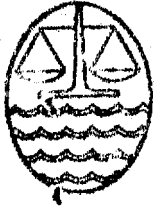




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**THIRD CONFERENCE  
ON THE LAW OF THE SEA**

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Afghanistan, Bhutan, Bolivia, Botswana, Burundi, Czechoslovakia, Hungary, Laos, Lesotho, Mali, Mongolia, Nepal, Paraguay, Swaziland, Uganda, Upper Volta and Zambia: explanatory paper on draft articles relating to land-locked States 1/

In accordance with the list of subjects and issues relating to the law of the sea which was approved by the Sea-Bed Committee in 1972 and which, according to its report to the twenty-seventh session of the General Assembly, "should serve as a framework for discussion and drafting of necessary articles" at the Third United Nations Conference on the Law of the Sea, 2/ legal norms ensuring the rights and interests of land-locked and other geographically disadvantaged States shall become a part of the new codification of international law of the sea which will emerge from that Conference, for the list includes two specific items, one dealing with the problems of land-locked countries, the other with the problems relating to the rights and interests of shelf-locked States and States with narrow shelves or coastlines.

Item 9, relating to land-locked States, includes inter alia the following subitems:

- "9.1. General Principles of the Law of the Sea concerning the land-locked countries
- 9.2. Rights and interests of land-locked countries
  - 9.2.1. Free access to and from the sea: freedom of transit, means and facilities for transport and communications
  - 9.2.2. Equality of treatment in the ports of transit States
  - 9.2.3. Free access to the international sea-bed area beyond national jurisdiction
  - 9.2.4. Participation in the international régime, including the machinery and the equitable sharing in the benefits of the area"

1/ Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 21 (A/9021), vol. II.

2/ Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 21 (A/8721), para. 23).

Needless to say, a just and satisfactory solution of the above-mentioned points and their implementation in adequate provisions are of the utmost significance for all land-locked countries, both developed States exporting industrial goods and importing raw materials, and developing States whose economy largely depends on the exportation of raw materials and the importation of industrial products and complexes.

Under present international law the right of land-locked States to free access to and from the sea is a firmly established and legally binding principle. It shall be reaffirmed and elaborated in the new codification instrument on the law of the sea.

Such a conclusion is indispensable if the land-locked States are to be given a real opportunity to participate in the uses of the seas and to enjoy benefits from them on equal terms with coastal States. For this purpose the land-locked States must obtain adequate legal means and guarantees ensuring them of the exercise of their right of free access to and from the sea, including the right of free access to the sea-bed area beyond national jurisdiction. This necessity arises from their geographically disadvantaged position, from the fact that they lack any sea coast whatsoever and, in most cases, vast distances separate them from the coast.

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As a principle of international law the right of land-locked countries to free access to and from the sea was also provided for and implemented step-by-step in bilateral and multilateral treaties, mostly concluded in this century. This development had several significant milestones, particularly the Barcelona Convention and Statute on Freedom of Transit in 1921, the Geneva Conventions on the Law of the Sea in 1958 and the New York Convention on Transit Trade of Land-Locked States in 1965.

Without underestimating the relevance of these instruments, their positive contributions to the struggle for recognition and development of the right of free access to and from the sea, as well as to practical settlements of many issues involved, it must be stated that in some respects they brought only partial solutions.

Thus, for example, the Barcelona Statute facilitated transit in general and was helpful to land-locked States, particularly those in Europe, by opening up to them necessary routes to the sea. Moreover, this multilateral regulation inspired the conclusion of bilateral agreements which were based on the principles of the Barcelona Statute.

On the other hand, this instrument did not provide for all means of transport and communication, having left aside, in particular, traffic by roads and pipelines, the importance of which has significantly grown since that time. Furthermore, the number of contracting parties to the Barcelona Convention and Statute, still in force, has remained relatively limited and it has lacked adherence among non-European States.

In the years preceding the first United Nations Conference on the Law of the Sea, the land-locked countries made vigorous efforts on different international levels to draw the attention of the whole international community to their specific problems and needs for ensuring their rights in the forthcoming codification. Their efforts were remarkably supported by the United Nations General Assembly which recognized in its

resolution 1028 (XI) of 20 February 1957 "the need of land-locked countries for adequate transit facilities in promoting international trade" and invited all Members of the United Nations "to give full recognition to the needs of land-locked Member States in the matter of transit trade and, therefore, to accord them adequate facilities in terms of international law and practice in this regard, bearing in mind the future requirements resulting from the economic development of the land-locked countries".

On the eve of the first United Nations Conference on the Law of the Sea a Preliminary Conference of Land-Locked States was held in Geneva from 10 to 14 February 1958 which adopted, as a result of its work, a document entitled "Principles Enunciated by the Preliminary Conference of Land-Locked States". Seven principles included in this document represented a restatement of principles and norms of international law concerning the right of land-locked States to free access to the sea and specific rights derived therefrom. Endorsed by all the then land-locked States this document became the basic paper of the Geneva Conference in its consideration of problems of States having no seacoast. 3/

In the Geneva Codification of the Law of the Sea significant progress towards the recognition of full equality of land-locked States in the exercise of freedoms of the seas was made. Article 2 of the 1958 Convention on the High Seas confirmed that the high seas were open "to all nations" and that freedoms arising from the freedom of the high seas were provided "both for coastal and non-coastal States". The right of land-locked States to free access to the sea was specifically declared in article 3 of this Convention. It stated that "in order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea-coast should have free access to the sea".

Nevertheless, though including a provision in favour of free transit for land-locked States through the territory of States situated between the sea and a State having no seacoast, as well as equal treatment for ships flying the flags of land-locked States as regards access to seaports and the use of such ports, article 3 of the Geneva Convention on the High Seas included a number of elements that in fact diminished the practical effect of the above-mentioned principle. By emphasizing that transit States shall accord free transit and other facilities by "common agreement" with a State having no seacoast and, moreover, by indicating that free transit should be accorded "on a basis of reciprocity", article 3 of the Geneva Convention on the High Seas made in fact the exercise of the principle of free access of land-locked States to the sea dependent primarily on transit States.

Besides, the principle of the 1921 Barcelona Declaration concerning the right of flows of both, coastal and non-coastal States was restated in article 4. Finally, a principle relating to land-locked States, equally with other States, was included in article 14 of the Convention on the Territorial Sea and the Contiguous Zone. This provision states generally that "ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea".

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3/ Document A/CONF.13/C.5/L.1, annex 7.

A/CONF.62/C.2/L.29

English

Page 4

Therefore, it must be concluded that the 1958 Geneva Codification, though declaring the principle of free access to the sea and recognizing the equality of States having no sea coast with coastal States, did not adopt adequate measures to ensure their effective exercise. Its half-way provisions, more declaratory than effective, could not satisfy the real needs of land-locked countries, for they did not take into due account their geographically most disadvantaged position in relation to the uses of the sea.

This fact was confirmed by developments following the Geneva Codification Conference, particularly by the first United Nations Conference on Trade and Development which was considering, among other points, "the proposal for the formulation of an adequate and effective International Convention, or other means to ensure the freedom of transit trade of land-locked countries". As a result the first UNCTAD Conference adopted a special document including eight principles, together with an Interpretative Note. 4/

It should be recalled that Principle I of this significant document emphasized that "the recognition of the right of each land-locked State of free access to the sea is an essential principle for the expansion of international trade and economic development". Principle VII already reflected the idea that the right of free access of land-locked countries to the sea originated from their disadvantaged position in relation to the sea, for it stated that "the facilities and special rights accorded to land-locked countries in view of their special geographical position are excluded from the operation of the most-favoured-nation clause".

The principles concerning land-locked countries adopted at the first UNCTAD Conference have much significance for a full recognition and implementation of the right of free access to and from the sea, a right which the land-locked countries urgently need if they are to compensate for the adverse effects of their disadvantaged geographical situation depriving them of any sea coast.

Moreover, the first UNCTAD Conference inspired the preparatory work for and the convocation of, a Conference on Transit Trade of Land-Locked Countries which was held in New York. In the Convention, drawn up at this Conference and adopted on 8 July 1965, the UNCTAD principles including a full recognition of the right of each land-locked State of free access to the sea, were incorporated. Furthermore, specific questions of the freedom of transit were settled in 16 substantive articles of the Convention.

The solutions offered by the Convention may be qualified as a compromise between the needs of land-locked countries and the interests of their transit partners. In some aspects, however, the interests of transit States prevailed. This is evident especially from article 15 of the New York Convention which states that "the provisions of this Convention shall be applied on a basis of reciprocity". The Convention thus made no difference between the needs for transit arising from the geographical location of States having no sea coast, and any other transit serving only to facilitate transport and communication in general.

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4/ Final Act of UNCTAD, document E/CONF.46/428, Annex A.I.2.

The land-locked States therefore earnestly hope that this Conference will not adopt the same restrictive approach which would create an unbalanced burden for the land-locked States.

The practical impact of the New York Convention on Transit Trade of Land-Locked Countries has not been great, for the number of its parties has remained rather limited. Moreover, they are mostly land-locked States or such coastal States which are not typical transit countries.

For all these and other reasons it must be concluded that a further step to facilitate the exercise of the right of free access of land-locked States to and from the sea is necessary, in order to make it more corresponding to present and expected conditions. This step should be taken now, in the framework of the Third United Nations Conference on the Law of the Sea.

In this connexion it should be recalled that the developing land-locked and other geographically disadvantaged States, which met in a conference held in Kampala, Uganda, from 20 to 22 March 1974, adopted a declaration containing principles reflecting the essential rights and interests of the developing land-locked and other geographically disadvantaged States to be embodied in the Convention on the Law of the Sea (document A/CONF.62/23 of 2 May 1974).

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In order to facilitate the work of the Conference in this field a group of non-coastal States submitted at the last session of the Sea-Bed Committee in Geneva a document called "Draft Articles relating to Land-Locked States" (document A/AC.138/93 of 2 August 1973). The draft articles should serve as a basis for the chapter of the future Convention on the Law of the Sea that would deal with problems of land-locked countries relating to free access to and from the sea, including the international sea-bed area, as well as their participation in the international régime, including the machinery and the equitable sharing of the benefits of the area.

As stated in the explanatory note to the draft articles, they are not intended to stand alone but "shall form an inseparable part of the law of the sea to be fitted to appropriate places into a comprehensive Convention relating to the law of the sea". Neither do the draft articles include a detailed regulation, thus remaining on the level of fairly general but legally binding principles, following the pattern of other principles to be included in the new Codification of the Law of the Sea.

First of all, attempts have been made in this document to express the up-to-date outcome of the development regarding the right of free access to the sea, starting with the 1921 Barcelona Statute on Freedom of Transit until the 1965 New York Convention on Transit Trade of Land-Locked Countries. Therefore, the greater part of the draft articles presents a restatement and confirmation of recognized principles, using as much as possible the language of previous instruments.

In some respects, however, the draft articles go further and are introducing new elements, taking into account the real needs of land-locked countries under present economic and technological conditions. Nevertheless, it has been the over-all aim of the drafters of this document to reflect in their proposals adequately existing practice and experience as developed in different parts of the world and to derive therefrom a common denominator that might be shared by all land-locked States and recognized by the whole international community.

(a) Fundamental principles

The draft articles relating to land-locked States begin with definitions of the notions "traffic in transit", "person in transit", "transit State" and "means of transport" which are based on the definitions of the Barcelona Statute and New York Convention.

It is evident from the definition of "means of transport" that the draft articles are intended to regulate transit by rail, road and waterways, and under special arrangements by pipelines, gaslines and storage tanks. They shall not, however, affect the conditions of transport by air which, though being undoubtedly one of the means of transport serving the land-locked countries in their speediest access to and from the sea and therefore quite indispensable, shall remain, due to its special character, subject to bilateral or multilateral agreements relating to air transport, as explicitly stated in paragraph 3 of article XX of the draft.

The term "traffic in transit" also includes, beside transit of baggage, goods and means of transport across the territory of one or more transit States, transit of persons as in the 1921 Barcelona Statute. However, the transit of persons is limited to passage of persons "whose movement is not prejudicial to security, law and order of the transit State".

The principles inserted in articles II and III may be qualified as corner-stones of the whole draft:

Article II characterizes the right of land-locked States to free access to and from the sea as "one of the basic principles of the law of the sea" and "an integral part of the principles of international law". In this way it is emphasized that the realization of the rights of land-locked countries in the uses of the sea is the concern of the international community as a whole and shall be considered as an inseparable part of the new Codification of the Law of the Sea.

The fundamental right of free access to and from the sea is declared in paragraph 2 of article II: land-locked States, irrespective of the origin and characteristics of their land-locked conditions, shall have this right "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".

In article III the stipulation of the main instrument that permits the exercise of the right to free access to and from the sea is inserted, i.e. the obligation of transit States to 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". Needless to say, without the right of free and unrestricted transit, and the corresponding obligations on the part of transit States, the fundamental right of States having no sea coast to free access to and from the sea, as well as their equal rights to enjoy the benefits from the uses of the sea would remain ineffective, a nudum ius without any practical significance.

Both principles are based on several relevant documents. Their present wording is abstracted from Principles Enunciated by the 1958 Preliminary Conference of Land-Locked Countries (in particular Principle V); from article 3 of the 1958 Convention on the High Seas; from UNCTAD Principles of 1964 (in particular Principle IV); and from article 2 of the 1965 Convention on Transit Trade of Land-Locked Countries. Of course, both the right of free access to and from the sea and the freedom of transit are spelled out in a manner which corresponds to contemporary conditions and to the aims of the new Codification of the Law of the Sea.

Without any doubt, the right of free access to and from the sea, as well as the freedom of transit originating from this right, shall be exercised in accordance with the provisions of the future Convention on the Law of the Sea.

(b) Position of land-locked States on the high seas and in maritime ports

The two fundamental articles are followed by a group of provisions confirming the traditional rights of land-locked countries arising from their right of free access to and from the sea, and their equal position on the high seas, in the territorial sea and in internal waters:

Article IV deals first with the rights of flags of land-locked States which was recognized as early as in 1921 by a special declaration unanimously adopted by the Barcelona Conference. In accordance with a generally recognized principle of international law, which is reflected in article 2 of the 1958 Convention on the High Seas, vessels flying the flag of a land-locked State shall have identical rights to those enjoyed by vessels of coastal States. Similarly, in the territorial sea and in internal waters, their vessels shall have identical rights and enjoy treatment equal to that enjoyed by vessels flying the flags of coastal States.

Article V declares the right of vessels of land-locked States to use maritime ports under the most favoured treatment, and article VI provides that traffic in transit shall not be subject to any custom duties, taxes or other charges, except charges levied for specific services rendered in connexion with such traffic.

As to their substance all these articles are based on provisions of previous documents, in particular on paragraph 1 of article 3 of the 1958 Convention on the High Seas; article 14 of the 1958 Convention on the Territorial Sea and the Contiguous Zone; principles II - IV of the UNCTAD Principles as included in the 1965 New York Convention; and article 4 of the New York Convention.

A new element is, however, included in paragraph 2 of article VI, according to which "if the port installations and equipments or the means of transport and communication or both existing in a transit State are primarily used by one or more land-locked States, tariffs, fees or other charges for services rendered shall be subject to agreement between the States concerned". The adoption of such a provision and its application in particular cases is justified by the extent of use of some ports and communications by certain land-locked States.

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For the purposes of these draft articles "maritime port" is understood to signify any port receiving sea-going vessels and serving international economic relations or transit of land-locked States. The granting of most favourable conditions to land-locked States, as provided in draft articles V and VI should balance the very considerable disadvantages of States having no sea coast or maritime ports.

Also belonging to this group of articles are rules concerning free zones and other facilities which may be provided, according to article VII, at the ports of entry and exit in the transit States, of course by agreement between those States and the land-locked States concerned. Such zones, which will be needed mostly in those maritime ports where a free port does not exist, shall be exempted from the customs regulations of the coastal States; they remain, however, subject to their jurisdiction with regard to police and public health regulations.

It should be recalled that the main provision of article VII of the draft is identical with article 8, paragraph 1 of the 1965 New York Convention.

As provided in article VIII of the draft, in the ports of transit or free zones, land-locked States shall have the right to appoint customs officials of their own, empowered in accordance with practice of States to make necessary arrangements and supervise operations and services for movement of traffic in transit. This draft provision reflects practice existing in different coastal States on the basis of their bilateral agreements with neighbouring land-locked countries. It is believed that such practice should become a general standard.

(c) Provisions relating to questions of transport and communications

Articles IX-XIII of the draft include provisions regulating different questions of transport and communications.

According to article IX, transit States shall provide adequate means of transport, storage and handling facilities at the points of entry and exit, and at intermediate stages for the smooth movement of traffic in transit. This draft article corresponds again to a similar provision of paragraph 1 of article 4 of the 1965 New York Convention.

Article X may be considered as an innovation according to which the land-locked States, in agreement with the transit State or States concerned, shall have the right to construct, modify or improve means of transport and communications or the port installations and equipment in the transit States when such means are inadequate or may be improved in any respect. Such principle, however, is justified by the need to develop and improve the means of transport and communications which, in the second half of the twentieth century are much greater than in previous periods.

Article XI, dealing with delays or difficulties in traffic in transit, is identical with article 7 of the 1965 New York Convention.

Some additional provisions to the general principle of freedom of transit are included in articles XII and XIII:

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In the first of these provisions, the right of land-locked States to access to and from the sea through navigable rivers which pass through their territories and the territories of transit States or which form a common boundary between those States and the land-locked States, should be recognized. This provision concerns all navigable rivers which may be used for traffic in transit, be they declared as international in a special legal instrument or not.

It should be recalled that from the historical point of view navigable rivers were the first means of communication used for international transit and that in the 1921 Barcelona Statute on Freedom of Transit its contracting parties assumed the obligation "to facilitate free transit by rail or waterway on routes in use convenient for international transit".

By the second of the above mentioned articles is provided the right of land-locked States to use one or more of the alternative routes or means of transport for purposes of access to and from the sea. Though an innovation, this provision is justified by the need to ensure the speedy and smooth movement of traffic in transit that might be, in fact, hindered or made more expensive when limited to a single route of access to the sea.

(d) Sovereignty of transit States and protection of their rights

Land-locked States, while possessing the rights provided for in the draft articles, which are derived from the principle of their free access to and from the sea, are well aware that transit States maintain sovereignty over their respective territories.

However, this provision shall not be construed as prejudicing territorial disputes of any kind.

Therefore, in article I the inclusion of pipelines, gaslines, and storage tanks when they are used for traffic in transit and other means of transport in the definition of "means of transport" shall remain "subject to appropriate arrangements as and when necessary". According to article VII free zones and/or other facilities at the ports of entry and exit in the transit States may be provided, but it shall be done by agreement between those States and the land-locked States. Any improvement of the means of transport and communications that would be made by the land-locked States under the scope of article X should be subject to agreement with the transit State or States concerned.

Moreover, the draft articles include a general clause safeguarding the rights of transit States against eventual infringements of any kind: according to article XIV the transit State shall have the right to take all indispensable measures to ensure that the exercise of the right of free and unrestricted transit shall in no way infringe its legitimate interests.

Furthermore, the 1973 draft articles include in article XV a special provision concerning "temporary deviations in exceptional cases". This provision is identical with the language of article 7 of the 1921 Barcelona Statute and analogical to article 12 of the 1965 New York Convention.

A/CONF.62/C.2/L.29

English

Page 10

(e) Question of reciprocity

The land-locked States attach a great importance to a just solution of the question of reciprocity.

As is known the 1958 Geneva Convention on the High Seas in its article 3, and in similar terms the 1965 New York Convention on the Transit Trade of Land-Locked Countries in its article 15, have secured to land-locked States the freedom of transit "on a basis of reciprocity". These provisions were apparently based on a wrong supposition that both the land-locked and the transit States have comparable positions and identical needs for transit. This is however not the case, for the purpose of free transit of land-locked countries is just that of ensuring them the exercise of their right of access to and from the sea.

The present draft declares therefore that "reciprocity shall not be a condition of free transit of land-locked States" the fulfilment of which might be required by transit States in favour of their own transit to any other country, for it would not be necessitated by the need for access to the sea. Such condition would not be just, in particular, in relation to those land-locked countries which are surrounded by several transit States.

At the same time article XVI of the draft does not exclude the possibility of providing reciprocal transit facilities under special agreements, if the level of relations between the partners concerned or their other interests lead them to such arrangements. Certainly, exact economic data would permit to recognize in each individual case whether at all, or to what degree, both sides might derive benefits from reciprocity, or a strict application of this condition would create an unbalanced burden for the land-locked State alone.

(f) Position of land-locked States in the régime of the sea-bed and their participation in the Sea-Bed Machinery

The draft articles submitted by land-locked States also contain, in the form of general guidelines, certain provisions concerning their participation in the exploration and exploitation of the sea-bed and its resources.

Article XVII first declares that land-locked States shall have the right of free access to and from the area of the sea-bed, a principle which was already raised in discussions on the régime of the sea-bed in the Sea-Bed Committee. For this purpose the land-locked States shall have the right to use all means and facilities provided with regard to traffic in transit.

It is obvious from the language of this provision that land-locked States do not require some privileges in this respect, but only equal rights and opportunities in the framework of the régime to be established for the area of the sea-bed beyond the limits of national jurisdiction. The aim of this article is to ensure that land-locked States will exercise free and unrestricted transit across the territory of one or more transit States not only for reasons of their own but also for the surface and waters of the sea for purposes of its traditional uses, such as navigation,

fisheries and others, but as well to its newly accessible areas of the sea-bed and subsoil thereof. Of course, their activities in this area shall be governed by principles and provisions of the Convention concerning the régime of the sea-bed and its machinery.

Furthermore, article XVIII includes some guidelines regarding representation of land-locked States in organs of the future international organization of the sea-bed in which not all member States would be represented, in particular in its Council. In such organs there should be an adequate and proportionate number of land-locked States, both developing and developed.

Article XIX deals with the very crucial point of decision-making in the machinery. It is understandable why the land-locked States, as a group of countries facing special problems arising from their disadvantaged geographical position in relation to the seas, insist on observing the principle that decisions of substance shall be made with due regard to their special needs and problems. It means that on questions of substance which affect the interests of land-locked States, decisions shall not be made without their participation or even against them. In this connexion the land-locked States maintain the view that they shall have equal rights in the decision-making process of the machinery.

(g) Relation of the general regulation to special agreements and question of most-favoured-nation clause

As has been already stated, a general regulation of the problems of land-locked countries would not at all exclude the possibility of concluding bilateral, regional or multilateral agreements in which special arrangements would be made. On the contrary, the draft requires the settlement of specific questions between the land-locked and transit States concerned in such agreements. Therefore, article XX of the draft states that the provisions of the future Convention governing the right of free access to and from the sea shall not abrogate existing special agreements between two or more States, nor shall they raise an obstacle as regards the conclusion of such agreements in the future.

On the other hand, the regulatory role of the new Convention, which will introduce a general standard, must be preserved. The same article XX provides therefore that in case existing special agreements ensure less favourable conditions than those which will be contained in the Convention, the States concerned will undertake that they shall bring them in accord with the present provisions at the earliest occasion.

A similar undertaking is usual in conventions dealing with a general regulation. It was also provided in article 10 of the 1921 Barcelona Statute on Freedom of Transit.

Of course, the future Convention, as the 1965 New York Convention, shall not preclude providing greater facilities in special agreements.

Since the new Convention would establish rights and facilities in view of the special geographical position of land-locked States and their fundamental right to free access to and from the sea, its provisions, as well as provisions of special agreements regulating the exercise of the right of free access to and from the sea and the area of the sea-bed, should be excluded from the application of the most-favoured-nation clause in favour of any third State. This principle, included in article XXI of the draft, is analogical to article 10 of the 1965 New York Convention.

Similarly, it does not prevent the extension of facilities and special rights that would be accorded to land-locked States under the new Convention or special agreements in favour of a land-locked State which would not become a party to this Convention on the basis of the most-favoured-nation clause of a treaty between that land-locked State and a contracting State of the Convention which have arranged such facilities and special rights.

The last provision of the draft (article XXII) includes a principle concerning settlement of disputes that would arise from the interpretation and application of the articles relating to land-locked countries. This principle, too, is drafted in general terms, stating that any such dispute "shall be subject to the procedures for the settlement of disputes provided for in the Convention".

Therefore, it is no way prejudicial to a later agreement on procedures that would govern the settlement of disputes arising from the interpretation and application of other provisions of the future Convention on the Law of the Sea.

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