LAND-LOCKED STATES

FRIDAY, SEPTEMBER 3RD, 1976

at 9.00 a.m.

Chairman: PROF. C. B. BOURNE

Prof. IVAN A. SHEARER (Australia: Rapporteur); Much of the inspiration behind the establishment of the Committee has come from the current United Nations Conference on the Law of the Sea in which, for the first time, a large group of land-locked States are participating. At the 1958 Sea Law Conference in Geneva only a handful of land-locked States were represented, and the negotiations leading up to the adoption of Article 3 of the Convention of the High Seas were hasty and represented the results of an uneasy compromise. With the addition of so many developing land-locked States, particularly in Africa, to the international community, it was inevitable that the current Law of the Sea Conference would have to look at the problems anew. The question posed at the 1958 Conference remains the crucial question for land-locked States in 1976: is access to the sea an inherent right of land-locked States deriving from the principle of the freedom of the seas, or is it merely a facet of the law of transit depending upon agreements with neighbouring States and upon reciprocity?

Since 1958 a further vital dimension to the problem has been added by the adoption of the concept of the sea-bed beyond national jurisdiction as the common heritage of mankind. Does this concept strengthen the claims of the land-locked States to gain access to the international area? The question also arises whether the land-locked States should be given preferential rights of exploitation and exploration of resources in the economic zones of neighbouring coastal States. If so, should such rights be conceded bilaterally or regionally on the basis of friendly co-operation and neighbourliness or should they be regarded as inherent rights to be demanded as such and not merely as favours?

When the Committee was established in 1974, it was thought that the Law of the Sea Conference might have concluded its work by the time of this present meeting. This would not necessarily have simplified the tasks facing the Committee but it would at least have clarified the parameters of the subject. If a result is achieved at all, it will inevitably bear the marks of compromise. The task of the Committee will then be two-fold: to attempt to evaluate the

provisions relating to land-locked States in the light of sound principles so that solid theoretical foundations may be laid, and, secondly, to assist in the creation of particular regimes of access, transit and sharing of resources. If the Conference as a whole should fail or the deliberations relating to land-locked States be inconclusive, then the task facing the present Committee will be correspondingly greater. At all events, the outcome should shortly become predictable.

Since the preparation of the present progress report, three further studies have been presented by members of the Committee to which I should like to refer. The authors of these studies deserve the congratulations of the meeting and it is unfortunate that the documents arrived too late for printing or even, in two cases, for circulation. Dr. A. O. Cukwurah of Nigeria has written a study of Nigeria as a transit State and this has been distributed to the Committee. It is the first of what I hope will be a series of individual studies of particular transit regimes. By the time of the next ILA Conference it should be possible for me to draw up a composite study of transit regimes based on these individual studies. The second working paper is by Dr. Vratislav Pěchota of Czechoslovakia whose inability to attend this meeting we all very much regret. Dr. Pěchota was one of the three "fathers" of the land-locked States study-group at the 1958 Law of the Sea Conference and his insight into the problem was, and still is, unrivalled. He has sent to me a very valuable paper he was intending to present to us here: "Free Access to the Sea of Land-locked Countries—A review of legal developments from the Peace of Westphalia to the First United Nations Conference on the Law of the Sea". This paper will be reproduced and circulated to members. A third valuable paper has been prepared by Dr. Milenko Milić of Yugoslavia, which elucidates the major issues of principle presented by the situation of land-locked States, including the analogy of innocent passage, the question of sovereignty and the relevance of reciprocity. Fortunately Dr. Milić is with us today and can elaborate orally on his paper. His paper will, however, also be reproduced and distributed as soon as possible.

Dr. HANNA BOKOR-SZEGÖ (Hungary): Quant au rapport je n'ai que certaines modestes remarques à faire. A la fin de ce document, notre rapporteur énumère les problèmes qui intéressent les travaux de notre Commission. Je suis d'accord avec la grande majorité de ces questions. Cependant il y en a quelques-unes qui—selon mon opinion—dépassent la compétence et le mandat de notre Commisson.

C'est ainsi que le point 5 concernant le transit par air de marchandises et de passagers devrait être examiné par exemple au

sein de la Commission du droit aérien. Le point 6 traitant du problème de la navigation sur les fleuves dépasse également les cadres de nos travaux. Finalement, en ce qui concerne le point 7, où il est question des services postaux, télégraphiques et téléphoniques, c'est là également un sujet—bien qu'il soit fort intéressant —qui devrait être étudié ailleurs.

Je voudrais cependant signaler l'existence d'un problème qui intéresse les pays sans littoral mais qui ne figure pas sur la liste à examiner, bien que ce problème ait déjà soulevé de grandes discussions au cours des Conférences de l'ONU sur le droit de la mer. Je pense à la participation des pays sans littoral aux recherches scientifiques qui s'effectuent dans la zone économique et sur la haute mer. Je suggère donc que la possibilité de la participation des pays sans littoral à ces recherches scientifiques soit également étudiée par notre Commission.

Mr. ALFRED P. RUBIN (USA): For more than twenty years there has been active discussion of the legal position of land-locked States asserting rights of transit through their neighbours' erritory. A brief review of the jurisprudential issues that underlie much of the legal debate might help to clarify the discussion.

To civil law jurists there is a conflict of legal principle at the centre of the discussion. The rights of free navigation and the principle of the common heritage of mankind in the resources of the sea are in conflict with legal principles that ensure the territorial integrity of the transit States and their rights as equal sovereigns to exclusive jurisdiction within their own territory.

To common law jurists, the general practice for transit States to give rights of transit to their land-locked neighbours only as a concession, coupled with a bargain or an apparent reservation of the legal power to cancel the concession (although perhaps not the "right" to do so), is evidence that there is no binding underlying principle that deserves the name "law".

It should also be remembered that, when the issue was squarely presented at the 1965 UN Conference on Land-locked States, as to whether there was any "law" binding transit States to permit their land-locked neighbours to cross their territory, the cost to the land-locked States of the adoption by the Conference in the 1965 Convention of Principles favouring such transit was expressly the agreement by the land-locked States that the Principles were not binding as "law".

Now, to civilians, as we know, the word "law" may attach to some statements of principle, and specific cases represent applications of that principle as the normal application of "the law'. To commoners like myself, the word "law" does not attach to any formulation until it is applied in practice; even a statute to us means

what the courts or administrators say that it means. Specific cases are the only certainty, and formulation, even in a statute, is not normally regarded as binding policy and is handled differently from, and usually less respectfully than, a binding precedent.

In these circumstances, it seems to me that questions regarding "rights" of access to the sea by land-locked States are essentially questions of principle and policy—not law. Thus, for the future work of the ILA, I have some difficulty in understanding the purpose of the research suggested for our future programme in the Rapporteur's clear and concise report. While there is no reason why we should not make suggestions *de lege ferenda* and support those suggestions with economic and political analyses, I am not sure that in this particular area we are equipped to come to a more useful result than other more frankly policy-making bodies such as the UN Third Law of the Sea Conference.

Dr. MILENKO MILIĆ (Yugoslavia): I have already had the opportunity to discuss this problem two days ago in my statement concerning the general conceptions influential in the negotiations at the running Sea Law Conference and at greater length in my Working Paper. Access to the sea by land-locked countries was presented before the first UN Conference on the Law of the Sea as a question that demanded its theoretical solution. However, insurmountable difficulties arose when a definition was sought which could correspond to existing relations between States.

Since the first UN Conference, this problem has gained considerably in importance. As this problem was part of the future régime on the seas, it needed to be solved then. The issues comprise not only free access *to* the sea but also *from* the sea, as well as the rights deriving from the concept of the common heritage of mankind. Nevertheless different views on the legal nature of free access to and from the sea have been once again expressed. In my Working Paper I have concluded that free access to and from the sea is a principle and not a right in spite of the fact that sometimes in the text it is mentioned as a right. This principle is a basic assumption for bilateral or multilateral conventions relating to transit and other connecting rights. As it concerns the aspirations of the land-locked countries to participation in benefits deriving from the natural resources of the submarine areas, a distinction must be made between an international area which should be under the International Authority and the economic zones of the coastal States. The pretentions of the land-locked countries to the resources of the International Area are well founded because they are entitled to participation in these benefits, being the common heirs, following the concept of the common heritage of mankind. On the contrary their interests in the economic zones of the coastal States could never

be equated with the sovereign rights of exploitation which belong only to the coastal States. It is true that the new horizons opened to the world economy by the richness of the submarine areas have produced new problems which require new legal formulas for their solution. But it is also true that, whenever we jurists want to frame a system, it should be first of all necessary to define the framework inside which this system has to be established. As the existing relations among the States are based on the principle of sovereignty, all the pretentions of the land-locked countries could not be satisfied.

Mr. G. SYRIL (UK): The first report prepared by the Committee on land-locked States is interesting and contains a wealth of detail, with a working definition of a land-locked State.

While commending the report, I would submit the following points for the consideration of the Committee:

Firstly, some of the Afro-Asian land-locked States have very low *per capita* incomes, as low as 500 US dollars. They are economically hard-hit and politically vulnerable. Compare the living standards of people living in East, Central, South and Western Africa, Afghanistan, Bhutan, Nepal with those living in Austria, Switzerland, Luxembourg, Andorra, etc.

The report rightly points out that the Europeans, by contrast, suffer less disadvantage due to diversity of established trade routes and sophisticated means of transport. I very much wish that the Committee had strongly recommended on equitable grounds technical assistance and trade preferences for the Afro-Asian land-locked States.

Secondly, it is unfortunate that the report makes no reference to air transport as a means of transit traffic. This question must be examined closely, bearing in mind the interests of national airlines and security considerations.

Thirdly, the current trend that land-locked States may also share the natural resources of the exclusive economic zones of neighbouring States may appear as an innovation at this stage. But, I am sure, world opinion would favour the land-locked States if the case is pursued vigorously.

In conclusion, I submit that, while the report appears to place much emphasis on the writings of international jurists and the decision in the North Sea Continental Shelf case, it is essential to add a little more practical knowledge in the light of the equitable rights of these land-locked States. This, I am sure would relieve the sense of frustration experienced by the Afro-Asian land-locked States.

Maître JEAN LISBONNE (France): Je dois dire que, si je m'intéresse aux problèmes relatifs aux Etats enclavés, ce n'est pas par pure

spéculation intellectuelle ni parceque la France est limitrophe de la Suisse, Etat enclavé s'il en est, et des Vallées d'Andorre, qui ne sont pas un véritable Etat, mais bien plutôt un fief médiéval de la France, exactement du Président de la République Française et de l'Evêque d'Urgel, mais parce que, m'occupant particulièrement de questions latino-américaines, je suis un peu au courant d'un problème d'actualité, celui qui se pose entre la Bolivie, Etat méditerranéen (au sens étymologique du terme), le Chili et le Pérou: vous le savez sans doute, le Chili envisage de mettre fin à la situation d'infériorité de la Bolivie, de lui permettre un accès à la mer par une bande de territoire limitrophe du Pérou, ce qui ne laisse pas de créer certains problèmes particuliers, ce territoire ayant été jadis cédé par le Pérou au Chili sous certaines conditions d'incessibilité, et étant ainsi en quelque sorte grevé d'une servitude.

Ceci amène à se poser une question, dont il faudra que la Commission se saisisse: le droit des Etats Tiers, qu'ils soient ou non titulaires de droits préférentiels, d'intervenir lors de la concession de droits de transit.

Il faut, je le crois, considérer qu'un Etat a droit, comme un individu, à la vie: et pour vivre un Etat a besoin de l'accès à la mer, comme un individu a besoin d'air pour respirer et survivre. C'est là un principe essentiel qu'il faut garder présent à l'esprit et qui entraîne des conséquences différentes, quant au choix du pays de transit, que j'appellerai, par référence au droit privé, le pays "servant": il faudra tenir compte de ce que, comme le rappelait le Prof. Milić, certains pays enclavés, comme le Liechtenstein, ne sont pas limitrophes d'un pays maritime, mais de deux Etats eux-mêmes enclavés, en l'espèce la Suisse et l'Autriche—et aussi de ce que l'accès le plus court n'est pas nécessairement le plus pratique. Je songe au Paraguay, dont le cas est heureusement réglé par le caractère international du fleuve qui le dessert.

Je souhaite aussi attirer votre attention sur le problème de l'équipement de la zone de transit: le "Informal Text" envisage que l'Etat de transit peut exiger la participation de l'Etat enclavé. Il faut aller plus loin et permettre à l'Etat enclavé de réaliser, à ses propres frais, sous le contrôle cependant de l'Etat de transfert, ce qui sans le transit n'eût pas été nécessaire.

Enfin, et pour n'aborder que les points qui me semblent essentiels, il me semble difficile, aujourd'hui où, hélas, les Nations tendent à compartimenter, à nationaliser la mer—je pense à la question du plateau continental—de prévoir, en l'état actuel du Droit, la participation des Nations enclavées aux richesses maritimes. C'est tout le problème des côtes, de la géographie, qui serait alors en cause: songez à un grand pays maritime, mais combien petit eu égard à sa superficie, le Zaïre, qui n'aboutit à la mer que par un véritable doigt de gant, entre l'Angola et Cabinda. Sa situation,

au regard du plateau continental, est bien proche de celle d'un Etat enclavé, ce qu'il n'est pourtant pas.

Laissez-moi en dernier lieu attirer votre attention sur une discrimination qui m'apparaît injustifiée: celle du droit reconnu aux pays en voie de développement, et à eux seuls, par le projet, de participer aux bénéfices du plateau et de la mer: le problème est en effet celui des pays enclavés et non celui de la richesse et du développement relatifs des pays: pourquoi refuser à la Suisse un droit qu'on accordera à un autre Etat, pénaliser en quelque sorte la Suisse d'être à l'avance du progrès, tandis qu'on pénaliserait au contraire un autre pays, de transit quant à lui, d'être limitrophe d'un pays en voie de développement.

Prof. BERNAD ALVAREZ DE EULATE (Spain) se refirió al relativismo del concepto de ventaja geográfica y a la necesidad de estudiar como *affaire d'espèce* los distintos casos, ponderando todos los elementos en presencia. Por lo que respecta al tránsito aéreo, defendió su especificidad, aún reconociendo las indudables conexiones con el tema, objeto del debate del Comité.

En la lista de temas de examen que figuraba al final del primer informe del Prof. Shearer, propuso la refundición de los dos primeros puntos, para así recoger juntos los aspectos histórico, geográfico, político y económico. Sin embargo, su observación principal fue la de que el enfoque a dar a los temas debía ser revisado para adecuarlo a la realidad de una situación que se pretende regular jurídicamente, para paliar en una medida equitativa desigualdades de hecho. Para el Prof. Bernad Alvarez es preciso reconocer claramente la existencia de dos planos distintos: (1) aquel en el que es la propia sociedad internacional en su conjunto—y no estados en concreto—quien concede, otorga o reconoce ciertos derechos a los estados sin litoral marítimo, en cuanto tales, y (2) aquel en el que otros estados (los estados interpuestos) conceden o reconocen ciertos derechos a los estados sin litoral marítimo. La experiencia demuestra que la distinción es importante, puesto que es más fácil la solución en el primer caso—así en lo relativo al derecho al pabellón—mientras que en el segundo se comprueba que la solución es más difícil. Esto queda perfectamente claro si recordamos la proporción de estados interpuestos que son parte en la Convención de 1965. Aceptado ese punto de partida operativo, propuso que la clasificación a seguir podría ser: (a) derechos de tránsito en sentido amplio y derechos en la zona económica exclusiva y (b) derechos concedidos directamente por la sociedad internacional y, en especial, los derivados del patrimonio común de la humanidad.

Concluyó refiriéndose a la evidente inadecuación de la actual organización política del mundo, a la necesidad de avanzar hacia un más justo nuevo orden económico internacional y a los principios

rectores en la materia estudiada, estimando que la equidad, debidamente aplicada teniendo en consideración todos los elementos de cada caso, debería basar las soluciones, aportando las correcciones imprescindibles. El deber internacional de los estados de cooperar entre sí y la propia existencia de la sociedad internacional exigen que se realicen ciertos sacrificios, que en definitiva redundan en beneficio general.

Dr. M. VIVOD (Yugoslavia): In efforts to identify the problem of the land-locked States two factors are always appearing—those of transit and transport. All other elements are of a subsidiary or theoretical character. It is always the element of transport over foreign territory, be it by road, rail, sea or air, which presents problems, chiefly at the connecting points such as airports, seaports and frontier stations. The leading principles concerning the necessity to compensate those countries which are disadvantaged by nature are known, and there is scarcely a State today which refuses to recognize them as principles. There is, however, another question: the non-willingness of the transit State is generally reflected in making the transit through its territory difficult by raising different obstacles and also, legitimately, through the imposition of increased tariffs and complicated administrative formalities, fiscal and custom charges, sanitary and veterinary regulations—sometimes also through technical obstacles. These obstacles, however, are not necessarily a reflection of the non-willingness of a transit State to help another country; they may be also the result of a simple accumulation of administrative measures, *i.e.* of non-intentional and non-discriminating steps which are more harmful for a land-locked country than for any other. This kind of difficulty may be prejudicial to any of the neighbouring States albeit not land-locked—which, for reasons of transport, economy or other factors, find the transit facilities through another country of vital importance. The difficulties which may hamper transport and trade are in no way a "privilege" of the land-locked countries but may affect countries necessitating transit. In short, the problem lies in transport and transit and the solution in facilitating international trade and transport through the simplification of administrative formalities and the reduction of fiscal and other charges of a technical and economic character.

What I am pleading for is not to confine the problem to land-locked countries alone but to channel it into a study of the results which would be of profit chiefly to the land-locked countries, *i.e.* the facilitation of international transport and trade. In this connection I should like to draw attention to the proposals made at the Helsinki Conference of the ILA in 1966, at the Buenos Aires Conference in 1968 and reiterated at The Hague Conference in 1970,

namely to set up a Committee to study the simplification of international transport and trade through the revision of administrative formalities imposed by public authorities in the fields of immigration, customs, veterinary and psychological control, etc.

It must be borne in mind that there exist, in addition to those mentioned in the report, international instruments which in an empiric way already deal with these questions, and I would quote in particular the Convention on the simplification of customs formalities (Geneva 1923), the London Convention on facilitation of maritime transport (1965), the revised TIR Convention for transport of goods (Geneva 1975), the Convention on the harmonisation of customs formalities (Kyoto 1973) and others achieved under the auspices of the Customs Co-operation Council in Brussels. As a number of States have ratified these Conventions, there already exist many recognized principles of international law which could be deduced from the existing instruments and practices and be offered to the international community for broader implementation. Therefore I plead for a re-naming and restructuring of the Committee, as a first step, so as to include in its programme the facilitation aspects of international transport. Alternatively, I suggest that a new Committee be established for this purpose.

Dr. KAYE HOLLOWAY (France): This is a far more important field of study than may appear at first sight. At this stage I would like to make the following remarks:

1. We are here faced with the paradoxical situation in which, on the one hand, integration and interdependence have become a factual reality imposed upon all States. On the other hand, we are witnessing the shrinking of the high seas by the extension of territorial waters, thus increasing the risk of multiplying conflicts. But a graver aspect of this paradoxical situation is the danger of undermining the validity of the fundamental rule of the freedom of the high seas without which it is difficult to conceive a law of the sea.

2. Considering that, in spite of its very wide implications, one cannot speak of any rule or principle, however general, which has crystalized and even less become binding, we have here a great chance of doing pioneer work in the field.

3. Consequently, I welcome Prof. Milić's suggestion that we try to elaborate general principles within a framework which, while taking into consideration the positive aspects of the little State practice that exists in the matter, draws on such elementary and fundamental principles as the right to life suggested by my French colleague, which at State level means precisely access to the high seas. All obstacles which tend to restrict that right entail denial of the right to existence. We have here an opportunity to fight the dangerous trend of an extension of the concept of State sovereignty

to deprive less fortunate members of the world community of their right to the common heritage of mankind.

Finally, I wholeheartedly agree with the Rapporteur's remark that the main question is whether *de lege ferenda* may be postulated "upon which to ground existing and desirable future rights . . ." (p. 7) and add that, where State practice so far offers no such basis, we should formulate these rights on the strength of certain *jus cogens* principles in other fields.

Prof. JOHN DUGARD (South Africa): It is generally accepted that a land-locked State is a State without a sea-coast. I would, however, like to draw attention to the problem faced by any port which is obliged to rely on the port of another State for effective access to the sea. This is a peculiarly Southern African problem, which is illustrated by two cases. When Namibia (South West Africa) achieves independence, it will be obliged to rely on the South African port of Walris Bay for access to the sea. Similarly the Transkei, which is due to become independent in October 1976, will have to rely on South African ports for effective access to the sea. Both these territories (Namibia and the Transkei) have a sea-coast but for natural and economic reasons they will have to use South African ports for the foreseeable future. According to the present definition of land-locked States, neither of these States-to-be qualifies for the imperfect right of access to the sea which is widely recognized in the issue under consideration. There may well be other cases in which the traditional definition of land-locked States requires review.

Mr. J. K. SRIVASTAVA (India): We are grateful to the Rapporteur, Prof. Shearer, for his valuable report. We must make a careful examination of the view taken therein with regard to the limitation of the sovereign rights of transit States on the one hand, to "something less than full sovereignty" and an extension of such rights to the "land-locked States" on the other, on the reasoning that these formerly were not subject to any kind of national appropriation but have become the subject of international agreement in favour of the disadvantaged land-locked States. In essence this means that land-locked States, enjoying continuity of the land mass through the transit States as far as the sea and Continental Shelf and the economic zone, have a vested sovereign right to the exploitation of these extensions. This doctrine, partly based on E. Lauterpacht's observations, appears far-fetched and, to some extent, contradictory to the principles of the sovereign rights of States so far recognized. The suggestion also applies, with unconvincing reasoning, different yard-sticks for European and Afro-Asian land-locked States. Only recently the President of the Coastal States Organization, Dr.

Castañeda of Mexico, made it clear that the demand of the land-locked States to share the non-living resources of the Continental Shelf and the Economic Zone of the Coastal States was neither justified nor acceptable. The report will require serious consideration before any workable solution not in derogation of the sovereign rights of Coastal States can be found. The subject is also under discussion at the UN Conference on the Law of the Sea.

The Rapporteur replied to various points raised in the course of the discussion which he considered had been most useful. He stated that, in his view, it was very important to distinguish and set out carefully the issues of principle involved in the topic of the land-locked States.

He anticipated that further papers would shortly be available and would be circulated to members of the Committee for comment. He appealed to members of the Association who had ideas on the problems presented by the land-locked States to forward them to him at the University of New South Wales, Kensington, NSW, Australia, and drew particular attention to the need for the provision of data relating to the various topics listed on pp.9 and 10 of the Committee report.

COMMITTEE ON LAND-LOCKED STATES

Members of the Committee

Prof. K. Zemanek (Austria) (*Chairman*)
Prof. I. Shearer (Australia) (*Rapporteur*)
P. Allott (U.K.)
Dr. H. Bokor-Szegö (Hungary)
Dr. A. O. Cukwurah (Nigeria)
Prof. C. J. R. Dugard (South Africa)
Dr. J. Gutiérrez (Bolivia)
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T. Makeka (Lesotho)
M. B. Matovu (Uganda)
Dr. V. Pěchota (Czechoslovaki a)
Prof. K. Równy (Poland)
Mrs. A. Sarup (India)
Prof. H. Steinberger (Germany)

The following first progress report is based on an introductory working paper prepared by the Rapporteur for the Committee members. By the time of the Madrid Conference a number of informal working papers prepared by individual members will have been circulated and will be discussed at the meeting.

A. The Land-locked Condition

A land-locked State is by common defimition a State without a sea-coast. Such a State thereby suffers a geographical disadvantage in that avenues of access to the State are dependent upon transit across the territory or territories separating it from the sea. Upon this working definition there are 31 land-locked States in the world (or 29 if doubts are held as to the international personalities of Andorra and Rhodesia/Zimbabwe).

The 31 land-locked States are :

Africa	*America*	*Asia*	*Europe*
*Botswana	Bolivia	*Afghanistan	Andorra
*Burundi	Paraguay	*Bhutan	Austria
*Chad		*Laos	Byelorussian S.S.R.
Cent. African Rep.		Mongolia	Czechoslovakia
*Lesotho		*Nepal	Hungary
*Malawi			Liechtenstein
*Mali			Luxembourg
*Niger			San Marino
Rhodesia/Zimbabwe			Switzerland
*Rwanda			Vatican City State
Swaziland			
*Uganda			
*Upper Volta			
Zambia			

Of the above States all are treated by UNCTAD as developing States with the exception of the land-locked countries of Europe, Mongolia and Rhodesia. The three least-developed countries of the world are land-locked; Burundi, Rwanda and Upper Volta have a *per capita* income level lower than $U.S.50 per annum. Those asterisked in the list above have *per capita* income levels less than $U.S.100.

It therefore appears that very often (although not necessarily) the land-locked condition imposes economic hardship on a State owing to the distance and difficulty of transit trade routes and the cost of maintaining means of communication and transport. By and large the poorest countries in the world are those most remote from a sea-coast and with underdeveloped facilities for access.

Political disadvantage also very often results from the land-locked condition. Land-locked countries are unusually vulnerable if tension develops between them and their neighbours on whom they are dependent for access and transit. Industrial unrest, poor management or inadequate handling facilities at the starting points of transit routes are of particular concern to the land-locked neighbours.

The land-locked condition of most modern developing States has been fortuitous and unintended, or at least their original dependence on transit routes was not as politically precarious as it is today. The land-locked countries of eastern, central, southern and western Africa were, after the advent of industrialization and oceanic trade, part of colonial territories having sea coasts and secure points of access. Decolonization was intended, in most cases, to be accompanied by federal or co-operative structures which would, as one of their results, have minimized the disadvantages of the land-locked partners, but these structures have for the most part proved to be ephemeral or only partly effective. The same is true of the Asian land-locked States with the exception (unless one goes back further in history) of Afghanistan and Mongolia. Bolivia, after independence from Spain, had a sea-coast but lost it in the war with Chile in 1879-1882.* Paraguay has been fortunate in having always enjoyed access to the sea via the natural phenomenon

*Bolivia made the following Declaration accompanying its signature of the Convention on the Transit Trade of Land-locked States, 1965 :

"Bolivia is not a land-locked State but a nation which is deprived by temporary circumstances of access to the sea across its own coast and that unrestricted and unconditional freedom of transit must be recognized in international law as an inherent right of enclosed territories and countries for reasons of justice and because of the need to facilitate such transit as a contribution to general progress on a basis of equality . . ."

In December 1975 negotiations were reported to be in progress between Chile and Bolivia with a view to the exchange of territory so that a corridor would be opened from Bolivia to the Pacific coast.

of the Panana-Paraguay river system. These countries therefore frequently point to historical factors beyond their control and suffer a sense of grievance and injustice ; they feel that the world community owes them special consideration in aid, technical assistance and trade preferences.

The peoples of western and central Europe, by contrast, suffered less of a disadvantage so far as trade and development were concerned. Hundreds of land-locked duchies, kingdoms and principalities existed in Europe as late as the middle of the nineteenth century. Political and cultural factors in Europe worked in a centripetal rather than, as elsewhere, in a centrifugal fashion, with the result that most of the land-locked States became federated with, or absorbed within, larger entities having sea coasts. Those that remained did so as a result of peculiar historical circumstances (*e.g.* Andorra, Liechtenstein, San Marino), by virtue of the religious settlement of 1648 and the common consent of the Powers in 1815 (Switzerland), or by peace treaty (Austria, Czechoslovakia and Hungary). The diversity of established trade routes and sophisticated means of transport, including wide navigable rivers, have made the European land-locked condition less significant a commercial or political disadvantage.

B. **Multilateral Efforts to ameliorate the Land-locked condition**

Article 23(e) of the Covenant of the League of Nations required member States to make provision for securing and maintaining freedom of communications and transit and equitable treatment of the commerce of other member States. Pursuant to that Article an Organization for Communications and Transit was established by the League and a Transit Section created within the Secretariat. The Organization sponsored in 1921 the Barcelona Conference which produced the Convention and Statute on Freedom of Transit (which was designed to guarantee and facilitate transit traffic and free it from discrimination or excessive charges), the Convention and Statute on Navigable Waterways of International Concern, and the Declaration on the Right to a Flag of States having no Seacoast. The Barcelona Conventions were moderately well supported in their time but they have not attracted wide adhesion from States created since 1945. In the inter-War period further conventions were signed on such matters as simplification of customs formalities, road traffic and railways which were not primarily aimed at land-locked countries but which benefited them.

After World War II the General Agreement on Tariffs and Trade (GATT) was signed, Article V of which related to transit trade and to the freedom of transit. In 1957 special recognition of the position of land-locked countries with regard to transit facilities and the promotion of international trade was given by the United

Nations in General Assembly Resolution 1028 (XI) (20 February, 1957). This marked the effective beginning of contemporary efforts to devise new measures of assistance and equalization.

At the First and Second United Nations Conferences on the Law of the Sea (1958-1960) few developing land-locked countries were represented, but recognition of the problems of land-locked States was sufficiently well advanced to ensure that a Committee was set up specifically to examine their significance in the law of the sea. Article 3 of the High Seas Convention established the principle of free access to the sea by land-locked and coastal States concerned on the terms and conditions of free transit, access to, and use of, seaports.

The next major step was taken by the United Nations Conference on Trade and Development (UNCTAD) at its First Conference in 1964. The Conference unanimously adopted Eight Principles relating to Transit Trade of Land-locked Countries, which are recited again in the Preamble to the 1965 Convention on the Transit Trade of Land-locked States. The Eight Principles are largely declaratory of existing provisions in the Barcelona and Geneva Conventions, but Principles VI and VII propose the encouragement of regional and other agreements for the solution of the special problems of trade and development of land-locked States and for the exclusion of such special facilities or rights from the operation of the most-favoured-nation clause.

In 1967 the Convention on the Transit Trade of Land-locked States (1965) entered into force. Its essential form is similar to that of the Barcelona Statute on Freedom of Transit (1921) but the 1965 Convention is more detailed in its provisions. The Convention is applied on the basis of reciprocity ; the desirability of such a provision is now being questioned by some land-locked States. Only 7 coastal States with land-locked neighbours have so far ratified or acceded to the Convention.

The second UNCTAD Conference in 1968 established a Special Working Group on Land-locked States which has been active to the present date in identifying the problems of land-locked States and in suggesting measures for the promotion of their trade and economic development.

The Caracas Conference on the Law of the Sea, which began in 1974 and completed its third session at Geneva in March-May 1975, gave greater consideration to the position of land-locked States than was possible at Geneva in 1958-1960. Whereas none of the African land-locked States was represented at the earlier Conference, all were present at Caracas with the exception of Rhodesia/Zimbabwe. At the end of the 1975 Session an "Informal Single Negotiating Text" was produced as a basis for negotiations prior to, and at the commencement of, the projected 1976 Session. It is to be stressed that

this document is not in any sense binding nor does it necessarily represent a gathering consensus. Indeed, so far as the central provisions on land-locked States are concerned (draft Articles 108-116—there are also ancillary articles elsewhere in the I.S.N.T.) the comment has been made in the report of the Australian delegation to its government on the work of that Session that they "reflected demands by the land-locked and geographically disadvantaged States in regard to the living resources of the economic zone, rights of transit, access to the seabed and the sharing of benefits from the sea area, which are unlikely to be acceptable to the Conference as a whole".

With this warning in mind, it is still of interest to set out the central draft articles of the I.S.N.T. here :

ARTICLE 57

1. Land-locked States shall have the right to participate in the exploitation of the living resources of the exclusive economic zones of adjoining coastal States on an equitable basis, taking into account the relevant economic and geographic circumstances of all the States concerned. The terms and conditions of such participation shall be determined by the States concerned through bilateral, subregional or regional agreements. Developed land-locked States shall, however, be entitled to exercise their rights only within the exclusive economic zones of neighbouring developed coastal States.

2. The provisions of this Article are without prejudice to the provisions of Articles 50 and 51.

ARTICLE 108

1. For the purposes of the present Convention :

(a) "land-locked State" means a State which has no seacoast ;

(b) "transit State" means a State, with or without a seacoast, situated between a land-locked State and the sea through whose territory "traffic in transit" passes ;

(c) "traffic in transit" means transit of persons, baggage, goods and means of transport across the territory of one or more transit States, when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk or change in the mode of transport is only a portion of a complete journey which begins or terminates within the territory of the land-locked State ;

(d) "means of transport" means :

(i) railway rolling stock, sea and river craft and road vehicles ;

(ii) where local conditions so require, porters and pack animals.

2. Land-locked States and transit States may, by agreement between them, include a means of transport pipelines and gas lines and means of transport other than those included in paragraph 2.

ARTICLE 109

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 the present Convention including those relating to the freedom of the high seas and the principle of the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territories of transit States by all means of transport.

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

3. Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measures to ensure that the rights provided for in this Part for land-locked States shall in no way infringe their legitimate interests.

ARTICLE 110

Provisions of the present Convention, as well as special agreements which regulate the exercise of the right of access to and from the sea, establishing rights and facilities on account of the special geographical position of land-locked States, are excluded from the application of the most-favoured-nation clause.

ARTICLE 111

1. Traffic in transit shall not be subject to any customs duties, taxes or other charges except charges levied for specific services rendered in connexion with such traffic.

2. Means of transport in transit used by land-locked States shall not be subject to taxes, tariffs or charges higher than those levied for the use of means of transport of the transit State.

ARTICLE 112

For the convenience of traffic in transit, free zones or other customs facilities may be provided at the ports of entry and exit in the transit States, by agreement between those States and the land-locked States.

ARTICLE 113

Where there are no means of transport in the 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, transit States may request the land-locked States concerned to co-operate in constructing or improving them.

ARTICLE 114

1. Except in cases of *force majeure* all measures shall be taken by transit States to avoid delays in or restrictions on traffic in transit.

2. Should delays or other difficulties occur in traffic in transit the competent authorities of the transit State or States and of land-locked States shall co-operate towards their expeditious elimination.

ARTICLE 115

Ships flying the flag of land-locked States shall enjoy treatment equal to that accorded to other foreign ships in maritime ports.

ARTICLE 116

Land-locked States may, in accordance with the provisions of Part III, participate in the exploitation of the living resources of the exclusive economic zone of adjoining coastal States.

C. **Directions of the Committee's Study**

From the foregoing, which is a most superficial traversal of the main developments of this century in questions affecting land-locked States, it appears that while much progress has been made in identifying the problems and devising the beginnings of measures to alleviate the situation of land-locked States, an air of uncertainty prevails. The land-locked States urge the recognition of legal rights, not special favours, while the coastal States, especially those with land-locked neighbours, are charitably enough disposed towards the desires of the geographically disadvantaged but wary of admitting the existence of rights in international law that would in any way diminish their own territorial sovereignty.

The major question facing the Committee therefore is whether any arguable legal principle emerges from State practice or may be postulated *de lege ferendo*, upon which to ground existing and desirable future rights and obligations of land-locked (and possibly otherwise geographically disadvantaged) States.

The central issue of principle has been largely avoided in the past. The International Court of Justice in the *Case Concerning Rights of Passage over Indian Territory* (Merits) I.C.J. reports, 1960, p.6 considered that it was not necessary for the resolution of Portugal's complaints against India of the latter's interruption of access to its enclaves to consider whether international custom or general principles of law recognized rights of transit such as were claimed by Portugal ; the Court applied what it found to be a local custom,

"a practice clearly established between two States which was accepted by the parties as governing the relations between them".

Professor Hyde, in a well-known passage, states what he conceives to be the principle, but *arguendo* and with some hesitation :

> "It may be doubted whether as yet it is generally acknowledged that a State owes a legal duty to another to yield it on equitable terms privileges of transit by land across the domain ... It must be apparent that the strength of a claim to a privilege of transit across foreign territory depends upon the nature and importance of the channel of communication to the domain of a State, and that it varies according to the geographical position and relative isolation fo the claimant ... The position ... of the State whose territory, notwithstanding itsvital importance as a channel of commerce to special groups of other States or to international trade generally, offers in time of peace an obstacle rather than an aid to transit, is likely, as time goes on, to be increasingly regarded as inequitable." (*International Law*, Vol. I, 2d rev. ed., 1945, p. 618).

It seems that if there is a principle, in Hyde's view it operates with different force according to times and conditions ; he makes an express reservation in times other than of peace and implies that enclaves would be in a stronger position to assert a claim of transit than a State which could choose among more than one convenient route of access. Moreover the principle itself seems to be based on a right of communication or a right of intercourse as a natural attribute of State sovereignty. Oppenheim, on the other hand, flatly states that "there is, in law, no such fundamental right of intercourse" although he goes on to say that, to the extent that intercourse between nations is a condition without which international law would not and could not exist, "to that extent it may be maintained that intercourse is a presupposition of the international personality of every State" (*International Law*, 8th ed., 1955, p. 321).

E. Lauterpacht in his most perceptive address "Freedom of Transit" (44 *Transactions of the Grotius Society*, 1958-59, 313, 319-20) prefers to move away from such bases as communication or even necessity, as propounded by Vattel, and to ground the principle more abstractly yet firmly : "The operative principle, it is believed, is that States, far from being free to treat the establishment or regulation of routes of transit as a substantial derogation from their sovereignty which they are entirely free to refuse, are bound to act in this matter in the fulfilment of an obligation to the community of which they form a part." In thus deriving the right of transit from the fact of existence of the international community and the interdependence of States, lie finds support from Grotius who wrote :

> "Similarly also lands, rivers and any part of the sea that has become subject to the ownership of a people, ought to be open

> to those who, for legitimate reasons, have need to cross over them ; as, for instance, if a people . . . desires to carry on commerce with a distant people . . . it is altogether possible that ownership was introduced with the reservation of such a use, which is of advantage to the one people, and involves no detriment to the other. Consequently, it must be held that the originators of private property had such a reservation in view." (*De jure belli ac pacis*, II, 2, 13).

It will be noted that Grotius' words are suggestive of a servitude which introduces yet another controversial principle of international law but, as E. Lauterpacht suggests, this need not be taken as anything more than the form in which the right might under some circumstances be asserted.

With current developments in the law of the sea in mind, it is tempting to explore the Lauterpacht thesis further. While Grotius was concerned with rights of passage and freedom of communication and commerce, land-locked States in modern times are equally concerned with access to natural resources. A principle of transit, whether grounded on necessity, servitude or freedom of intercourse, could never support a claim to a share in the resources of the exclusive economic zones of neighbouring adjacent States. Transit, of course, is the necessary condition for land-locked States to exercise the freedom of the high seas and to participate in the exploitation and exploration of the seabed beyond national jurisdiction which has been proclaimed "the common heritage of mankind". The only principle that could explain why land-locked States may share in the exploitation and exploration of neighbouring exclusive economic zones is that in the waters of the zone and in the continental shelf and seabed beneath, littoral States have "sovereign rights" (something less than full sovereignty) which, since they were formerly not subject to any kind of national appropriation but have become the subject of international agreement based on the interdependence of the world community, are subject to a reservation in favour, *inter alia*, of their disadvantaged land-locked neighbours. Further support for this thesis may be argued to follow from the characterization of the continental shelf by the International Court of Justice in the *North Sea Continental Shelf Case*. The Court stated :

> "What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea." (I.C.J., Reps., 1969, p. 31).

If the continental shelf is only "deemed to be" part of the adjacent territory (and the actual outer limits have still to be determined at the exploitability depth, the outer edge of the continental margin, or at an agreed distance/depth line between) could it not also be argued with some force that the submarine territory is a prolongation of the adjacent land mass *as a whole* (Cf., the term "*continental* margin") and that consequently the inland States of the land mass have rights there also? If this is so, the suggested reservation of rights in respect only of living renewable resources in the adjacent exclusive economic zones could not be defended.

It is submitted that the claims of the Land-locked and Other Geographically Disadvantaged States Group in the current Law of the Sea Conference force a re-assessment of the miscellaneous bundle of rights and favours hitherto conceded and prompt a renewed search for a sound basic principle. Unless such a principle is found, such rights as are conceded will rest on insecure foundations and may ultimately lead to greater tension and instability in international relations than the disadvantages and imbalances they are intended to redress.

It must be accepted, as E. Lauterpacht points out (*op, cit.*. pp. 322-323), that evidence of State practice in the matter of transit does not give unambiguous support to the principle here advanced. A particular point of concern is that transit by air has been consistently treated as *sui generis* and that inherent rights of transit have been expressly negated by the conventions of 1919 and 1944. Both the Transit Trade Convention, 1965, and the draft Caracas Convention on the Law of the Sea omit reference to air transport as one of the means of transit traffic. It may be that the explanation for this is, as Lauterpacht suggests, to be found in economic considerations affecting the protection of national airlines and in national security considerations. But the question now is whether air transport can any longer be maintained as a special case, even if one does not concede the suggested general principle underlying rights of transit; the Bermuda and other techniques for solving competition problems are not dependent on the resolution of questions of transit, and security considerations can easily be met through corridor arrangements to which in any event States have in practice been driven for reasons of traffic separation and air safety.

While bearing the wider issues constantly in mind, it is necessary at the outset of the Committee's work to concentrate primarily on the assembly of data and on the analysis of particular aspects of the situation of land-locked States. A tentative outline of topics is as follows :

1. Historical, political and geographical factors affecting land-locked States.

2. The impact of distance and transit difficulties on the economies of land-locked States.

3. The role and work of UNCTAD in the assessment of the problems of land-locked States.

4. Transit by rail and road of goods and persons to and from land-locked States.

5. Transit by air of goods and persons to and from land-locked States.

6. Transit by navigable rivers of goods and persons to and from land-locked States.

7. Transit of electric power, gas, oil and water pipelines, and postal, telegraphic, telephonic and other like services to and from land-locked States.

8. The rights of Transit States in such matters as customs, health, immigration, quarantine (animals and plants), security and other legitimate interests.

9. Access by land-locked States to the sea.

10. The right of land-locked States to a maritime flag and to the use by its vessels of neighbouring ports, including rights in the territorial sea and in the *port d'armament*.

11. The right of land-locked States to enjoy the freedom of the high seas.

12. The right of land-locked States to participate in the exploitation and exploration of the resources of the high seas and of the seabed beyond national jurisdiction.

13. Participation by land-locked States in the exploration and exploitation of neighbouring exclusive economic zones, including the modalities of such participation whether on a bilateral or regional basis.

14. The peculiar problems of enclaves—
(a) enclaved States, and (b) detached portions of national territory enclaved within other States.

28 December, 1975.

I. A. SHEARER, Rapporteur.