[An analysis of international law principles in state practice of bilateral transit treaties]

Anujin Thi Hong Onon

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A. ONON

MLP
Abstract

Title of Dissertation: An analysis of international law principles in state practice of bilateral transit treaties

Degree: Master of Science

This dissertation is a study of an analysis of international law principles in state practice of bilateral transit treaties.

The aim of this research is to shed light on state practice of bilateral transit treaties by analysing which principles of international law are embodied in transit treaties and determining which principles can secure and strengthen the right of access to the sea of land-locked States.

The study analyses the Treaty of Transit between India and Nepal, 1999 and Afghanistan-Pakistan Transit Trade Agreement, 2010 (APTTA). Furthermore, this study uses comparative legal analysis.

Finally, concrete knowledge of international law principles with regard to state practice of bilateral transit treaties is presently lacking. Therefore, by focusing on this particular area, this research adds value to the existing body of knowledge.

KEY WORDS: land-locked State, transit State, transit treaty, right of access to the sea, principles of international law, good faith, peaceful settlement of international disputes, freedom of transit

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<tr>
<td>APTTA</td>
<td>Afghanistan-Pakistan Transit Trade Agreement</td>
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<td>ATTA</td>
<td>Afghan Transit Trade Agreement</td>
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<td>CHS</td>
<td>Convention on the High Seas</td>
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<td></td>
<td>The United Nations Economic Commission for Asia and the far East</td>
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<td>ECAFE</td>
<td>The United Nations Economic and Social Commission for Asia and the Pacific</td>
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<td>GATT</td>
<td>The General agreement on Tariffs and Trade of 1947</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
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<td>IUCN</td>
<td>International Union for Conservation of Nature</td>
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<td>PCIJ</td>
<td>Permanent Court of Justice</td>
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<td>UN</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<td>UNESCO</td>
<td>The United Nations Educational, Scientific and Cultural Organization</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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CHAPTER 1. INTRODUCTION
“Access to the sea is synonymous with access to the world market”

1.1. Prologue/Preface
Maritime transport is the cheapest and efficient transport of international trade. According to the review of maritime transport, more than 90% of the world trade by volume is transported by the sea. (UNCTAD, 2019).

As defined by Červenka (1973), land-locked States are the States which have no sea-coast and completely remote from the sea. Its access to the sea depends on the consent of its neighbouring transit States for using their routes to the sea and their seaport facilities (Červenka, 1973).

Currently there are 45 land-locked States (Tanaka, 2019).

<table>
<thead>
<tr>
<th>States that are Parties to UNCLOS</th>
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<tr>
<td>Armenia</td>
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*Table 1 List of land-locked States (Tanaka, 2019)*

Land-locked States due to their remoteness from the sea, have challenges in in its economic and commercial development and tend to pay more than double on import and export costs compared to their neighbouring coastal States (UN, 2014). The recognition of the right of unrestricted access to the sea have an utmost importance for the expansion of international trade and economic development of land-locked States because they are considered 40% of the world’s low income economies (Lahiri & Masjidi, 2012).

Article 125 of UNCLOS secures and guarantees the right of access to the sea for land-locked States. Article 125 (1) of UNCLOS provides that land-locked States shall have the right of access to the sea for the purpose of exercising the rights provided for UNCLOS. Notwithstanding article 125(1) of UNCLOS, land-locked States still have challenges to secure its unrestricted and free access to the sea because access right has an imperfect nature. In other words, the right of access to the sea is not a self-executing right. As stated in Article 125 (2) of UNCLOS the right of access to the sea is attainable
only if land-locked State concludes bilateral transit treaty with its transit State. Moreover, Article 125 (3) of UNCLOS states that transit State can take indispensable measures if its legitimate interests are infringed by land-locked State. According to Article 125 (2) of UNCLOS, bilateral transit treaties hold the fundamental importance in securing the right of access to the sea. Transit trade of land-locked States have an utmost importance to their economic cooperation with other States, expansion of international trade and to its overall sustainable development. Therefore, in order to gain its free and unrestricted right of access to the sea and freedom of transit, it is vital for land-locked States that the transit treaty should be concluded with its transit State in a way that it can demonstrate competence in its handling of the dispute.

Thus, bearing in mind the universality and influence of the general principles of international law, this research is focused to identify which principles of international law are present or available in bilateral and transit treaties and whether principles might demonstrate competence in strengthening the right of access to the sea for land-locked States.

1.2. Aim of the research
This research aims at shedding a light on the State practice of bilateral transit treaties by determining which principles of international law are present in transit treaties for the support of strengthening land-locked States’ claim regarding the right of access to the sea.

1.3. Questions of the research
In order to achieve the above mentioned aim the following questions will be answered:
1. How the right of access to the sea for land-locked States has evolved historically?
2. Which principles of international law are present in bilateral transit treaties?
3. Which principles of international law can secure and strengthen the right of access to the sea of land-locked States?
1.4. Scope and limitation of the research
The right of access to the sea for land-locked States is a broad topic. Currently there is no ICJ, ITLOS or Arbitral Tribunal’s decision based on Article 125 of UNCLOS. Therefore, this research will restrict its focus on State practice of bilateral transit treaties. Protocols, Memorandum to the Protocol, Annexure and Annexes of bilateral treaties will not be studied. Only the main transit treaty will be studied for the purposes of this research.

The general principles of international law, first included in the Statute of the PCIJ, substantially incorporated in Article 38 (1)(c) of the Statute of the ICJ under the terms "general principles of law recognized by civilized nations." (Bassiouni, 1990). There are many principles exist in international and national legal sources. However, this research will restrict its focus on four principles of international law, namely the principle of good faith, freedom of transit, peaceful settlement of international disputes and principle of human rights law (principle of universality) and sustainable development.

1.5. Methodology of the research
In order to achieve the aim and objectives of this research, the scientific methodology which will be used is comparative legal analysis.

1.6. Literature review
Literature review aims to summarize the findings or claims that have emerged from prior studies relevant to the topic of this research. In other words, it may help to understand the importance of principles of international law with regard to State practice of bilateral treaties.

It is articulated by Glassner (1970) that bilateral agreement concluded between land-locked State and transit State should be based on the principles of international law, reciprocity and mutual economic benefits. In both bilateral agreements, land-locked States are dependent on persuasion more than threats. If the principles of international
law are present in transit treaty, its role to secure the right of access to the sea is best achieved.

The right of access to the sea is not a self-executing right unless a free and unrestricted transit is practically implemented. Therefore, universally accepted principles of international law are needed in order to serve as legal basis for bilateral transit treaties in securing the right of access to the sea (Glassner, 1978).

Several historic claims for the right of access to the sea were made by land-locked States. Those historic claims were initially based on principle of natural law. Land-locked States claimed that they shall have the right of access to the sea by its very sovereignty because the high seas are open to every country. They are entitled to exercise their transit right due to the fact that the high seas are the common heritage of mankind (Sinjela, 1983).

Vasciannie (1990) demonstrates that Article 125 of UNCLOS carries a deficiency. While some commentators assume that Article 125 of UNCLOS guarantees the right of access to the sea, the author claims that Article 125 (2) of UNCLOS does not have any inclusion of legal consequences on the failure of bilateral agreements. Moreover, Article 125 (3) of UNCLOS has an ambiguity to the point where it fails to describe what may be regarded as legitimate interests. If there is no indication of such terminology, transit State might close its border not only on serious matters but also for trivial problems. The right of access to the sea can only be strengthened only if it refers to the principles of international law, such as natural law, municipal legal systems and doctrine of State servitudes (Vasciannie, 1990).

Uganda’s access to the sea had been de facto for many years due to the civil war in South Sudan and it only obtained de jure right of access when South Sudan became the land-locked State in 2011. According to this historic fact, in certain circumstances, war may cause disrupt on exercising right of access to the sea. Sometimes war is inevitable, and therefore it is crucial for land-locked States to keep their right of access
to the sea as de jure crystallized (Vrancken & Tsamenyi, 2017). In addition, bilateral treaties might support keeping de jure status of such right. Moreover, inclusion of the principles of international law with regard to the outbreak of war is important.

According to Tanaka (2019) it is impermissible for transit States to take all measures necessary as stated in Article 125 (3) of UNCLOS because Article 300 of UNCLOS provides the principles of good faith and the prohibition of an abuse of right. Thus, Tanaka (2019) highlights that States shall act in accordance with principles of international law embodied.

Claims that have emerged from prior research only highlights that principles of international law have a fundamental importance in securing and strengthening the right of access to the sea. However, concrete knowledge of the principles of international law in relation to State practice of bilateral transit treaties is required and presently badly lacking. In other words, embodiment of general principles in transit treaties remain underexplored in comparison to general problems of land-locked States. Therefore, by focusing on this particular area, this research will add value to the existing body of knowledge.

**CHAPTER 2. EVOLUTION OF THE RIGHT OF ACCESS TO THE SEA**

“You have to look at history as an evolution of society”

*Jean Chretien*

How the right of access to the sea for land-locked States has evolved historically? Several international conventions which recognized the right of access to the sea have been negotiated since the beginning of the 21st century. Codifying the right of access to the sea had not been an easy task and each international instruments to some extent failed to establish all the challenges and obstacles faced by land-locked States (United Nations, 1987).
3.1. Convention and Statute on Freedom of Transit of 1921

At the end of the First World War, land-locked States did not have a right to navigate with its own flag in international waters (Mugumyankiko, 1994). Article 23 (e) of the Covenant of the League of Nations stated that “Will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League.” Development of the Barcelona Convention is based on the need of a secured right of transit to the sea for land-locked States (United Nations, 1987).

The Barcelona Convention, adopted on 20 April 1921, is the first multilateral treaty that ensures the freedom of navigation in international waters. It ensured the general freedom of transit for all the Contracting States but considered “transit” as a non-self-executing right (United Nations, 1987).

It is further articulated by Mugumyankino (1994) that with the adoption of the Barcelona Convention, Contracting States have a responsibility to facilitate free transit through their territories either by railway or waterway. As stated in Article 2 of the Barcelona Convention, there will be no discrimination in freight rates based on nationality of person and the flag of vessel, and so on.

Although the Barcelona Convention adopted valuable provisions regarding the right of transit, it did not fully guarantee the right of access to the sea for land-locked States. From land-locked States’ perspective, the adoption of the Barcelona Convention had been recognized as a promising start of securing the right of transit. However, the absence of further valuable principles was evident. The Barcelona Convention did not declare the right of transit as a universal principle and was only confined to Contracting States. Moreover, the Barcelona Convention only applied to railway and waterway transportation so that it created a limitation to many African and Asian countries which are highly dependent on road transport to the sea (Sinjela, 1983).
In fact, as being the first important convention that deals with the freedom of transit, the influence and contribution of the Barcelona Convention cannot be undervalued.

3.2. The General agreement on Tariffs and Trade of 1947

GATT was established in October 1947, shortly after the Second World War, with the purpose of reducing or eliminating tariffs and other barriers to international trade. It entered into force on 1 January 1948 (WTO, n.d.).

GATT did not specifically refer to land-locked States but it reaffirmed the principles of freedom of transit adopted by the Barcelona Convention (Sinjela, 1983).

Article 5 (2) of the GATT states:

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

Article 5 (6) of the GATT stipulates:

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

Glassner (1970) highlights that the GATT rather than fully recognizing the principles of freedom of transit, it just reaffirmed the existing principles of the Barcelona Convention and did not progress beyond the Barcelona Convention.

Even after 1945, the right of access to the sea and freedom of transit still had not been declared as the universal and general legal principle of international law despite being indispensable for land-locked States.
3.3. Convention on the High Seas of 1958

The CHS was adopted on 29 April 1958 during the first Conference on the Law of the Seas in Geneva, Switzerland. It entered into force on 30 September 1962 (United Nations, 2008).

During the 11th session of the UN General Assembly in February 1957, there were six land-locked States which advocated to include the questions of access to the sea in the agenda of the UN Conference on the Law of the Sea to be organized next year (Glassner, 1970).

The ECAFE established a recommendation regarding the challenges of freedom of transit for land-locked States particularly addressing that “the needs of land-locked member States and members having no easy access to the sea in the matter of transit trade be given full recognition by all member States and that adequate facilities therefore be accorded in terms of international law and practice in this regard.” Therefore, this recommendation influenced the UN and its agencies to put the challenges of transit of land-locked States in its agenda setting (Sinjela, 1983).

At the end of a Preliminary Conference of Land-locked States which was held in Geneva in 1958, land-locked States established set of principles, also called as the Magna Carta read as follows (United Nations, 1987):

Principle IV: Regime to be applied in ports

“Each Land-locked State is entitled to the most favoured treatment and should under no circumstances receive a treatment less favourable than the one accorded to the vessels of the maritime State as regards access to the latter’s maritime ports, use of these ports and facilities of any kind that are usually accorded.”

Principle V: Right of free transit
“The transit of persons and goods from a land-locked country towards the sea and vice versa by all means of transportation and communication must be freely accorded, subjected to existing special agreements and conventions.”
“The transit shall not be subject to any customs duty or specific charges or taxes except for charges levied for specific services rendered.”

Principle VI: Right of States of transit
“The State of transit, while maintaining full jurisdiction over the means of communication and everything related to the facilities accorded, shall have the right to take all indispensable measures to insure that the exercise of the right of free access to the sea shall in no way infringe on its legitimate interests of any kind, especially with regard to security and public health.”

Principle VII: Existing and future agreements
“The provisions codifying the principles which govern the right of free access to the sea of the land-locked State, shall in no way abrogate existing agreements between two or more Contracting Parties concerning the problems which will be the object of the codification envisaged, nor shall they raise an obstacle as regards the conclusion of such agreements in the future, provided that the latter do not establish a regime which is less favourable than or opposed to the above-mentioned provisions.”

The CHS did not fully reflect the Magna Carta (United Nations, 1987). Article 3 (1) of the CHS states:
“In order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea-coast should have free access to the sea. To this end States situated between the sea and a State having no sea-coast shall by common agreement with the latter, and in conformity with existing international conventions accord: a. To the State having no sea-coast, on the basis of reciprocity, free transit through their territory.”
Furthermore, Article 3 (2) of such CHS provides:

“States situated between the sea and a State having no sea-coast shall settle, by mutual agreement with the latter, and taking into account the rights of the coastal State or State of transit and the special conditions of the State having no sea-coast, all matters relating to freedom of transit ..., in case such States are not already parties to existing international conventions.”

Sinjela attempted to summarize land-locked States’ view on Article 3 of the CHS and gave a more complete picture of it. According to Sinjela (1983), land-locked States expressed objections on the provision which requires an agreement with a transit State before the right of access to the sea is acknowledged.

Moreover, land-locked States argued even if land-locked States conclude an agreement with its transit neighbour, transit States do not have a duty to grant the right of access to the sea. On the whole, the CHS created a circumstance where the right of access to the sea for land-locked States is based on the reciprocity.

According to Article 3 of the CHS, if there is no need for a transit State to access through its land-locked neighbour’s territory, then it may not have interest to grant the right of access to the sea. For this reason, land-locked States demonstrated that only the modalities of implementation should be negotiated with transit States (Sinjela, 1983).

Article 3 of the CHS safeguarded the interests of transit States. In addition, article uses the hortatory “should” rather than “shall” so that this creates an optional choice that disrupts the spirit of the right of access to the sea (United Nations, 1987). In other words, the foundation for land-locked States’ objection and claim to Article 3 of the CHS was based on the conception that the right of access to the sea should be universally and fundamentally accepted as the general legal principle of international
law. As a consequence, this desire resulted to the adoption of a more comprehensive convention, known as the New York Convention (United Nations, 1987).

3.4. **The Convention on Transit Trade of Land – locked States of 1965**

Article 55 of UN Charter requires the UN to promote conditions of economic progress and solutions of international economic problems. The Convention was adopted in New York in July, 1965 at the Ministerial Conference on Asian Economic Cooperation (UN, 1987). The New York Convention was established to specifically address land-locked States’ transit problems. Even though the New York Convention was not completely satisfactory to land-locked States, it has become the new international standard, which represented an advance over the Barcelona Convention.

In its Preamble it recognized the right of access to the sea is an essential principle for the expansion of international trade and economic development. Unlike previous conventions, the New York Convention recognized the right of access as the principle of international law.

Preamble of the New York Convention states:

“Recognized the right of free transit for land-locked countries and the special considerations which apply to their transport and transit problems and the importance of the relationship of these problems to questions of regional co-operation and the expansion of intra-regional trade.”

Compared to Article 3 of the CHS, the New York Convention seems to be less authoritative due to the reason that its provisions are brief and do not carry an ambiguity or vague meaning (Vasciannie, 1990). Without any hesitation, the New York Convention is considered as one of the most valuable establishments of international law in terms of codification of the right of access of land-locked States to the sea and freedom of transit. The New York
Convention not only includes five all-important principles in its Preamble but also formulated number of different provisions, such as (UN, 1987):

1. Interpretation of Article 2 (1) is hortatory because it uses “shall” instead of “should”, and therefore it strengthens the nature or spirit of the right of transit.
   Article 2 of the New York Convention states:
   “I. Freedom of transit **shall** be granted under the terms of this Convention for traffic in transit and means of transport.”

2. It includes crucial provision which identifies terms “land-locked State” and “transit State.” In addition, it broadened the scope of “means of transport” which was narrowly defined in the Barcelona Convention.

3. It is noteworthy that Article 4 works to the benefit of land-locked States. It requires Contracting States to provide adequate means of transport and handling equipment without unnecessary delay at the points of entry and exit, and as required at points of trans-shipment.”

4. Article 7 is found to be of paramount importance because it requires States Parties to take action to prevent restrictions and delays on traffic in transit except in cases of force majeure. If such delay or any challenges occur, transit States shall have a duty to support and cooperate with land-locked States in order to abolish such difficulties.

The New York Convention can be viewed as an impressive instrument which attempts to equalize the rights of both land-locked and transit States. Looking at all the benefits that are offered to land-locked States, it might be the reason why only a limited number of transit States ratified the New York Convention. Following the New York Convention’s recognition on the right of transit, it was predominantly ratified by land-locked States (Vasciannie, 1990).
It is also argued that not all provisions are beneficial to land-locked States, such as the Preamble and Article 15 of the New York Convention still includes the requirement of reciprocity.

Preamble of the New York Convention states:

“In order to promote fully the economic development of the land-locked countries, the said countries should be afforded by all States, on the basis of reciprocity, free and unrestricted transit, in such a manner that they have free access to regional and international trade in all circumstances and for every type of goods.”

Article 15 of the New York Convention provides:

“The provisions of this Convention shall be applied on a basis of reciprocity.”


In 1973, seven land-locked States submitted proposals which included fundamental and valuable principles to the International Law Commission of UN, read as follows (Sinjela, 1983):

1. Article 2 (1) states that “The right of land-locked States to free access to and from the sea is one of the basic principles of the law of the sea, and forms an integral part of the principles of international law.”

2. Article 2 (2) provides that “In order to enjoy the freedom of the seas and to participate in the exploration and exploitation of the sea-bed and its resources on equal terms with coastal States, land-locked States irrespective of the origin and characteristics of their land-locked conditions, shall have the right of free access to and from the sea in accordance with the provisions of this Convention.”
3. Article 2 (3) stipulates that “The right of free access to and from the sea of land-locked States shall be the concern of the international community as a whole and the exercise of such rights shall not depend exclusively on the transit States...”

Article 3 notes that “Transit States shall accord free and unrestricted transit for traffic in transit of land-locked States, without discrimination among them, to and from the sea by all means of transport and communication with the provisions of this Convention.”

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<td>2. Committed to all the preliminary procedures, such as the election of officers and adoption of rules and so on.</td>
<td>2. Questions and challenges related to the right of access and freedom of transit were addressed by delegations of several land-locked States and coastal States.</td>
</tr>
<tr>
<td>3. During the meeting held before the second Session of the Conference in Uganda from 20 to 22 March 1974, developing land-locked States and other geographically disadvantaged States adopted the Kampala Declaration.</td>
<td></td>
</tr>
</tbody>
</table>

*Table 2 Prior works before the Third Conference on the Law of the Sea (United Nations, 1983)*
The UN organized the Third Conference on the Law of the Sea with the purpose of developing a new Law of the Sea that can fill the needs of the globalized world, leaving the old traditional law behind. (Anand, 1983). The third Conference on the Law of the Sea was held in December 1973.

During the conference, the principle of Common Heritage of Mankind was introduced that the sea is the common heritage of every States and it should be used for the benefits of all (Anand, 1983). To further elaborate on that, as long as the sea is the common heritage of mankind, there should be the universal treaty that regulates problems related to the sea and States’ relation and communication with each other.

UNCLOS, signed at Montego Bay, Jamaica, on 10 December 1982, required 14 years of fruitful work of more than 150 countries with different socio-economic development, including coastal, geographically disadvantaged, island States and land-locked States. The purpose of adopting this comprehensive international treaty was to deal with all the matters related to the sea due to the notion that those challenges are interrelated and should be solved all together (UN, 1983). UNCLOS has been signed by 157 States and has 168 State Parties (United Nations, 1994).

The convention has 17 parts and nine annexes. Preamble of UNCLOS states that the Convention’s achievement will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked.

Article 125, the central provision in Part X of UNCLOS provides the right of access of land-locked States to and from the sea and freedom of transit.

The earlier treaties, except the New York Convention, provided that land-locked States should have the right of access to the sea. Using hortatory “should” instead of “shall”,

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created a confusion whether transit States have legal obligation to grant the right of access to the sea or just morally bound to do that. However, Article 125 of UNCLOS removed this uncertainty and recognized “access to the sea” as a right. UNCLOS used “shall” instead of “should” creating a legal obligation for coastal States (Vasciannie, 1990).

Article 125 of UNCLOS states:

“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.”

In addition, UNCLOS does not have the requirement of reciprocity. (Vasciannie, 1990). Elimination of the requirement of reciprocity is a huge advantage for land-locked States to move forward and enjoy its free access to the sea.

Every international conventions regarding the right of access to the sea, have had its deficiencies. Conventions do not regulate all the matters related to the right of access to the sea for land-locked States. Preamble of UNCLOS states that “matters not regulated by this Convention continue to be governed by the rules and principles of general international law.”

State practice of bilateral treaties have paramount importance for land-locked States since they will secure and strengthen land-locked States’ the right of access to the sea and freedom of transit. As mentioned in Chapter 1, identifying whether principles of international law are present in bilateral transit treaties is important because those principles can demonstrate competence in strengthening and securing the right of access to the sea for land-locked States.
CHAPTER 3. PRINCIPLES OF INTERNATIONAL LAW:

“Global markets must be balanced by global values such as respect for human rights and international law, democracy, security and sustainable economic development”

Anna Lindh

Principles of international law are of fundamental importance due to the rapid growth of the number and significance of international organizations and treaties (Schlesinger, 1957).

3.1. The concept of the principles of international law

The general principles were first included in the Statute of the PCIJ and substantially incorporated in Article 38 (1)(c) of the Statute of the ICJ under the terms “general principles of law recognized by civilized nations.” With regard to Article 38 (1) (c) of the Statute of the ICJ, it can be interpreted that general principles exist in international and national legal sources (Bassiouni, 1990).

There are many scholarly definitions of general principles of international law and its importance. Firstly, as Gutteridge (1952) defines, citing Cheng, general principles are fundamental part of the legal system, in light of which international law can be understood and used. Another scholar Professor Schlesinger (1957) defines general principles as “a core of legal ideas which are common to all civilized legal systems.” General principles exist independently of any institutions of any particular State and create irreducible basis of all legal systems (Jalet, 1962). Further definition was made by Verzijl (1968) that every society, which are arranged in an orderly way, cannot exist without accepting general principles as justifiable. As Lammers (1980) highlighted that general principles are the basis of domestic legal orders and it is the embodiment of the universal legal standards certified by the law of civilised States. General principles, recognized and used in dispute settlement between States, are the sources of municipal and international law. General principles not only used to interpret ambiguity of conventional or customary international law but also can be
utilized to determine the rights and duties of States (Bassiouni, 1990). Lastly, brilliant explanation was given by Jones (2018), citing English judge Lord Phillimore, that general principle is “maxims of law, or principles accepted by all nations in foro domestico.”

All in all, according to the scholars’ definitions, general principles of international law can strengthen and promote the rule of law in international community. The principles of international law which have a relation to the formulation of the right of access to the sea include, inter alia, principles of good faith, peaceful settlement of international disputes, freedom of transit and principles of international human rights law and sustainable development

3.2. Invoking principles of international law: principle of good faith, peaceful settlement of international disputes, freedom of transit and principle of international human rights law and sustainable development

3.2.1. Principle of good faith

It is widely demonstrated by scholars that principle of good faith is one of the most important and well-established principles of international law. Principle of good faith according to Bilder (1986) due to its supportive nature, is established in many bilateral treaties and in various international court decisions.

Principle of good faith is established in Article 2 (2) of the UN Charter, UNGA Resolution 2625 (XXV), Article 26 and 31 (1) of the Vienna Convention, UNCLOS and in the decisions of the ICJ.

According to the UN Charter and UNGA Resolution 2625 (XXV), all States shall fulfil in good faith their obligations under the generally recognized principles and rules of international law.

Vienna Convention recognizes the principle of good faith as one of the universal principles and states that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”
Moreover, Article 300 of UNCLOS provides that “States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.”

Principle of good faith had been established in the ICJ decisions. In the Nuclear Tests (Australia v. France) case, the ICJ demonstrated that “One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.” In the Fisheries Jurisdiction (U.K. v. Iceland) case, the ICJ pointed out that “Governments of Iceland and the U.K. are under mutual obligations to undertake negotiations in good faith for the equitable solution of their differences concerning their respective fisheries rights in the areas specified.” In the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) case, the ICJ demonstrated acts that are calculated to deprive, to defeat, or directed to defeating a treaty’s purpose will be considered as the violation of the principle of good faith.

Evidently, when States enter into an international agreement between or among States, agreement creates a mutual trust and obligation, and therefore none of those States should violate its purpose and provisions. Endeavouring to achieve purpose of the agreement is the act of good faith. Principle of good faith abstains parties from failing to comply with the object and purpose of a treaty. Good faith can be explained that the signatures of a treaty is not an empty gesture. The principle of good faith helps to ascertain the legal meaning of actors’ behaviour in international legal life. It is also considered as an ethical principle (Gragl & Fitzmaurice, 2019).

An example of using the principle of good faith in dispute settlement can be found in the 1928 Megalidis decision by the Greco-Turkish Mixed Arbitral Tribunal predating the Vienna Convention by almost 40 years. Turkey and Greece had negotiated and signed the Treaty of Lausanne in 1923. Prior to Treaty’s entry into force, Greece had
seized the property of a Greek national, and had claimed that the property was exempt from restoration under Article 67 of the Lausanne Treaty. Although, the Tribunal, adjudicated that the seizure of the property was illegal since States already signed the treaty and its signature creates an obligation that before Treaty’s entry into force, contracting parties have an obligation and duty not to do anything that could cause harm to the agreement (Gragl & Fitzmaurice, 2019). This decision clearly embodies the principle of good faith.

3.2.2. Principle of peaceful settlement of international disputes
The PCIJ has provided that “the international dispute as a disagreement over a matter of law or fact, a contradiction in opposition to law theses or interests.” As stated in the UN Charter, settling disputes in diplomatic, juridical, and within the UN or other international organizations are three main ways to settle international disputes peacefully. Negotiations are considered as one of the fundamental and effective way to solve disputes between States. According to the State practice, the parties of treaties tend to solve disputes primarily by negotiations (Stoica, 2019).

The UN established cardinal principles of international law, notably the strict limitation on the right to use force against other State. Principle of peaceful settlement of international disputes is established in the UN Charter, UNGA Resolution 2625 (XXV) and in UNCLOS.

In order for the negotiation to be possible, good communications between the parties is necessary, in the sense of free acceptance of the negotiations, on the basis of the fundamental principles of public international law, especially the principle of the sovereign equality of states. Accepting and using this means does not automatically resolve the dispute. Solutions can be diverse, such as giving up claims, accepting them, reaching a compromise, essential to meeting the commitments made by the parties at the end of the negotiations. If the dispute is not settled, the parties have an obligation to resort to other means of settlement, but only by peaceful means.
As stated in Article 1 of the UN Charter, one of the primary goals of the UN is to maintain international peace and security.

Article 2 of the UN Charter states:
“3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”

“4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

Article 33 of the UN Charter provides:
“1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”

Preamble of the Vienna Convention states that Parties to the present Convention should settle their international disputes in conformity with the UN Charter and with the principles of justice and international law, by peaceful means.

Article 300 of UNCLOS states that:
“1. In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.”
3.2.3. Principle of freedom of transit

Principle of freedom of transit is established in the Preamble of New York Convention and in Article 125(1) of UNCLOS.

Freedom of transit secures the economic well-being and stability of the land-locked States, and therefore it can support land-locked States’ legitimate claim to free access to the sea. Land-locked States considered that the freedom of transit represents the economic interdependence of States. It is created by a customary law—a custom of economic relation or interaction. (Uprety, 1994).

During the third United Nations Third Conference on the Law of the Sea Convention, the principle of freedom of transit had been supported by the majority of land-locked States (Martin, 1984):

Delegation of Mongolia Mr.Nyamdorj stated that the freedom of transit is one of the principles of the law of the sea and stands as a fundamental part of the principles of modern international law. It is derived from the principle of the freedom of the high seas.

Delegation of Nepal Mr.Upadhyaya highlighted that the principle of freedom of transit is recognized and established in many international conventions. It is crucial for the land-locked States future development.

Delegation of Bolivia Mr.Medeiros Querejazu stated that “the right of free transit had been formally established in the Convention on the High Seas and it was necessary to regulate them now in breadth and in detail in the convention on the law of the sea, in order not only to give them a multinational character and increased application but also to ensure their full realization and effectiveness.”

Delegation of Afghanistan Mr.Malikyar noted that the existing conventions did not fully address the needs and legitimate interests of the land-locked States. Moreover,
the delegation highlighted that it would be a violation of the principle of equality of States and the norms of international law, if there is a restriction on the principle of free transit.

Delegation of Uganda Mr. Ochan highlighted that the principle of freedom of transit is established as the principle of customary international law and he hoped that equal treatment in the use of port facilities should not be left out. The reason is that the freedom of transit cannot exist without equal treatment in the use of port facilities.

Delegation of Bhutan Mr. Penjor stated that the problem regarding the right of free transit should be taken into account due to the urgent needs and interests of land-locked States. The delegation mentioned that the traditional universality and freedom of the seas cannot be enjoyed as long as land-locked States do not have the freedom of transit. Second of all, the freedom of transit allows land-locked States to communicate and trade with the outside world. Finally, the freedom of transit is an important prerequisite for land-locked States to share the common heritage of mankind.

3.2.4. Principle of international human rights law and the concept of sustainable development

Principle of international human rights law and the concept of sustainable development are broad discussion. However, this part will try determining following question:

➢ Are there any principles of international human rights law and the concept of sustainable development embodied in Article 125 (1) of UNCLOS?

○ Principles of international human rights law

Human rights are not granted to human beings by any State. We have human rights because we were born as human beings. “They range from the most fundamental – the right to life – to those that make life worth living, such as the rights to food, education, work, health, and liberty” (United Nations, n.d.).
The core principle of international human rights law is the principle of universality, which means all humans are equally entitled to human rights. It was first highlighted in the UDHR and later emphasized in many international human rights conventions (United Nations, n.d.). Principle of universality might be the cornerstone of Article 125 (1) of UNCLOS due to the following chronological explanation:

1. “All human rights are indivisible and interdependent.” (United Nations, n.d.)
   One human right cannot be enjoyed without the other. Therefore, human rights are interdependent. One of the purposes of the UN is to achieve international co-operation in solving international problems of an economic character and in promoting human rights.

2. The ICESCR in article 12 establishes:
   “2. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”

   The foremost important duty for national governments is to protect and promote the human rights of its citizens under their municipal law and international law (Zyberi, 2008). Governments have a duty to ensure the right established in Article 12 of the ICESCR. Therefore, gaining free and unrestricted access to the sea is vitally important for land-locked States. In other words, having an access to the sea, is one of the solutions to support living conditions of its citizens.

3. Preamble of the UNCLOS states:
“Bearing in mind that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked,”

Principles of international human rights law with regard to UNCLOS, is broadly summarized in its Preamble. Preamble of UNCLOS recognizes the desirability of creating a just and equitable international economic order and recognizes the interests and needs of developing countries, both land-locked and coastal. It is noteworthy that the original aim of UNCLOS is to promote the economic and social advancement of all people of the world (Oanta, 2019).

4. Article 125 (1) of UNCLOS states that “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...”. Article 125 (1) recognizes the special needs and interests of land-locked States. The right of access to the sea is the desire to support the overall well-being of its citizens and continuous sustainable development of its country.

Article 125 of UNCLOS might be indirectly encouraging and promoting human rights from the perspective of economic development and the right of adequate standard of living. In other words, due to its language and purpose, Article 125 (1) of UNCLOS might include the principle of universality and sustainable development in a broader context.

- Definition of sustainable development
There is no terminological unification of sustainable development among international community. Sustainable development is a terminology known as difficult to describe and carries a broad and ambiguous nature (Fergus & Rowney, 2005).

- The World Conservation Strategy, established by the IUCN, developed the first definition of sustainable development which elaborates “takes into account social and ecological factors, as well as economic ones; of the living and non-living resource base; and of the long term as well as the short term advantages
and disadvantages of alternative actions” (International Union for the Conservation of Nature and Natural Resources, 1980);

- UNESCO describes sustainable development as “a paradigm for thinking about the future in which environmental, societal and economic considerations are balanced in the pursuit of an improved quality of life” (UNESCO, n.d.);

- Kates et al. (2005) defines that “sustainable development as a concept that, in the end, represents diverse local to global efforts to imagine and enact a positive vision of a world in which basic human needs are met without destroying or irrevocably degrading the natural systems on which we all depend.”

In brief, it can be assumed that international human rights law and sustainable development are indivisible and interdependent. Therefore, for the purpose of this study the researcher will try to identify whether the principle of universality of international human rights law and the core idea of sustainable development are present in transit treaties.
CHAPTER 4. TRANSIT TREATY BETWEEN THE GOVERNMENT OF INDIA AND HIS MAJESTY’S GOVERNMENT OF NEPAL AND AFGHANISTAN-PAKISTAN TRANSIT TRADE AGREEMENT, 2010 (APTTA)

4.1. Transit Treaty Between the Government of India and His Majesty’s Government of Nepal

Figure 2 Map of geographic location of India and Nepal

Source: www.mapsofindia.com
Nepal, is a land-locked State which borders Tibet, China to the north and India to the east, south and west. It covers an area of 147,181 square kilometres (UNCTAD, 2003). It is located hundreds of miles from the sea, and therefore always experienced the handicaps of being isolated from the main world flows of goods and communication. Free access to the sea and freedom of transit have a paramount importance for land-locked Nepal in overcoming its problems so that it can expand its international trade and promote its economic development. Nepal is very much dependent in India. This dependency is also called by Nepalese “India-locked”. (Glassner, 1984).

Nepal's geographical location serves as an example of how geopolitics has created challenges for its overall development and harmonizing regional and international relation with other countries (Khadka, 1992). Therefore, the right of access to the sea is essential for the expansion of Nepal's international trade and economic development. In order to strengthen the economic ties with India and with the rest of the world, it is very important for Nepal to conclude a successful transit agreement with India.

4.1.1. Transit treaties between India and Nepal prior to 1999

➢ Treaty of Trade and Commerce, 1950

Treaty of Trade and Commerce, amended in 1960, 1971 and 1978, was the first transit arrangement concluded between India and Nepal on July 31, 1950. Even though the Treaty had a liberal nature, most of its provisions remained completely theoretical (Upreti, 1993).

Article 1, 2 and 4 of the Treaty dealt with the freedom transit. Article 1 of the Treaty stated that “The Government of India recognizes in favour of the Government of Nepal full and unrestricted right of commercial transit of all goods and manufactures through the territory and ports of India as provided in Articles 2, 3 and 4 below.”
The Treaty regulates free flow of goods between India and Nepal. Its aim was to strengthen the economic ties by promoting, expanding, facilitating and diversifying trade between the two countries. In order to achieve such objective, parties established that, unconditionally, treatment no less favourable than that accorded to third countries regarding to custom charges and duties on export and import. In addition, even though the Treaty recognizes Nepal’s free access to the sea through Indian territory, as stated in Article 2 and 4, transit was only limited to “commercial trade” and excluded persons or baggage (Uprety, 1993). As stated in Article 5 of the Treaty, taxes not lower than those of India were levied on the same goods. As a result, Nepal failed to compete effectively both within Indian and with the rest of the world (Glassner, 1978).

**Treaty of Trade and Transit, 1960**

Despite its challenges of being land-locked, Nepal with the desire to promote its economic development, had negotiated the 1960 bilateral transit treaty with India (Khadka, 1992). Treaty of Trade and Transit was signed between India and Nepal on September 11, 1960 (Ministry of External Affairs, n.d.). Treaty was concluded when Nepal had its first democratically elected government supported by the majority of Nepalese. However, its democratic government did not exist for a long period and it was replaced by an absolute monarchy. Nepal’s new government brought negative results to Indo-Nepal relation and thus India imposed a trade blockade in the early 1960s (Khadka, 1992).

Treaty of Trade and Transit recognized Nepal’s access to foreign trade but the freedom of transit was excluded in its Preamble (Glassner, 1978). In the Preamble it was only mentioned:

“**Being animated by the desire to strengthen economic cooperation between the two countries, and convinced of the benefits likely to accrue from the development of their economies towards the goal of a Common Market,**”
“Have resolved to conclude a Treaty of Trade and Transit in order to expand the exchange of goods between their respective territories, encourage collaboration in economic development and facilitate trade with third countries.”

Treaty did not secure a full and unrestricted right of transit through each other’s territory. Transit was not recognized as the right.

➢ Treaty of Trade and Transit, 1971

In the 1970s India-Nepal’s relation started worsening due to Nepal’s growing friendship with China. This friction between India and China became evident in the long process of negotiating a new trade and transit agreement after the expiration of 1960s treaty (Khadka, 1992). The new Treaty of Trade and Transit was concluded and signed between India and Nepal on August 13, 1971 (Ministry of External Affairs, n.d.). In its Preamble Treaty did not secure Nepal’s free and unrestricted access right to the sea.

The tension between two countries can be seen in the language and provisions of the Treaty. Treaty provided that only raw materials will be exempt from customs duty so that it encouraged Nepal to export primarily raw-materials. Moreover, India put quota restriction on Nepal’s several essential products (Khadka, 1992).

➢ Treaty of Transit, 1978

The Treaty of Transit signed between India and Nepal on March 25, 1978. It was renewed on March 21, 1983 and expired on March 31, 1989 (Uprety, 1983). This treaty was considered to be better than the previous Treaties (Khadka, 1992).

Historically, the Treaty had several important aspects (Uprety, 1983):

1) Treaty recognized Nepal’s special needs and interests as a land-locked country and therefore recognized and secured Nepal’s right of access to the sea.
2) In its Preamble it recognized Nepal’s need to facilitate traffic in transit through the territory of India through agreed routes.

Goods in transit were exempt from any charges and customs duties, except transport cost.

4.1.2. Treaty of Transit of 1999

During the third United Nations conference on the law of the sea convention 1982, Nepal’s Delegation Mr. Upadhyahya highlighted the importance and value of developing a comprehensive and universally accepted law of the sea. He mentioned that the primary aim of the international community in adopting a new Conference is to support and promote the economic interests of all mankind. Delegation’s main concern was to protect and guarantee Nepal’s wider recognition to the right of free access to the sea. It is also noteworthy that Nepal’s India assured that its neighbouring land-locked States’ can rely on its support on this matter (Glassner, 1978).

Relations between India and Nepal improved following the formation of the new democratically elected government in Nepal. This led to the formation of new treaty. Bearing in mind that the previous transit treaties had deficiencies and to some extent limited Nepal’s freedom of transit, there was a need to adopt more comprehensive treaty. Treaty of Transit was concluded and signed between India and Nepal on January 5, 1999. Treaty consists of Preamble, 11 articles, Protocol, Memorandum to the Protocol, and Annexure (Ministry of Industry, Commerce and Supplies, n.d.).
4.2. Afghanistan – Pakistan Transit Trade Agreement, 2010 (APTTA)

Figure 3 Map of geographic position of Afghanistan and Pakistan

Source: www.nationalgeographic.org
Afghanistan is a land-locked State located in the heart of Eurasia, between the China and the Middle East, and between South Asia and Europe (WTO, n.d.). As a developing country, Afghanistan considered that the rights of land-locked countries should be adequately taken into account. Moreover, Afghanistan considered that restricting the legitimate free access to the sea of a group of States such as the land-locked countries or to deprive them of a fair share of the benefits derived from the exploration and exploitation of the resources of the sea would be contrary to the principle of equality of States and the norms of international law. (Martin, 1984).

4.2.1. Afghan Transit Trade Agreement (ATTA), 1965
ATTA, a bilateral agreement between Afghanistan and Pakistan, entered into force on March 2, 1965. Pakistan granted Afghanistan the freedom of transit and transit facility in line with its commitment to the UNCLOS, 1958, which states that land-locked States shall have the freedom of transit. The purpose of the ATTA is to improve the traffic in transit and movement of goods through each other’s territories based on a mutually agreed advantageous basis. Therefore, parties granted to each other freedom of transit to and from their territories. Due to its remoteness from the sea, Afghanistan was supposed to enjoy the freedom of transit but Pakistan, on the other hand, did not have a good relation with USSR during that time so that its intention was to capitalize upon the transit facility only through the territory of Afghanistan provided by ATTA (Paswan, n.d.).

4.2.2. Afghanistan – Pakistan Transit Trade Agreement, 2010 (APTTA)
Afghanistan and Pakistan considered that the rules and provisions under ATTA does not take into account the current economic realities and the new international transit requirements, they acknowledged the need for the new transit treaty.

Afghanistan concluded Afghanistan-Pakistan Transit Trade Agreement (APTTA) with Pakistan on October, 2010. APTTA entered into force on June 12, 2011. APTTA facilitates transit trade for Afghanistan and gateway for Pakistan for the transit trade to Central Asia using the Pakistani port of Karachi. This agreement enables
Afghanistan to gain a free and unrestricted access to Indian and Chinese markets via access to seaports and land crossing points (WTO, n.d.). APTTA consists of Preamble, 13 Sections, 58 Articles and 2 Annexes (Ministry of Commerce of Pakistan, n.d.).

CHAPTER 5. ANALYSIS OF STATE PRACTICE OF BILATERAL TRANSIT TREATIES: PRESENCE OF THE PRINCIPLES OF INTERNATIONAL LAW

5.1. Treaty of Transit Between the Government of India and His Majesty’s Government of Nepal: Presence of the principles of international law

➢ Presence of the principle of good faith

Identifying and locating the principle of good faith is difficult since good faith is mostly hidden. In other words, telling whether parties have a good morality is a challenge but to some extent it can be located in the language of an agreement or by how parties fulfilling its purpose. Thus, the principle of good faith might be located in the past when parties only have a clear intention to conclude agreement, present when the agreement is in force and in the future when parties are implementing the treaty.

Past- Principle of good faith can be located in the past or before concluding and signing Transit Treaty. To further elaborate on that, it is Nepal and India’s clear intention to create a legal relationship. It can be explained that before negotiating the Transit Treaty both India and Nepal had been honest with their intention and had a will to conclude it in good morality. Before finalizing the Transit Treaty, if there is no act of bad faith, thus, it means parties have created a further mutual understanding and a possibility to locate the act of good faith in the present when the agreement is finalized and signed.

Present- Signatures of Minister of Commerce of India and Minister of Commerce of Nepal create the desire to develop and strengthen the friendly relations and cooperation between the countries. Signatures of two Ministers are the proof of India’s recognition of Nepal’s challenges of being land-locked. As mentioned in Chapter 2,
signatures of the transit treaty are not an empty gesture, it is the act of good faith that Nepal and India are creating a mutual trust and obligation.

- **The Preamble of the Transit Treaty provides:**

  “Animated by the desire to maintain, develop and strengthen the existing friendly relations and co-operation between the two countries,”
  “Who, having exchanged their full powers, and found them good and in due form, have agreed as follows:”

- **Article X of the Transit Treaty states:**

  “In order to facilitate effective and harmonious implementation of this Treaty the Contracting Parties shall consult each other regularly”

  The language of the Preamble and Article X of the Transit Treaty establishes the principle of good faith.

  However, acting in good faith and endeavouring to achieve the purpose of the Transit Treaty exist in the future when parties implement the agreement.

- **Article VIII of the Transit Treaty:**

  In Article VIII parties agree to maintain or introduce measures or restrictions as are necessary for the purpose of protecting public morals, human, animal, and plant life, and any other interests as mutually agreed upon. This Article is the interpretation of the act of good faith.

Future- In the future, Nepal and India’s performance of the Transit Treaty must be honest and reasonable. It must not be capricious and arbitral. Giving further thought, the principle of good faith requires that parties must not undermine mutual interests in bad faith.

- **Presence of the principle of peaceful settlement of international disputes**
Transit Treaty does not include neither the principle of peaceful settlement of international disputes nor a dispute resolution provision such as negotiation, good offices, mediation, international inquiry, and international conciliation.

Instead, the Transit Treaty has an ambiguous and vague article that might not be in conformity with the principle of peaceful settlement of international disputes.

- **Article II states:**

  “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.”

Firstly, Article II (a) states that Contracting Parties shall have a right to take all measures necessary in order to protect its legitimate interests. Legitimate interest is a general legal concept and at the same time it carries an ambiguity and vagueness. Since legitimate interest differs from State to State, it can be interpreted in different ways. The vague word “legitimate interests of any kind” might create a situation where transit State India can impose unnecessary limitations or any restrictions deemed necessary on Nepal’s access right to the sea and freedom of transit in order to defend its legitimate interest.

Secondly, instead of peacefully settling disputes, Article II (a) is advocating to take any measures necessary. It is arbitrary and undesirable. There are no prior remedies such as mediation, conciliation, and so on. The term “all indispensable measures” carries an ambiguity whether the use of violence and weapons against another State are included.
Lastly, Article II (b) states that no provision in this Treaty shall prevent from taking any indispensable measures. As mentioned before, the principle of good faith is already embodied in Article X which states that parties shall facilitate the harmonious implementation of the Transit Treaty. However, if States have a right to take any measures without prior consultation or negotiation of peaceful dispute settlement, the Transit Treaty might not be harmoniously implemented. In other words, there will be no act of good faith. Consequently, Article II and Article X are contradictory.

- **Presence of the principle of freedom of transit**
  - **Preamble of the Transit Treaty provides:**
    “Recognizing that Nepal as a land-locked country needs freedom of transit, including permanent access to and from the sea, to promote its international trade,”
    “And recognizing the need to facilitate the traffic-in-transit through their territories,”

  - **Article I of the Transit Treaty states:**
    “The Contracting Parties shall accord to “traffic-in-transit” freedom of transit across their respective territories through routes mutually agreed upon. No distinction shall be made which is based on flag vessels, the places of origin, departure, entry, exit, destination, ownership of goods or vessels.”

  - **Article IV of the Transit Treaty states:**
    “Traffic-in-transit shall be exempt from customs duties and from all transit duties or other charges,”

  - **Article V of the Transit Treaty provides:**
    “For convenience of traffic-in-transit, the Contracting Parties agree to provide at point of entry or exit, on such terms as may be mutually agreed upon and subject to relevant laws and regulations prevailing in either country.”
Preamble and Article I, IV, V of the Transit Treaty embodies the principle of freedom of transit. Transit Treaty not only recognizes Nepal’s special interests and needs as a land-locked State, but also acknowledges its **permanent access to the sea**. As can be seen India provides adequate safeguards for the right of free transit, and therefore Nepal can enjoy the legitimate free access to the sea.

- **Presence of the principles of international human rights law and sustainable development**
  - Presence of the principle of universality
  - **Article VIII of the Transit Treaty states:**

  “Notwithstanding the foregoing provisions, either Contracting Party may maintain or introduce such measures or restrictions as are necessary for the purpose of:

  (i) Protecting public morals;
  
  (ii) **Protecting human, animal and plant life**;
  
  (iii) Safeguarding of national treasures
  
  (iv) Safeguarding the implementation of laws relating to the import and export of gold and silver bullion; and
  
  (v) **Safeguarding such other interests as may be mutually agreed upon.**”

The Transit Treaty is not directly regulating human rights issues; however, it is providing with possibility that later parties can introduce measures that are necessary for the purpose of protecting human life and safeguarding other interests as may be mutually agreed upon. Interestingly, Article VIII is providing parties with an opportunity to co-operate on the matter of international law, human rights, good neighbourliness and so on that are necessary for the daily administration of the agreement.

On the other hand, the principle of universality might be located in a broad sense because the treaty grants the right of access to the sea and freedom of transit. Giving further thought, as long as the treaty is securing Nepal’s right of access to the sea, it is
safeguarding its citizens’ right to an adequate standard of living or continuous improvement of living conditions under article 12 of the ICESCR. However, it needs further research since human rights is a big topic.

- **Presence of the concept of sustainable development**

The Preamble of the Transit Treaty recognizes Nepal’s permanent access to the sea. Nepal, situated hundreds of miles from the sea, had always had to deal with challenges regarding sustainable development. However, by having permanent access to the sea Nepal has an opportunity to promote its sustainable development.

5.2. Afghanistan – Pakistan Transit Trade Agreement, 2010 (APTTA): presence of the principles of international law

- **Presence of the principle of good faith**

As mentioned before, the principle of good faith is most of the time embodied in the Preamble of treaties. In the Preamble of APTTA parties used words, such as desirous, recognizing, reiterating, recalling, recalling further, considering and acknowledging. These words incorporate parties’ good faith that they have an intention to harmoniously implement APTTA considering all the circumstances and issues mentioned in the Preamble. In other words, these particular words have a capability to express parties’ good faith and a clear intention of why parties decided to sign and implement APTTA.

- **The Preamble of APTTA mentions:**

The Government of the Islamic Republic of Afghanistan and the Government of the Islamic Republic of Pakistan, from here on referred to as the Contracting Parties,

“Desirous of strengthening the economic ties between their two countries on a mutually beneficial basis,

Recognizing the right of Afghanistan to freedom of access to the sea as an essential principle for the expansion of its international trade and economic development,
Recognizing the importance of the North-South Corridor for Pakistan in relation to trade with Central Asia and for Afghanistan in relation to trade with ECO and SAARC countries,

Reiterating their commitment to ensure the smooth, rapid and efficient movement of goods and vehicles between and through the territories of the two countries,

Recalling the objectives and principles enunciated in the Convention on High Seas (Geneva, 1958) and the ECO Transit Transport Framework Agreement (Almaty, 1998),

Recalling further the WTO rules and provisions under the General Agreement on Tariffs and Trade (GATT, 1994, Article V) concerning “Freedom of Transit”,

Considering that the Afghan Transit Trade Agreement (ATTA) of 1965 does not take into account the current economic realities and the new international transit requirements,

Acknowledging the need for effective reciprocal transit services between the two Contracting Parties, have agreed as follows:”

As discussed before, the signatures of the Minister for Commerce and Industries of Afghanistan and Minister for Commerce of Pakistan are to some extent embodies the act of good faith.

On the other hand, the principle of good faith exists as a treaty term. The principle of good faith incorporates the idea of reasonableness. With regard to reasonableness, good faith can be considered as a contractual term. Sometimes good faith is not based on the parties’ intent but it is a principle implied by operation of law. Principle of good faith exists as a contractual term to make sure that the treaty between the parties is a just and reasonable in the court’s view. Therefore, when courts and tribunals demonstrate that one party owes another a good faith duty, it is referring to the good faith term in relation to agreements’ interpretation (MacQueen & O’Byrne, 2019). In relation to that the principle of good faith can be identified as a legal term in the following Articles of APTTA:
It would be easy to interpret the treaty, if the treaty has definition of terms or terminologies. In other words, these terms and terminology definitions will be helpful when there is an ambiguity to understand the language of the treaty or when there are contradictory opinions about the general context of Articles of APTTA. Moreover, terms that are defined in APTTA can help parties to understand the intention of the treaty to some extent. This is the reason why parties included “Article 2: Definitions”. Thus, by explaining such terms, parties embodying the act of good faith as term in Article 2. If there will be any dispute with regard to APTTA and parties have misunderstanding about certain terms and its application, court can refer back to the definitions which are present in APTTA.

The final clauses in Section XII embodies the principle of good faith. First of all, as stated in Article 50, contracting parties can make amendments based on mutual consent. Moreover, Article 51 provides the treaty shall not affect the rights and obligations of parties arising from international treaties and conventions to which it is a contracting party. Lastly, parties agree to ensure that no measure taken under the agreement could risk harming or destroying public morals, human, animal, and plant life, national treasures, security of its own territory, and any other interests as mutually agreed upon.

Finally, the principle of good faith, as mentioned before, can exist in the past and in the future.

Presence of the principle of peaceful settlement of international disputes

Inclusion of articles regarding the principle of peaceful settlement of international disputes is an integral part of the state practice of bilateral treaties.
Parties include provisions of peaceful settlement of international disputes in the treaties in order to avoid war, the use of force and threat of force, in their international relations since it endangers peace and humanity (Stoica, 2019).

Section XI of the APTTA established a comprehensive provision with regard to peaceful settlement of international disputes.

The scope and coverage of provisions of Section XI shall apply to the settlement of disputes between the parties concerning the interpretation or implementation of this Agreement. Parties have appointed arbitral tribunals which shall interpret and apply the provisions of APTTA in accordance with customary rules of interpretation of public international law.

**Diplomatic settlement of international disputes is incorporated in the following articles of the APTTA:**

- **Article 40 of the APTTA states:**

  “The Parties through APTTCA shall at all times endeavour to agree on the interpretation and implementation of this Agreement through cooperation to arrive at a mutually satisfactory resolution of any matter that might affect its operation.”

- **Article 41 of the APTTA provides:**

  “1. A Party may request consultations with the other Party with respect to any matter affecting the interpretation or implementation of this Agreement which cannot be resolved by the APTTCA. A party may make the request to the other Party if the Party considers that:”

  “2. If a Party requests consultations with regard to a matter, the other Party shall reply promptly to the request for consultations.”
“3. Any requests for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the factual and legal basis of the complaint. Each Party Shall also:

a. Provide sufficient information to enable a full examination of how the measure might affect the operation of this Agreement; and

b. Treat as confidential any information exchanged in the consultations which the other Party has designated as confidential.”

“4. The Party to which the request is made pursuant to this Article shall reply to the request within 10 days after the date of receipt of the request and shall enter into consultations within 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.”

Afghanistan and Pakistan established a way to solve their disputes by the means of direct negotiation and good offices in Article 40 and 41 of the APCCA. In other words, both Articles establish provisions which embody the principle of peaceful settlement of international disputes. Articles are well-defined and procedural. According to Articles 40 and 41 of the APCCA parties can easily conduct negotiations by exchanging written documents.

In international practice, direct diplomatic negotiations are commonly used to settle a dispute since it is within the reach of States, not costly and States can easily contact with each other. If parties fail to make negotiations, they can resort to arbitration. (Stoica, 2019).

**Arbitral settlement of international disputes is incorporated in the Articles 41-49 of the APTTA.**

Arbitral tribunals, composed of the parties to the dispute, are an ad hoc court established to settle international disputes. The 1907 Hague Convention on the Settlement of International Conflict is the first international convention that dealt with
arbitration. It set out that parties shall comply with the arbitral decision in good faith. Its orders are binding only on the parties. It is noteworthy that the arbitral tribunals adjudicate the case on the basis of the arbitral compromise and the application of the principles of international law (Stoica, 2019).

- **Presence of the principle of freedom of transit**
  - **Preamble of the APTTA states:**
    “Recognizing the right of Afghanistan to freedom of access to the sea as an essential principle for the expansion of its international trade and economic development,“

  - **Article 1 of the APTTA states:**
    “The Contracting Parties agree to facilitate the movement of goods between and through their respective territories and to provide all possible facilities in accordance with the provisions of this agreement.”

  - **Article 3 of the APTTA provides:**
    “1. There shall be freedom of transit through the territory of each contracting party, via the pre-settled routes most convenient for international transit, for traffic in transit to or from the territory of other contracting party. No distinction shall be made which is based on flag of the vessel, the place of origin, departure, entry, exit or destination, or any circumstances relating to the ownership of goods, vessels or other means of transport.”

  - **Article 7 of the APTTA states:**
    “1. The Government of the Islamic Republic of Pakistan guarantees the Islamic Republic of Afghanistan, the right to use the ports of Karachi, port Qasim, and Gwadar Port, for the movement of goods in transit to and from Afghanistan in accordance with
the official tariffs, rates and conditions applicable to other users of the ports without any discrimination.”

These are the main provisions which secure Afghanistan’s legitimate free access to the sea. As shown, Pakistan not only recognizes Afghanistan’s right of free access to the sea but also considers it as an essential principle.

- Presence of the principle of international human rights law and sustainable development
  - Presence of the principle of universality

Article 53 of the APTTA establishes that the contracting parties agree to ensure that no measure taken under the agreement could risk harming or destroying human life and any interests as mutually agreed upon.

The APTTA is not directly regulating human rights issues; however, it is providing with possibility that later parties can introduce measures that are necessary for the purpose of However, it is noteworthy that the principle of universality is not present in the Transit Treaty.

In addition, the principle of universality might be existing in a very broad context since the treaty recognizes and secures the right of free access to the sea and considers it as principle of international law. To further elaborate on that, if the treaty secures the right of access to the sea, at the same time it is recognizing Afghan people’s right to an adequate standard of living or continuous improvement of living conditions under article 12 of the ICESCR.

- Presence of the concept of sustainable development

Even though transit treaty did not use the term “sustainable development” in its provisions, it clearly states in its Preamble that both parties are desirous of strengthening the economic ties between their two countries on a mutually basis.
Moreover, as mentioned before, parties not only recognize the right of access to the sea as the principle of international law but also mentions that this principle is essential for the expansion of its international trade and economic development. In addition, parties highlighted in the Preamble that the Afghan Transit Trade Agreement of 1965 does not take into account the current economic realities and the new international transit requirements.

CHAPTER 6. CONCLUSION AND RECOMMENDATION

6.1. Conclusion

With regard to research question 1.

How the right of access to the sea for land-locked States has evolved historically? Evolution of the international conventions starting from the Barcelona Convention till UNCLOS have had its advantages and disadvantages. Land-locked States throughout the history, urged that the access to the sea should be recognized and established as an essential right. Moreover, several land-locked States proposed that the freedom of transit should be recognized as the principle of international law since it can strengthen the economic ties with the rest of the world by expanding its international trade and economic development. However, the right of access to the sea and freedom of transit is a broad issue. Consequently, international conventions do not regulate all the issues related to such right, and thus conventions have had deficiencies. Therefore, state practice of bilateral transit treaties has a fundamental importance for land-locked States in securing their free and unrestricted access to the sea. No State, whether land-locked or not should be isolated from the rest of the world.

With regard to research question 2.

Which principles of international law are present in bilateral transit treaties?

<table>
<thead>
<tr>
<th>Principles of international law</th>
<th>Treaty of Transit Between India and Nepal, 1999</th>
<th>Afghanistan-Pakistan Transit Trade agreement, 2010</th>
</tr>
</thead>
</table>

56
<table>
<thead>
<tr>
<th>Principle of good faith</th>
<th>Principle of good faith is embodied in the Preamble, Article VIII and X. Although principle is broad and difficult to explain, it can be located in the past when parties decide to conclude the treaty based on the particular needs and interests, present when the treaty is in force and principle can be identified in the provisions and in the future when parties tend to its contractual duties. It is noteworthy that signatures of the respective ministers also embody the act of good faith.</th>
<th>Firstly, the principle of good faith is established in the Preamble. Secondly, the principle can be identified as a term in Article 2. Moreover, this principle exists in the final clauses in Section XII, particularly in article 50 and 51. Lastly, the signatures of the respective persons represent the act of good faith.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principle of peaceful settlement of international disputes</td>
<td>Treaty does not include the principle of peaceful settlement of international disputes. It did not establish any dispute mechanism neither political and diplomatic negotiations nor arbitral settlement.</td>
<td>Treaty includes varieties of dispute settlement mechanisms and therefore it embodies the principle of peaceful settlement of international disputes. Section XI provides provisions regarding diplomatic negotiations and arbitral settlement of international disputes.</td>
</tr>
<tr>
<td>Principle of freedom of transit</td>
<td>Treaty recognizes and secures a free and unrestricted right of access to the sea and freedom of transit. Principle of freedom of transit is established in the Preamble and in Article I, IV and V.</td>
<td>Treaty not only recognizes and secures a free and unrestricted right of access to the sea but it also considers the freedom of transit as an essential principle of international law. Principle of freedom of transit can be located in</td>
</tr>
</tbody>
</table>
The Preamble and in Article 1, 3 and 7.

| Principle of international human rights law | Treaty does not include principle of universality. It does not regulate any human rights issues. However, in Article VIII, parties agreed to introduce measures for the purpose of protecting human life and any other interests as may be mutually agreed upon. Human rights issues are broad so that it is difficult to assume that Article VIII is taking into account the rights of individuals. Further study is needed to analyse Article VIII’s relation to the rights of individuals. On the other hand, treaty might be having an inclusion of the right to an adequate standard of living. However, further study is needed. | Treaty does not include principle of universality. It does not regulate rights of individuals. However, in Article VIII, parties agreed to introduce measures for the purpose of protecting human life and any other interests as may be mutually agreed upon. On the other hand, treaty might be including the right to an adequate standard of living. However further research is required. |
| Concept of sustainable development | Treaty incorporates the concept of sustainable development in its Preamble where it recognizes that Nepal as a land-locked country needs freedom of transit, including permanent access to and from the sea, to promote its international trade. | Concept of sustainable development is incorporated in the Preamble where parties expressed their desire to strengthen the economic ties between their two States. |

Table 3 Embodiment of international law principles in transit treaties

Source: Anujin Onon, 2020
Which principles of international law can secure and strengthen the right of access to the sea of land-locked States?

1) **Principle of good faith**

As mentioned in Chapter 3, the principle of good faith is the most commonly used principle in state practice of bilateral treaties. It is embodied in many domestic or international court decisions. Parties can invoke or imply the principle of good faith when they need to cooperate in order to harmoniously implement the treaty. Furthermore, if one party discovers that another party is exercising a discretionary power, it can imply good faith term. In addition, in a situation where one State is evading its agreement obligations, the principle of good faith can also be invoked by another party. All in all, the importance of good faith is not restricted by the above mentioned circumstances. It can be invoked in many different situations. In other words, parties’ obligation to negotiate treaty in good faith is inevitable and thus the principle can be used in many beneficial ways to secure and strengthen the right of access to the sea.

2) **Principle of peaceful settlement of international disputes**

It is undeniable that land-locked States have to keep a good relation with its transit States. Given the facts that India-Nepal relation got worsened during 1970s, it was evident that their relation affected badly in the formulation of transit treaties. As mentioned before, the right of access to the sea is not a self-executing right so that land-locked States will always be dependent on its transit State. As stated in Article 125 (3), transit States can take all necessary measures in order to protect its legitimate interests. The ambiguity of this Article creates a situation where States can interpret the concepts of “all necessary measures” and “legitimate interests” in any way they understand so that it is important to include preventive principle of international law. Thus, the inclusion of principle of peaceful settlement of international disputes is fundamentally important.
Problems or challenges related to bilateral transit treaties should be primarily resolved by diplomatic negotiations and international co-operation. This principle is not only about solving disputes between two States, but also established to protect peace and humanity of mankind. In other words, principle prevents war, the use of weapons and abuse of power. Consequently, establishment of this principle in bilateral transit treaties holds a paramount importance in securing the right of access to the sea.

3) **Principle of freedom of transit**

Principle of freedom of transit is the most important principle which can directly secure and strengthen the right of access to the sea. Embodied in many international conventions, this principle can be used as the main claim for the right of access to the sea. Principle of freedom of transit establishes that no State, just because of its geographical location should be isolated from the rest of the world. Land-locked States can participate in the exploitation of the resources of the sea only if they have the freedom of transit. Lastly, it is essential to bear in mind because of its lack of freedom of transit that land-locked States had been classified as one of the developing or less developed countries.

4) **Principle of international human rights law and sustainable development**

The necessity of securing the right of access to the sea is based on the special interests and needs of land-locked States: to promote its economy and improve the living condition of its people. Moreover, this special commitment of strengthening the economic development and supporting its people’s well-being can also be a contribution to the UN SDGs. After all everything that is happening all around the world are interrelated. However, not only bilateral treaties but also Article 125 of UNCLOS do not address the issue of human rights. The right of access to the sea will be more secured and strengthened only if the principles of human rights law and sustainable development are embedded in state practice of bilateral transit treaties.
6.2. Recommendation

- Inclusion of the principles of international law in bilateral, regional or multilateral treaties are vitally important not only in securing and strengthening a free and unrestricted right of access to the sea but also preventing from any of the disputes that might happen in the future. Particularly, it is important to include the principle of good faith, peaceful settlement of international disputes, freedom of transit and principle of international law and sustainable development.

- However, there are many other important principles embodied in municipal and international law. In order to distinguish which principles can strengthen and secure the right of access to the sea remains unknown. Further, study of the principles of international law in relation to the right of access to the sea is therefore an interesting area to study. Each principle can be studied in great details.

- It is noteworthy that the study of the principles of human rights law in relation to Article 125 of UNCLOS and regarding state practice of bilateral transit treaties remains great since it has not been discussed in detail.

- As mentioned before, the UNCLOS and bilateral treaties established some ambiguous and vague terms, such as “all indispensable measures” and “legitimate interests” so that a further study of state practice of bilateral transit treaties in relation to such ambiguous terms will be valuable and without any doubt it will add contribution to the existing body of knowledge.
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WEB PAGE


