute, be referred by the ICJ. But, there are many matters in the transit treaty

⁵⁵ *ibid*

⁵⁶ For a discussion on cumbersome customs and transit procedure, Subedi, *op. cit.*, ch.3 pilferage of Nepalese good on India railways increases Nepalese export costs. According to a research, transit expenditure consumes 8 % of Nepal's GDP. See. *Far Eastern Economic Review* (8 March 1990), p. 24

⁵⁷ *Supra* note 24 p.113

which are not covered by the Barcelona Convention and the Statute, and for such matters no international tribunals has jurisdiction, unless states, by special agreement, consent to take the case to an international tribunal or to the ICJ.⁵⁸

At first momentary look, Kathmandu's conceding of reciprocal transit facilities to India do not sound disastrous so long as India is interested only in securing general transit conveniences in the event of need. In reality, India too is entitled to assured transit facilities under the general principle of the freedom of transit.⁵⁹ The truth however is that Nepal's work out of the right of free access to and from the sea should not be made dependent on Nepal's granting parallel facilities to India which is not landlocked. It is almost not justifiable to inquire Nepal to tender similar facilities in return for something that is accessible to Nepal by virtue of its being landlocked. As the 1991 treaty is projected to grant transit facilities to Nepal for her access to the sea, the reciprocity prerequisite seems, in practical terms, worthless, as landlocked Nepal, by definition, lacks the means no reciprocate. Actually there is no any transit trade of India through Nepal, and it does not need Nepal's land for India's international trade. It seems, for only the political leverage, India employed this reciprocity clause. Furthermore, the requisite of reciprocity incorporated in Art. 1 of the transit treaty is not consistent with India's own admission in the preamble to the treaty that 'Nepal as a landlocked country needs access to and from the sea to promote its international trade'.⁶⁰

The concept of reciprocity, as the Indo-Nepal relationship is concerned, raises numerous issues. As stated before, India wished to bind Nepal's transit right to other issues like bilateral trade, dealing of Indians living in Nepal, India's strategic interests. The reason is Nepal and India has a most complex bilateral relationship governed by a number of treaties some of which are quite indistinct and outdated.⁶¹

However, the new transit treaty represents some achievement for Nepal in the logic that India, a regional superpower and a traditional transit state, agreed after all this legal squabbling to conclude a separate treaty on transit and conceded to the Nepalese stipulate to have 15 transit routes reinstated by the new treaty. The division of transit matters from other bilateral issues is a essential to Nepal and the new transit treaty has achieved this goal. From this, Nepal can hope that India will not try again in the future to exert pressure on Nepal by mixing the question of transit facilities with other bilateral matters. In that case Nepal's right of access will have been strengthened as a legal right rather than as facilities dependent on the transit state's goodwill.⁶²

5. Conclusion

⁵⁸ Ibid p. 118

⁵⁹ Art. 2 of the Barcelona statute on Freedom of Transit provides a general freedom of transit for all states party too it. This general freedom of transit is however limited to transit by rail or waterway.

⁶⁰ Supra note 24 p. 114

⁶¹ ibid

⁶² id

Obliviously, the LOSC must be approved as a package deal and a affirmative footstep toward these objectives and the success of the LOSC will be considered in large part by the number of participants it create a center of attention, and this particularly true when evaluating the prospective effectiveness of provisions of freedom of transit. The agreement between land locked states and transit states concern must be agreed with universal acceptance of an international law, human rights, need for good faith, and principle of good neighborliness for the daily administration of transit trade. Without the cooperation of transit states, the right of access documented by UNLOSC will be an empty and cynical gesture for land locked states.

Part X of the LOSC (art. 124-132) specially a number of rules concerning the right of access of land-locked states to and from the sea. However, the article still leaves the landlocked countries in an inadequate situation. The key concepts are couched in ambiguous and inconsistent language. Which the landlocked countries are recognized to have a 'right' of access to the sea, transit is called a 'freedom'. On the other hand, transit states have the 'right' to take all necessary measures to protect their legitimate interests. Yet the terms and modalities for the exercise of the freedom of transit are left for agreement between the landlocked and transit states. In specific terms, therefore, what does the article guarantee land-locked countries? In order to understand the problems that the article presents it is necessary to explore the meaning of its provisions in depth.

Nepal and India have very old relationship in culturally, geographically, economically. They don't need passport and other travel document to travel each other countries. They have various type of bilateral agreement in various sectors. However India is a largest country in south Asia and economically in good condition in the contrast of Nepal. The right to access to and from sea has been established by new transit treaty 1991.

In contrast to the stance taken by New Delhi during the Indo-Nepal stalemate that under international law. Nepal was permitted to only one transit route, Nepal seems to have achieved a reasonable transit treaty with India as the latter approved to the Nepalese stipulate for a separate treaty on transit and for 15 transit route. For Nepal's trade with or via Bangladesh, India approved to continue to endow with overland transit facilities through Radhikapur. For example, the transit treaty ignores not only Art. In reality, India too is entitled to assured transit facilities under the general principle of the freedom of transit. As the 1991 treaty is projected to grant transit facilities to Nepal for her access to the sea, the reciprocity prerequisite seems, in practical terms, worthless, as landlocked Nepal, by definition, lacks the means no reciprocate. Actually there is no any transit trade of India through Nepal, and it does not need Nepal's land for India's international trade. 1 of the transit treaty is not consistent with India's own admission in the preamble to the treaty that 'Nepal as a landlocked country needs access to and from the sea to promote its international trade'. India wished to bind Nepal's transit right to other issues like bilateral trade, dealing of Indians living in Nepal, India's strategic interests. The division of transit matters from other bilateral issues is an essential to Nepal and the new transit treaty has achieved this goal.

The effectiveness of global treaty in sub-regional level is semi effective, since UNLOSC Article have some ambiguous and inconsistent language. Land-locked states ought to rely on regional and sub-regional treaty.

Bibliography

Books

Churchill and Lowe, *Law of the Sea*, third edition, Manchester University Press (1999)

Glassner, *Bibliography on Landlocked States: Fourth Revised and Enlarged Edition* (Dordrecht/Boston/London:Martinus Nijhoff, 1995).

Global and European treaties, Edited by Ole Kristian Fauchald and Bård Dverre Tuseth, Published with support from the University of Oslo and Selmer advokatfirm, 2007

P.W. Birnie, A.E. Boyle and C. Redgwell, *International Law and the Environment*, Oxford University Press, New York, USA, third edition, 2009

Stephen C. Vasciannie, *Land-locked and Geographically disadvantaged states in the international law of the sea*, Clarendon Press Oxford, 1990

Surya P. Subedi, *Dynamics of Foreign Policy and Law (A study of Indo-Nepal Relations)*, Oxford University Press-2005

Articles

Dr. Stephen Vasciannie, *Land-Locked and Geographically disadvantaged states*, Heinonline—31 *Commw. L. Bull.* 60-60, 2005

Helmut TUERK and Gerhard HAFNER, *Law of the Sea, the library of essays in international law*, edited by Caminos, Hugo, The Cromwell Press, 2001

Ibrahim J. Wani, *An evaluation of the convention on the law of the sea from the perspective of the landlocked states*, Heinonline—22 *Va. J. Int'l L.* 641 1981-1992

Ingrid Delupis, “*Land-locked states and the law of the sea*” © Stockholm institute for Scandinavian Law 1957-2009

Mpaszi Sinjela, *Freedom of transit and the right of access for Land-Locked states: the evolution of principle and law*, Heinonline—12 *Ga. J. Int'l & Comp. L.* 50 1982

Tatjana Rosen, ‘*Environmental law, International environmental issues and oceans*’, Edited by Saundry (last updated-Nov. 30 2006)

Journals

Robert E. Bowen, *The land-locked and geographically disadvantaged states and the law of the sea*, *political geography quarterly*, Vol. 5 NO. 1, January 1986

Surya P. Subedi, ‘The Marine Fishery Rights of Land-locked states with particular Reference to the EEZ’, *International Journal of Estuarine and Coastal Law* 2/4 (1987), 277-39.

Times of India (17 April 1989).

Reports

Far Eastern Economic Review (8 March 1990)

Report of the Nepal international transport development board, *Additional port facilities in India for Nepal's Exim trade with third countries*, 2009

ULR

<http://rod.eionet.europa.eu/instruments/498> (date: 2010/5/25)

http://www.imo.org/Conventions/contents.asp?header=false&topic_id=148&doc_id=637

Tara Dahal, *Nepal as a Transit state: Emerging possibilities*, (<http://www.ifa.org.np/pdf/new4.pdf-27/7/2010>)

Annex

<http://dgicce.nic.in/indoneptreaty.pdf> (05/08/2010)