

2021

## The Right to Access the Sea and Why India Should Pioneer It, 53 UIC J. Marshall L. Rev. 947 (2021)

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UIC J. Marshall L. Rev. 947 (2021)

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# THE RIGHT TO ACCESS THE SEA AND WHY INDIA SHOULD PIONEER IT

BY DHANANJAY SAHAI\* & PRASHANT KHURANA\*\*

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## I. INTRODUCTION\*\*\*

The Right to Access the Sea has been a long-standing demand for land-locked States (LLS). The number of States lacking such access is not small either, as 31 recognized States across the world lack sovereign access to a coast.<sup>1</sup> Historically, unfettered access to the sea has been an important factor underpinning economic prosperity and strategic heft of a society. The seafaring societies of Europe during the 17th and 18th centuries were able to establish vast empires for themselves.<sup>2</sup> In the post-colonial world, access to the sea has been critical in establishing the trading and manufacturing prowess of the United States.<sup>3</sup> The Cold War demonstrated this several times in the form of the Soviet fixation on access to the Black Sea and the Mediterranean<sup>4</sup> – something that

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\*\*\* The Authors would like to convey their heartfelt gratitude to the Hugh & Hazel Darling Law Library, and in particular Ms. Rebecca Fordon (Lecturer in Law and Faculty Services Librarian, University of California-Los Angeles School of Law) for their enormous help and guidance in conducting research for this paper.

1. *Land-locked States*, ENCYCLOPEDIA OF INT'L L. (3d. ed. 2009) [hereinafter OXFORD DICTIONARY].

2. See generally H. Th. De Booy, *The Life Lines of the British Empire*, 10 PAC. AFF. 161 (1967).

3. See generally Ronald P. Wilder & David R. Pender, *Economic Behaviour of Public Ports in the United States*, 13 J. TRANSP. ECON. POL'Y. 169, 170 (1979) (detailing the foreign trade tonnage and rank of U.S. Ports as of 1974).

4. See Alexandra Kuimova & Siemon T. Wezeman, *Russia and Black Sea Security*, STOCKHOLM INT'L. PEACE RES. INST. (2018), [www.sipri.org/publication](http://www.sipri.org/publication)

Russia followed up with Ukraine in the recent past.<sup>5</sup> China's economic rise has been partially attributed to the harbors of Shanghai and Guangzhou. Put simply, access to the sea is not just an imperative for global trade, it is also the hallmark of a country's ability to project its economic, political, and strategic heft. This natural advantage is what LLS lack irreparably. Therefore, they end up having to rely on the force of bilateral and multilateral arrangements to ensure passage through territories of their seafaring neighbors, also known as transit States. These agreements, however, have not been perfect enunciations of contractual or legal obligations and the loopholes therein have imposed prohibitive economic and social costs on LLS.

This Article attempts to draw upon the existing international legal regime in this area, to arrive at a defined international law position for the Right to Access the Sea. The authoritative position in statutory international law on this subject flow from Article 125 of the UN Convention on the Law of the Sea (UNCLOS), which provides a limited right of access for LLS.<sup>6</sup> The right has evolved through a series of historical enunciations in several conventions. The historical process of this evolution is discussed in Part I. The right is limited through a "sovereignty exception" which provides the transit States with protection against the LLSs access right from intruding into their "legitimate interests."<sup>7</sup> This has been substantiated by the authoritative weight of scholars who hold that a general right to access to the sea, apart from conventional obligations, is "difficult to sustain."<sup>8</sup>

Based on this, we concur that there is demonstrable precedent in international law – derived through state practice and coordinate legal obligations – to hold that an established albeit limited, right to access the sea exists, and has existed in favor of LLSs. However, we shall attempt to discuss the exact scope of that right through this study. In Part II, we discuss the various ways in which States have implemented this right and evaluate them against the touchstone of an ideal implementation by defining a three-part Effective Enforcement Test.

Part III presents the core of the study where we discuss cases

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s/2018/sipri-background-papers/russia-and-black-sea-security [perma.cc/37BZ-8JK6] (explains the history of the dispute over the Mediterranean Sea in the context of the 2014 Russian annexation of Crimea); Neil J. Melvin, *Rebuilding Collective Security in the Black Sea Region*, STOCKHOLM INT'L. PEACE RES. INST. 5-16 (2018), [www.sipri.org/sites/default/files/2018-12/sipripp50\\_0.pdf](http://www.sipri.org/sites/default/files/2018-12/sipripp50_0.pdf) [perma.cc/U8R9-ASFZ].

5. Cory Welt, CONG. RESEARCH SERV., R45008, UKRAINE: BACKGROUND, CONFLICT WITH RUSSIA, AND U.S. POLICY 14 (2020).

6. U.N. Convention on the Law of the Sea art. 125(2), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

7. *Id.*

8. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 271 (6th ed. 2003).

which do not optimally meet the Effective Enforcement Test. We argue that international law envisages only a narrow sovereignty exception which must meet the strict scrutiny of a *compelling and overriding interest* of the Transit State to be applicable in curtailing this right. Contrary to this interpretation, some States have used the Sovereignty Rider (contained in Article 125(2) of the Convention), and the Modalities Clause (contained in Article 125(3) of the Convention) to cause undue delay and deny the proper enjoyment of the right of access to LLS. Clearly, such an implementation is contrary to the effective enforcement of the right and falls short of our Effective Enforcement Test. We argue that such use of the Convention's modalities clause and the sovereignty rider conflicts with the standard principles of interpretation and is therefore a violation of the obligations of transit States under International Law.

In Part IV, as a remedy for such violations, we suggest that the United Nations has the power – incidental to its duties under the U.N. Charter – to create space for accountability and actively facilitate negotiations between LLSs and recalcitrant transit States, thereby levelling the playing field to ensure the proper implementation of the Convention's aims and the functions assigned to the U.N. under its Charter.

Part V addresses a very specific, narrow set of circumstances relating to the right of access. We refer to these as “emergency provisions.” Our argument here is that there can be certain situations where the sovereignty exception can be narrowed even beyond the textual scope of the Convention because of the overriding effect of the Law of Necessity. In such rare circumstances, it becomes permissible for LLSs to gain access to the sea without any explicit or implicit authorization by the transit State(s). In Part VI, this Article concludes with a strategic case for why it makes strategic sense for India to champion this right in the context of the geopolitical landscape in the Indian subcontinent.

## II. PART I: HISTORICAL EVOLUTION OF THE RIGHT TO ACCESS THE SEA

The Right to Access the Sea is a culmination of several decades of developments in a series of bilateral and multilateral agreements. While the text of each of these agreements is not important for the purposes of this study, a brief introduction to them can prove to be informative in chalking out how the right has evolved over the years.

### 1. *The Flag State Declaration*

Before World War I, there had been some confusion over whether a State administering territory without access to the sea

could have its flag used for the purpose of ships plying at sea. The practice requiring all shipping vessels to be registered at a port and carry the flag of the state administering the port began sometime in the 17th century with an ordinance passed by the English Rump Parliament under the leadership of Oliver Cromwell.<sup>9</sup>

The Barcelona Declaration in April 1921<sup>10</sup> clarified this position by providing recognition to ships registered in LLSs and recognized the place of registration as a legal fiction of a port of registration.<sup>11</sup> It is interesting to note here that the language used in the title and content of the Barcelona Declaration seems to only recognize the existence of a flag of a landlocked country: thus, its name – “Flag State Declaration.”<sup>12</sup> The Declaration does nothing to recognize an inherent right of these countries to have access to means to make this right practicable – something presumably left for the determination of other bilateral and multilateral arrangements.

## 2. *Barcelona Convention and Statute of Freedom of Transit, 1921*

The end of the First World War led to the creation of many new LLS due to the disintegration of the Austro-Hungarian Empire.<sup>13</sup> As a result, Europe saw an increase in transit treaties as these newly formed LLS were keen to secure their economic interests by accessing the sea. The Covenant of the League of Nations itself recognized “freedom of communications and of transit and equitable treatment for the commerce of all Members of the League.”<sup>14</sup> On the initiative of the League of Nations, the Barcelona Convention was brought into effect in 1922.<sup>15</sup>

The Convention contains provisions for LLS freedom of transit through waterways and railway.<sup>16</sup> The treaty did not cover the aspect of air or other forms of overland travel.<sup>17</sup> The Convention is based on the general recognition of a freedom of transit in favor of LLS; however, it does not establish any clear right in their favor.<sup>18</sup>

9. An Act for the Encouraging and Increasing of Shipping and Navigation 1660, 12 Car. 2 c. 18, § 1 (Eng.).

10. Declaration Recognizing the Right to a Flag of States Having No Sea-Coast, Apr. 20, 1921, 7 U.N.T.S. 73 [hereinafter Flag State Convention].

11. Louis de Gouyon Matignon, *The 1921 Flag Right Declaration*, SPACE LEGAL ISSUES (Jun. 10, 2019), [www.spacelegalissues.com/the-1921-flag-right-declaration/](http://www.spacelegalissues.com/the-1921-flag-right-declaration/) [perma.cc/WL3L-VQ8F].

12. Flag State Convention, *supra* note 10.

13. Matignon, *supra* note 11.

14. League of Nations Covenant art. 23(e).

15. Milenko Milic, *Access of Land-Locked States to and From the Sea*, 13 CASE W. RES. J. INT'L L. 501, 507 (1981).

16. Barcelona Convention and Statute on Freedom of Transit art. 2, Apr. 20, 1921, 7 L.N.T.S. 11 [hereinafter Barcelona Convention].

17. *Id.*

18. Ijaz Hussain, *Pakistan's Attitude Towards the Question of Free Access to*

It even contains various provisions where this freedom could be suspended.<sup>19</sup> Article 5, for instance, allows a State to prevent in its territory the entry of such goods and persons as it sees as a threat to the State's security.<sup>20</sup>

While this Treaty fell short of recognizing a right of transit for land-locked States, it did form the basis of several future Conventions and bilateral and multilateral treaties that recognized such rights and freedoms.<sup>21</sup>

After the Barcelona Convention in 1922 and the Second World War, several international and multilateral instruments dealt with the issue of free access to the sea for land-locked countries. These include the General Agreement on Tariffs and Trade (GATT) Article V,<sup>22</sup> Havana Charter<sup>23</sup>, and some recommendations made by the Economic Commission for Asia and the Far East.<sup>24</sup> While these are often cited by land-locked countries as demonstrative of sufficient state practice and awareness on the issue, Dr. Ijaz Hussain, a Professor in Pakistan, argues that it was their insufficient ability to rake up the issue that led to the International Law Commission (ILC) deciding against the inclusion of the principle as it framed the first draft of the UNCLOS – partly attributable to their lack of “clout.”<sup>25</sup> Subsequently, as the draft UNCLOS moved from the ILC to the United Nations General Assembly (UNGA), resolutions 1028<sup>26</sup> and 1105<sup>27</sup> were adopted to consider and study the issue of transit trade for landlocked states.<sup>28</sup>

### 3. *The Fifth Committee*

Over the years, the LLS led by countries like Afghanistan, Bolivia, and Czechoslovakia had been pressing for greater recognition of their Rights.<sup>29</sup> This prompted the UN General

*the Sea of Landlocked States*, 22 ARCHIV DES VÖLKERRECHTS 475, 477 (1984).

19. Barcelona Convention, *supra* note 16 (discussing levies in Article 4, security threats in Article 5, and emergency situations in Articles 7 and 12).

20. KISHOR UPRETY, *THE TRANSIT REGIME FOR LANDLOCKED STATES: INTERNATIONAL LAW AND DEVELOPMENT PERSPECTIVES* 49 (2006).

21. *Id.* at 49.

22. General Agreement on Tariffs and Trade art. 5, Oct. 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S 194 [hereinafter, GATT].

23. Final Act of the United Nations Conference on Trade and Development, U.N. Doc. E/CONF.2/78, art. 33 (1948).

24. Uprety, *supra* note 20, at 478.

25. Hussain, *supra* note 18, at 491.

26. G.A. Res. 1028, U.N. GAOR, 11th Sess., Supp. No. 17, (1957). G.A. Res. 1028 (XI) (Feb. 20, 1957).

27. G.A. Res. 1105, U.N. GAOR, 11th Sess., Supp. No. 17, (1957). G.A. Res. 1105 (XI) (Feb. 21, 1957).

28. Hussain, *supra* note 18, at 475-79.

29. Kishor Uprety, *Right of Access to the Sea of Land-Locked States: Retrospect and Prospect for Development*, 1 J. INT'L LEGAL STUD. 21, 60 (1995).

Assembly to recommend a conference to address the issue.<sup>30</sup> As a result, the Geneva Conference of 1958, or the First UN Conference on the Laws of the Seas opened.<sup>31</sup> The Geneva Conference recommended the establishment of the Fifth Committee to look into the question of land-locked States' access to the sea.<sup>32</sup>

While the Fifth Committee did not itself recommend a draft, it suggested that the first UNCLOS should include provisions that granted access to the sea for land-locked States.<sup>33</sup> This includes not just free access to the coast, but also a recognition of the free access to the high seas, the right to fly a flag, and innocent passage across territorial water.<sup>34</sup> These suggestions did find a place in the Convention on the Territorial Sea and Contiguous Zone and the Geneva Convention of the High Seas.<sup>35</sup>

#### 4. *The Geneva Convention on the High Seas*

The Geneva Convention of the High Seas was one of the four Conventions that emerged out of the First U.N. Conference on the Law of the Seas.<sup>36</sup> It was signed in 1958, but brought into effect in 1962.<sup>37</sup> Article 3 of this Convention discussed the prospect of access to the sea for land-locked States, based on reciprocity and subject to “common agreement” with the transit States.<sup>38</sup> It did not speak of a right of access, but only stated that LLS “should have” access to the Sea.<sup>39</sup> Therefore, Kishor Uprety, Senior Counsel at The World Bank, says that this Convention “to satisfy the demands of LLS for a general law of free access and, as a *pactum de contrahendo*, made transit rights dependent on the goodwill of coastal States.”<sup>40</sup>

#### 5. *The U.N. Convention on Law of the Seas – Textual Analysis*

The most comprehensive enunciation of the right to access the sea in modern statutory law is provided in the United Nations Convention on the Law of the Sea (UNCLOS) in Part X.<sup>41</sup>

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30. *Id.*

31. *Id.* at 60-61.

32. *Id.*

33. Milic, *supra* note 15, at 503.

34. *Id.*

35. *Id.*

36. Tullio Treves, *1958 Geneva Conventions on the Law of the Sea*, AUDIOVISUAL LIBR. INT'L L. [www.legal.un.org/avl/ha/gclos/gclos.html](http://www.legal.un.org/avl/ha/gclos/gclos.html) [perma.cc/G6JE-AFDU] (last visited Aug. 31, 2020).

37. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11 (entered into force Sep. 30, 1962).

38. *Id.* at art. 3.

39. *Id.*

40. Uprety, *supra* note 20, at 4.

41. UNCLOS, *supra* note 6, at arts. 124-32.



### B. Article 124 of UNCLOS

Article 124(1)(a) provides the definition of a landlocked State as a State controlling territory without a sea-coast.<sup>42</sup> Article 124(1)(b) defines a Transit State as a state which is situated between land-locked State and the seacoast “through whose territory traffic in transit passes.”<sup>43</sup> There are a few important facets of note here. First, Article 124(1)(b) does not limit its definition of a Transit State only to States which have a sea-coast, therefore, a land-locked State can also be a transit state in the event that it is so situated that “traffic in transit” passes through it.<sup>44</sup> Second, nothing contained in Part X places any limitation or qualification upon the route taken by the traffic from the LLS.<sup>45</sup> Clearly, this means that a land-locked state is under no obligation to use a shorter route, even when available.

Article 124(1)(c) and (d) provide a definition of “traffic in transit” and “means of transport” respectively.<sup>46</sup> These are defined to include traditional merchandise shipments and due to the time of enactment, make no mention of modern day, intangible commodities like data and internet traffic.<sup>47</sup>

### C. Article 125 of UNCLOS and Freedoms of the Sea

Article 125 is the operative portion of the statutory scheme.<sup>48</sup> It is a three-part article and provides the general rule first. It provides LLSs with the right of access to and from the sea “for the purposes of exercising the rights” provided in the Convention, “through the territory of the transit State by all means of transport.”<sup>49</sup> Isolated from the sovereignty exception, this is a very comprehensive enunciation of the Right to Access the Sea. It has the effect of extending the full force of the Freedoms of the Sea provided in Article 87 of the Convention.<sup>50</sup>

As a concept, Freedoms of the Sea is a reference to the *Mare Liberum* doctrine enunciated by Grotius in 1609.<sup>51</sup> *Mare Liberum*

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42. *Id.* at art. 124(1)(a).

43. *Id.* at art. 124(1)(b).

44. *Id.*

45. *See* UNCLOS, *supra* note 6, at arts. 124-32 (being silent on this matter with regards to Part X of UNCLOS, despite extensive references to the contours of the right of access and defining obligations of LLS and transit States).

46. UNCLOS, *supra* note 6, at art. 124(1)(c), (d).

47. *Id.*

48. *See* UNCLOS, *supra* note 6, at art. 125(1) [provides that LLS possess the right to access the sea through transit States].

49. UNCLOS, *supra* note 6, at art. 125(1).

50. Oxford Dictionary, *supra* note 1.

51. *See* HUGO GORTIUS, THE FREE SEA (David Armitage ed., Richard Hakluyt trans., Liberty Fund Inc. 2004) (1609).

has its origins in the Anglo-Saxon law in the court of Elizabeth I, and stands in opposition to *Mare Clausum* (closed sea).<sup>52</sup> The former posits the existence of a seafaring regime that recognizes freedom of navigation across the world barring enclaves,<sup>53</sup> which are akin to today's internal waters under the UNCLOS.<sup>54</sup> *Mare Liberum* developed through centuries of practice and evolved because of fishing rights given out by the English Crown.<sup>55</sup> In the centuries leading up to the reign of King James I, English kings had given out so many fishing rights off the coast of England that the right had virtually become universal.<sup>56</sup> However, this was not the position elsewhere, for instance in Scotland, a fact that James I attempted to use when he began attempting a failed reversal of the Elizabethan court's embrace of *Mare Liberum*.<sup>57</sup> Today, the freedom to navigate and exploit the seas is an undeniable facet of the international law of the sea. Article 87 of UNCLOS merely gives statutory recognition to a long existing right.<sup>58</sup> It is known to include, inter alia, (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines (subject to Part VI of UNCLOS); (d) freedom to construct artificial islands and other installations (subject to Part VI of UNCLOS and other international law); (e) freedom of fishing (subject to conservation requirements); and, (f) freedom to conduct scientific research.<sup>59</sup> This list is not an exhaustive one and other norms of international law may provide for further freedoms.<sup>60</sup> Perhaps, this is also a recognition of the imperfections inherent in the codification of customary norms of international law; broadly drafted clauses are often an attempt to allay the potential for *errors* of omission during interpretation.<sup>61</sup> Article 125(1) also provides that LLS have a right to enjoy the "common heritage of mankind" in the form of

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52. PERCY E. CORBETT, LAW IN DIPLOMACY 110 (1959).

53. *Id.*

54. *See, e.g.*, UNCLOS, *supra* note 6, at arts. 2, 3 (defining the breadth and legal status of the territorial sea of a State as an enclave of sovereignty).

55. Corbett, *supra* note 52, at 112.

56. *Id.* at 112-13.

57. *Id.* at 110-11.

58. *Freedoms of the Sea*, OXFORD DICTIONARY, *supra* note 1.

59. UNCLOS, *supra* note 6, at art. 87.

60. *Id.*

61. *See, e.g.*, *Felder v. Casey*, 487 U.S. 131, 149 (1988) ("The Congress which enacted [42 U.S.C.] §1983 over 100 years ago would have rejected [a requirement of exhaustion of state remedies] as inconsistent with the remedial purposes of its broad statute."); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 237 (1969) ("A narrow construction of §1982 would be inconsistent with the broad and sweeping nature of the protection meant to be afforded by §1 of the Civil Rights Act of 1866."); *Northeast Marine Terminal v. Caputo*, 432 U.S. 249, 268 (1977) ("The language of the 1972 Amendments [to the LHWCA] is broad and suggests that we should take an expansive view of the extended coverage. Indeed such a construction is appropriate for this remedial legislation.").

exploitation of sea resources.<sup>62</sup> “Common heritage of mankind” articulates that the resources of certain areas – such as the sea, in this case – shall not be exploited by a few States whose technical and commercial abilities may allow them to do so at a given time, but rather on behalf of humankind as a whole.<sup>63</sup> This term finds reference in several other international conventions which have been understood to enunciate a standard of resource exploitation based on mutual comity and cooperation.<sup>64</sup> Some have even argued for the doctrine’s application to the cultural field.<sup>65</sup> While there is no clear enunciation of what the phrase seeks to convey as essential precepts of international law, its essence reflected in the General Assembly Resolution articulating the International Seabed Convention.<sup>66</sup> The resolution notes – in the context of the ocean floor at high seas – that the area would not be subject to appropriation by any one State or person;<sup>67</sup> that right to the area or its resources will have to be exercised in consonance with international law;<sup>68</sup> the use by any State should be solely for peaceful purposes.<sup>69</sup>

#### *D. Additional Articles of UNCLOS Narrowing the Sovereignty Limitation*

Article 127 places a bar on taxation of LLS transit<sup>70</sup> and Article 128 opens the door for free zones in the ports of the Transit States.<sup>71</sup> Article 129 and 130 further demonstrate that the text intends the right of LLS to access the sea to be broadly construed.<sup>72</sup> They require Transit States to not only ensure the construction and improvement of appropriate infrastructure to facilitate transit,<sup>73</sup>

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62. UNCLOS, *supra* note 6, art. 125(1).

63. *Common Heritage (of mankind)*, OXFORD DICTIONARY, *supra* note 1.

64. *See, e.g.*, G.A. Res. 2749(XXV) A, Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction at art. 1 (Dec. 17, 1970); Agreement governing the Activities of States on the Moon and Other Celestial Bodies art. 11, Dec. 5, 1979, 1363 U.N.T.S. 3; *see also* G.A. Res. 34/46, 1979 The Moon Treaty ¶ 1 (Dec. 5, 1979)

65. *See* Edwin Egede, *The Common Heritage of Mankind and the Sub-Saharan African Native Land Tenure System: A ‘Clash of Cultures’ in the Interpretation of Concepts in International Law?*, 58 J. AFR. 71 (2014); Craig Forrest, *Cultural Heritage as the Common Heritage of Humankind: A Critical Re-Evaluation*, 40 COMP. & INT’L L. J. S.AFR. 124 (2007); Anastasia Strati, *Deep Seabed Cultural Property and the Common Heritage of Mankind*, 40 INT’L & COMP. L. Q. 859 (1991).

66. G.A. Res. A/2749(XXV), *supra* note 64.

67. *Id.* at art. 3.

68. *Id.* at art. 4.

69. *Id.* at art. 5.

70. UNCLOS, *supra* note 6, at art. 127.

71. *Id.* at art. 128.

72. *Id.* at arts. 129-130.

73. *Id.* at art. 129.

but to minimize delays and ensure removal of any other difficulties from transit as well.<sup>74</sup> In addition, by providing for the involvement and cooperation of LLSs in the process,<sup>75</sup> the Convention further narrows the sovereignty limitation.

### *E. Outside the Confines of Part X of UNCLOS*

UNCLOS, therefore, works to bring coastal states and LLS at a point of legal parity, at least insofar as the rights of each *on the seas* is concerned. Even outside the confines of Part X, an attempt has been made to extend this parity wherever possible. For instance, in Article 69 of the Geneva Convention, an equitable right to access the living resources of the continental shelf – i.e., within the exclusive economic zone – has been recognized.<sup>76</sup> While the modalities of such exploitation have been left to regional and sub-regional bilateral and multi-lateral arrangements,<sup>77</sup> the exercise and existence of an equitable right for LLS in this domain is abundantly recognized in the Article.<sup>78</sup> It is also important to note that unlike Part X, Article 69 does not explicitly limit the right of exploitation to the principle of sovereignty, even though the exploitation of resources will take place in the Exclusive Economic Zone.<sup>79</sup> The consistent textual credence to ensure equity in the rights and freedoms associated with the seas among coastal States and LLS demonstrably indicates an intent to bridge geographical disadvantage through a legal fiction, to the extent possible.<sup>80</sup> It also indicates an intent to depart from any existing non-essential practice to the contrary.<sup>81</sup> The substantive qualitative limitation on the dependence predicating the application of the exception is further indicative of the expansively intended breadth of the statutory language. This equality provides the fundamental basis

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74. *Id.* at art. 130.

75. *Id.* at art. 129.

76. *Id.* at art. 69(1). [Article 70 extends similar treatment to Geographically Disadvantaged States (GDS), which is a distinct categorization and may also include coastal States.] *Id.* at art. 70. However, that is not a relevant category for the present discussion. For further discussion on the criteria for GDS, see Lewis M. Alexander, *The Disadvantaged States and the Law of the Sea*, 5 MARIN POLY 196 (1981).

77. UNCLOS, *supra* note 6, at art.125(2).

78. UNCLOS, *supra* note 6, at art. 125(1); *see also infra* Part III (for a discussion on the misuse of article 125 by transit States).

79. *Cf.* UNCLOS, *supra* note 6, at art. 125 (providing from both certain rights for some States, although the former provides an explicit caveat of sovereignty).

80. The term “Coastal States” is narrower in scope than “Transit States” due to the context of the right involved.

81. UNCLOS, *supra* note 6, at art. 71 (driving home this point through the phraseology of article 71, which creates an exception to article 69 but is limited to cases where the coastal state is overwhelmingly dependent on the living resources of the region).

to our argument that barring the geographical reality of access, there is no differentiation between coastal states and LLS states as it pertains to the law of the sea. It can, therefore, be argued that the textual intent is to keep the sovereignty exception contained in Article 125(3) to the narrowest possible limit.<sup>82</sup>

### *F. The Three-Fold Approach to Determine International Law*

While the principle presented by a textual analysis such as the one elucidated above can be quite convincing, a generalization can be deceiving. R.J. Dupuy described the law of the sea as “situationalist” because despite the universality of its application, its implementation has been a diverse concoction predominantly dictated by individual circumstances.<sup>83</sup> This is true from a practical perspective, since most transit relationships are instituted through bilateral and regional agreements.<sup>84</sup> However, international law is one arena where practice is often impacted by extra-legal considerations such as military and strategic capacity, offset conditions, etc.<sup>85</sup> Now, the recognized sources of international law are primarily understood to be three-fold:

Statutory International Law enunciated in specific agreements and applicable as to the countries that voluntarily choose to contract into them;<sup>86</sup>

Customary International Law;<sup>87</sup> and,

Renowned academic and judicial opinion.<sup>88</sup>

Flowing from the Statute of the International Court of Justice (ICJ), the above three-fold approach to the determination of international law has been analogized to legal philosopher H.L.A. Hart’s “secondary rules.”<sup>89</sup> Hart enunciated the concept of secondary rules to explain the approach for the determination of laws that actually influence and direct the behavior of parties,

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82. See UNCLOS, *supra* note 6, at art.125(3).

83. D. CARREAU et. al., DROIT INT’L ECONOMIQUE 61 (1990).

84. See *infra* Part II.

85. Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT’L L.J. 487 (1997) (highlighting the comprehensive manner in which practical considerations cause a divergence between the normative and positive view of international law and State practice).

86. Statute of the International Court of Justice art. 38(1)(a) Apr. 18, 1946.

87. *Id.* at art. 38(1)(b).

88. *Id.* at art. 38(1)(c).

89. Randall H. Cook, *Dynamic Content: The Strategic Contingency of International Law*, 14 DUKE J. COMP. & INT’L L. 89, 94 (2004).

referred to as “primary rules.”<sup>90</sup> Within this three-fold approach, “Customary International Law” is critical for our discussion. The ICJ has defined the term to mean that body of law which can be derived from consistent State practice and “*opinio juris*.”<sup>91</sup> *Opinio Juris* is a doctrine enunciated in several ICJ cases.<sup>92</sup> It operates as a further condition on *consistent State practice* and requires that to be considered Customary International Law, such practice must also be carried out under a belief that that it is in “confirming to what amounts to a legal obligation.”<sup>93</sup> *Opinio Juris*, therefore, is a doctrine that hinges on the subjective satisfaction of a State that the action performed by it is being done to fulfill a legal obligation it owes. Such an obligation may or may not find space in Statutory International Law by itself. However, if it is carried out *consistently*, and with the element of *opinio juris* it becomes Customary International Law.<sup>94</sup>

The above discussion is critical in the context of the rights of LLS. This is because any enunciation of the right in UNCLOS, or any other international agreement for that matter, will be severely constricted in its implementation because of extra-legal factors. To an outside observer, this gives the impression of a haphazard and ad-hoc implementation of the right itself, perhaps explaining Dupuy’s characterization of the Law of the Sea as “situationalist.”<sup>95</sup> However, from a legal standpoint, the conduct of transit states cannot eviscerate or dilute the obligation undertaken by them under Article 125 of the UNCLOS. This is because such conduct would not carry the necessary *opinio juris* to affect a customary repeal of the statutory enunciation of the UNCLOS. It may, however, inform the operation of the sovereignty exception contained within Article 125.

### III. PART II: EFFECTIVE ENFORCEMENT OF THE RIGHT TO ACCESS THE SEA

#### 1. *Effective Enforcement Test*

The manner in which the sovereignty exception operates can

90. H.L.A. HART, THE CONCEPT OF LAW 89-96 (1961).

91. Cook, *supra* note 89, at 94.

92. *See, e.g.*, Asylum (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20) (for a discussion on the origins and definition of *opinion juris*), North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, ¶ 76-77 (Feb 1969), Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement 1986 I.C.J. 109-109 (June 27), S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 ¶ 76, 79 (Sept. 7).

93. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, ¶ 77 (Feb. 20).

94. CLIVE PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW (1965) (discussing the evolution of international criminal law).

95. CARREAU, *supra* note 83, at 61.

be gleaned from the numerous agreements between transit States and LLSs. An ideal transit agreement that adequately enforces the Right of Access for Transit States should demonstrate the following features:

**Freedom of Movement** – Generally, the agreement must provide for a friction-less movement of goods through the transit state, with minimal time and monetary cost imposition. Regulatory procedures, if any, should be tailored to meet narrowly defined aims and must not impose an excessive burden on movement. Quantitative or qualitative exceptions should be specific and must also be narrowly tailored to meet specific pre-defined interests of transit States, e.g., in the movement of hazardous material.

**Predictability and Certainty** – This is critical to the actual utilization of any benefits provided in an agreement. Meaningful economic and social activity cannot exist in the absence of a predictable and stable legal regime since frequent changes increase risk, and therefore deter investment. Dramatic changes – even when they are not adverse to free movement – can also increase animosity and sour public opinion. Over time, these can contribute to a complete breakdown of support for the system. This can be seen in the debate leading up to the Brexit vote. The build-up of anti-immigration sentiment – notwithstanding a qualitative judgement on that opinion – created a cleavage between the interests of a significant section in the UK and the rest of the EU, causing a rupture.<sup>96</sup> Therefore, any arrangement that establishes freedom of movement must also have a self-contained mechanism of negotiated, deliberate changes that all parties commit to follow in earnest. Institutionalization of changes in this manner allows each contracting party to approach the negotiating table with clear, identifiable interests in mind. It also opens space for a broad-based involvement of stakeholders, reducing the potential for arbitrary changes.

**Institutionalized Remedies** – The above two elements must also be secured through a system of remedies, ensuring that arbitrary decision making at any level would be swiftly counteracted to restore status quo ante.

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96. Toby Helm, *British Euroscepticism: A Brief History*, GUARDIAN, (Feb. 7, 2016, 12:04 AM), [www.theguardian.com/politics/2016/feb/07/british-euroscepticism-a-brief-history](http://www.theguardian.com/politics/2016/feb/07/british-euroscepticism-a-brief-history) [perma.cc/24JE-X3S3].

Many international agreements are often rendered unenforceable simply because the contracting parties begin to act in pursuit of parochial self-interests. Where significant strategic and economic disparities exist among the parties, this phenomenon is even more pronounced. Ultimately, such a situation results in a de facto abandonment of the agreement and all associated rights and obligations. A mechanism – whether political, judicial or a hybrid of the two – acts as a strong deterrent to parochial instincts and preserves the integrity of the system.

## 2. *Current Enforcement Practices*

A survey of existing bilateral and multilateral arrangements tested against the touchstone of the aforementioned metrics reveals substantial variance in enforcement. Agreements range from those which meet all three of the above criteria to situations where none of them exist. The latter category tends to foster an ecosystem of informal, ad-hoc actors that facilitate limited movement at enormous costs. In the former category, perhaps the finest example is the thirty-two member European Union Single Market.<sup>97</sup>

### *B. The European Union Single Market*

The Single Market allows for virtually unhindered access of goods and services across the borders of member States,<sup>98</sup> and therefore makes it easier for LLSs to access port facilities anywhere on the continent. The regulatory compliance burden on individuals is also comparatively minimal.<sup>99</sup> Barring the exception of Brexit, the Single Market has proven to be an exceptionally stable zone.<sup>100</sup> The international treaties establishing the Single Market are entrenched in the municipal laws of each of the member States, and

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97. The European Union Single Market includes the twenty-seven full member States of the European Union, and the United Kingdom (during the Brexit transition phase at the minimum). It also includes Norway, Liechtenstein, and Iceland through a multilateral agreement, and Switzerland through an independent bilateral agreement with the EU.

98. The Single Market also largely overlaps with the Schengen Area. However, including Schengen as an example would be inaccurate since it primarily deals with the movement of people and the right of access to the sea in the UNCLOS context is limited to movement of goods.

99. *The European Single Market*, EUROPEAN COMM'N, [www.ec.europa.eu/growth/single-market\\_en](http://www.ec.europa.eu/growth/single-market_en) [perma.cc/2PHF-L4SF] (last visited Sep. 9, 2020).

100. *About the EU-Countries*, EUROPEAN UNION, [www.europa.eu/european-union/about-eu/countries\\_en](http://www.europa.eu/european-union/about-eu/countries_en) [perma.cc/9SYM-PCYD] (last visited Sep. 9, 2020). The EU and the Single Market have only expanded since their inception. *Id.* Britain was the first country ever to demand a withdrawal. *Id.*



it enjoys high political support in each of the member States.<sup>101</sup> Paradoxically, the political slugfest surrounding the Brexit process has not only increased support for the institution within member countries, it has also worked to demonstrate its centrality and permanence in the geopolitical landscape of Europe – an exemplar of stability and predictability of the regime.<sup>102</sup> Other examples of regional pacts are the Association for Southeast Asian Nations (ASEAN) free trade area in South East Asia;<sup>103</sup> the Andean Community in South America;<sup>104</sup> and the Southern African Development Community in Africa.<sup>105</sup> While modeled around the Single Market, none of these agreements have yet been able to reach the comprehensiveness or maturity of their European counterpart.

### *C. The China-Mongolia-Russia Transit Agreement Bypasses the Complexities of the Single Market*

Another approach to regional transit agreements can be seen in the relatively recent China-Mongolia-Russia Transit Agreement (Asian Highway Network Agreement).<sup>106</sup> Mongolia is a land locked State bordered by Russia and China. This agreement opens up specific roads to Mongolia for use as transit routes, while keeping the rest of the transit countries outside its ambit.<sup>107</sup> The agreement also has the potential to be expanded because it includes the accession by other neighboring countries. One of the roads opened to Mongolia also leads into Pakistan as part of the Silk Road

101. *See id.* (noting that joining the EU requires ratification of all existing EU laws and procedures – unless exempted specifically – and further requires implementation of all EU regulations throughout the duration of membership); *see also* Richard Wike et al., *Europeans Credit EU With Promoting Peace and Prosperity, but Say Brussels Is Out of Touch With Its Citizens*, PEW RES. CTR. (Mar. 19, 2019), [www.pewresearch.org/global/2019/03/19/europeans-credit-eu-with-promoting-peace-and-prosperity-but-say-brussels-is-out-of-touch-with-its-citizens/](http://www.pewresearch.org/global/2019/03/19/europeans-credit-eu-with-promoting-peace-and-prosperity-but-say-brussels-is-out-of-touch-with-its-citizens/) [perma.cc/AHG9-MQN8] (discussing public support levels for EU which continue to remain relatively high despite BREXIT).

102. Douglas Webber, *Why Brexit Has Not and Will Not Trigger EU Disintegration*, CONVERSATION (Jan. 31, 2020 6:07 AM), [www.theconversation.com/why-brexit-has-not-and-will-not-trigger-eu-disintegration-130719](http://www.theconversation.com/why-brexit-has-not-and-will-not-trigger-eu-disintegration-130719) [perma.cc/2JBX-6WVU].

103. ASEAN Framework Agreement on Services signed and in effect: 1998. ASEAN Trade in Goods signed and in effect: 2010. ASEAN Comprehensive Investment Agreement: 2012.

104. Agreement on Andean Subregional Integration, May 26, 1969, 8 I.L.M. 910.

105. Treaty of the Southern African Development Community, Aug. 17, 1992, 32 I.L.M. 116.

106. *China, Mongolia And Russian Federation To Open Up New Era Of Trade Cooperation*, UNESCAP (Dec. 8, 2016), [www.unescap.org/news/china-mongolia-and-russian-federation-open-new-era-trade-cooperation](http://www.unescap.org/news/china-mongolia-and-russian-federation-open-new-era-trade-cooperation) [perma.cc/QE5Z-KSL5].

107. *Id.*

Initiative. Clearly, this agreement is limited in scope to road transportation. However, it defers to internationally accepted standards for hazardous goods<sup>108</sup>, regulation of types of vehicles to be used,<sup>109</sup> and contains provisions for reciprocal exemption from customs for import of certain commodities necessary for transit.<sup>110</sup> The agreement also establishes a supervisory council to ensure smooth implementation and dispute resolution.<sup>111</sup>

The deference to international standards is quite significant because it reduces the scope for arbitrary changes in municipal regulation and eliminates the need for complex negotiations on these definitions. Since the agreement does not seek to create a free trade regime between China, Russia and Mongolia, and instead is only focused on creating a transit regime; it can bypass the complex structures needed to sustain a Single Market like that of the EU. This narrower approach is easier to accomplish and can serve as an ideal model for situations where political consensus on a Single Market is not available. This is also reflected in the fact that other agreements in the region have tended to follow this template to varying extents. Central Asian and Eastern Europe have several agreements extending transit rights to ensure port access.<sup>112</sup> While

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108. Intergovernmental Agreement on International Road Transport Along the Asian Highway Network art. 7, Dec. 8, 2016, UNESCAP, [www.unescap.org/sites/default/files/Intergovernmental-Agreement-on-International-Road-Transport-along-the-Asian-Highway-Network-English-language.pdf](http://www.unescap.org/sites/default/files/Intergovernmental-Agreement-on-International-Road-Transport-along-the-Asian-Highway-Network-English-language.pdf) [perma.cc/43U6-6YRQ] [hereinafter ASN Agreement].

109. *Id.* at art. 6.

110. *Id.* at art. 8.

111. *Id.* at art. 12.

112. *See* Agreement Between the Government of the Republic of Kazakhstan and the Government of the Kyrgyz Republic on Transit Movement By Road Transport of Goods Through the Territory of the Republic of Kazakhstan (March 26, 2004); Agreement between the Governments of the Republic of Kazakhstan, People's Republic of China, Kyrgyz Republic and Islamic Republic of Pakistan On Transit Transportations (March 9, 1995); Agreement Between the Government of the Kyrgyz Republic and the Government of China on International Road Transport, (June 4, 1994); Agreement on International Road Transport between the Government of the Republic of Kyrgyzstan and the Government of the Islamic Republic of Iran, (June 22, 1993); Agreement between the Government of the Kyrgyz Republic and the Government of the Republic of Kazakhstan on International Road Transport, (Dec. 25, 2003); Agreement between the Government of the Republic of Belarus and the Government of the Republic of Kyrgyzstan on International Road Transport, (June 14, 1995); Agreement between the Government of the Kyrgyz Republic and the Government of the Republic of Kazakhstan on Transit of Commodities by Motor Transport through the Territory of the Republic of Kazakhstan, (Mar. 26, 2004); Agreement between the Government of Mongolia and the Government of the Kyrgyz Republic on International Road Transport, (Mar. 1, 2004); Agreement between the Government of Russian Federation and the Government of the Republic of Kyrgyzstan on International Road Transport, (Apr. 16, 2002); Agreement between the Government of the Kyrgyz Republic and the Government of the Republic of Tajikistan on International Road Transport, (May 27, 2013); Agreement between the Government of the Kyrgyz

each of these has some variation – including qualitative and quantitative restrictions in some cases – they broadly follow the template of the Asian Highway Network Agreement.<sup>113</sup> A further boost to these agreements has been the One Belt One Road Project pursued by China which – if successful – could substantially improve real world connectivity across Central Asia and yield access to ports on their Eastern and Southern flanks, in Russia, China, and Pakistan. It would also be a substantial diplomatic feat for China.<sup>114</sup>

On the bilateral front, the Djibouti-Ethiopia Transit Agreement is important to consider.<sup>115</sup> The agreement provides for a comprehensive 20-year framework with a clearly defined regulatory scope, deemed renewal, and subsistence clauses in cases of an early termination.<sup>116</sup> It also contains provisions for dispute resolution.<sup>117</sup> These factors led the U.N. Conference on Trade and Development (UNCTAD) to include it as a model bilateral transit agreement.<sup>118</sup>

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Republic and the Government of Turkmenistan on International Transport of Passengers and Goods by Road, 1995; Agreement between the Government of Ukraine and the Government of the Republic of Kyrgyzstan on International Road Transport, (Feb. 21, 1993); Agreement between the Government of the Kyrgyz Republic and the Government of the Republic of Uzbekistan on International Road Transport, (Sept. 4, 1996); Afghanistan Azerbaijan Islamic Republic of Iran Kazakhstan Pakistan Tajikistan Turkey Turkmenistan Uzbekistan ECO Transit Transport Framework Agreement, (May 9, 1998); Armenia Azerbaijan Georgia Kazakhstan Tajikistan Turkey Uzbekistan Basic Multilateral Agreement on International Transport for Development of the Europe-the Caucasus-Asia Corridor, (Sep. 8, 1998); Armenia Azerbaijan Georgia Kazakhstan Russian Federation Tajikistan Uzbekistan Agreement on Weights and Dimensions of Vehicles Undertaking International Transport on Roads of the CIS Member States, 1999.

113. See *DATABASE OF AGREEMENTS RELATED TO INTERNATIONAL ROAD TRANSPORT*, UNESCAP, [www.tadb.unescap.org/](http://www.tadb.unescap.org/) [perma.cc/6MYR-R5XV] (last visited Jul. 3, 2020) (providing a full list of agreements among landlocked States and transit States).

114. See Alexander Cooley, *Russia And China in Central Asia*, Norwegian Inst. Int'l Aff. (2015) (discusses China's imperatives and strategy behind OBOR).

115. See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *THE DJIBOUTI CITY – ADDIS ABABA TRANSIT AND TRANSPORT CORRIDOR*, UNCTAD/ALDC/2018/6 (2018), [www.unctad.org/en/PublicationsLibrary/aldc2018d6\\_en.pdf](http://www.unctad.org/en/PublicationsLibrary/aldc2018d6_en.pdf) [perma.cc/E5H4-NKUQ] (explains the transit agreement signed between Djibouti and Ethiopia).

116. Yohannes Anberbir, *Ethiopia: Djibouti Signs 20 Year Port Agreement with Ethiopia*, REP. ETH. (Dec. 16, 2006), [www.allafrica.com/stories/200612180599.html](http://www.allafrica.com/stories/200612180599.html) [perma.cc/H86V-PYMB].

117. *Id.*

118. U.N. Conference on Trade and Development, *Regional Cooperation in Transit Transport: Solutions For Landlocked and Transit Developing Countries*, at 11, U.N. Doc TD/B/COM.3/EM/30/3 (Nov. 12, 2007), [www.unctad.org/en/Docs/c3em30d2\\_en.pdf](http://www.unctad.org/en/Docs/c3em30d2_en.pdf) [perma.cc/U2C7-5KL6].

#### IV. PART III: HIJACKING THE MODALITIES CLAUSE

While the analysis in Part II provides useful insight into the implementation of transit agreements, there is little discernible commonality – distillable from geopolitics – to help in a meaningful heuristic analysis of the limits on the sovereignty exception. Such lack of commonality strips away the necessary consistency required in a Customary Law analysis of the sovereignty exception in Article 125 of UNCLOS. Furthermore, by their very nature, bilateral and regional transit agreements depend heavily on geopolitical negotiations. While perfectly reasonable from a foreign affairs standpoint, it prevents the agreements from meeting the standard of *opinio juris* as elaborated by the ICJ,<sup>119</sup> and thus lack the necessary force of Customary International Law (CIL). Therefore, while the agreements were negotiated by the States under a belief that they were fulfilling a legal obligation under UNCLOS, their content provides little guidance on scope of the right to access the sea that LLS possesses under the Convention.

##### A. *Strong Presumption that UNCLOS Provides a Secure Right to Access*

It may also be argued that groping for a uniform understanding of the scope of the right to access is a farcical exercise in the first instance. There would be some force in this argument because while it lays down a general principle, the Convention has largely left it to States to decide the exact modalities of the operation of that principle<sup>120</sup> – thereby providing textual recognition to a decentralized approach. However, we contend that such a reading of the Convention presents an unreasonably narrow interpretation of textual intent. As highlighted in Part II above, several provisions within the Convention point to a deliberate attempt to completely secure the right granted to LLS. These go beyond the enunciation of a generic principle and actively place obligations in matters that would otherwise be considered sovereign decisions, e.g., Article 130 (obliging transit States – using the word “shall” – to “take all appropriate measures to avoid delays”); and Article 127 (prohibiting the imposition of customs and taxes on Transit goods). Conventional doctrines of interpretation and construction dictate that greater specificity posits an application according to its terms – the “plain meaning rule.”<sup>121</sup> The specificity of these provisions raises a strong presumption of a textual intent of establishing strong protections for the right of access. The presumption can be further buttressed by observing Article 132

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119. Parry, *supra* note 94.

120. UNCLOS *supra* note 6, art. 125(2).

121. *E.g.*, *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013).

which explicitly protects against preemption of greater transit facilities.<sup>122</sup> Such a clause would not be necessary if the right of access in the Convention was intended to provide a general principle. Given that the sovereignty exception would operate – even without its inclusion in Article 125(3) – through the Geneva Convention in all transit agreements, the existence of Article 132 cannot be explained as a protection for agreements in violation of the sovereignty rider. Therefore, the inclusion of Article 132 can only be explained by assuming some level of specificity of the right to access enunciated in the Convention – this is the bare minimum that is specified in International Law and Article 132 formalizes the understanding that Part X of the Convention should be seen as a floor. A bare minimum, by its very definition, cannot be an abstract idea and, therefore, has a defined specificity for the purposes of International law. However, that specificity – while in existence – has evidently not yet received articulation, to the fullest extent.

Traditionally, this role would have been fulfilled by a decision of the ICJ or a resolution of one of the political branches of the UN. In its absence, States have used the interpretational elbow room to create the widely disparate systems we analyzed above. In many cases, these deny LLS the basic rights due to them under the Convention by transit States, either generally or episodically.<sup>123</sup> Effectively therefore, transit States have used the modalities clause of Article 125 - which merely exists to formalize enforcement of the right of access – to deny the existence of the right itself, by placing arbitrary limitations on the enforcement of the right. This has been accomplished by either creating impermissibly wide exceptions in bilateral and multilateral agreements contracted in pursuance of the modalities clause or by simply keeping the agreements in abeyance.

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122. UNCLOS, *supra* note 6, at art. 132.

123. See, e.g., *Around the World, Blockade by Pretoria Said to Strain Lesotho*, N.Y. TIMES (Jan. 15, 1986), [www.nytimes.com/1986/01/15/world/arond-the-world-blockade-by-pretoria-said-to-strain-lesotho.html](http://www.nytimes.com/1986/01/15/world/arond-the-world-blockade-by-pretoria-said-to-strain-lesotho.html) [perma.cc/3GYE-4YSE]; Barbara Crossette, *Nepal's Economy Is Gasping as India, a Huge Neighbor, Squeezes It Hard*, N.Y. TIMES (Apr. 11, 1989), [www.nytimes.com/1989/04/11/world/nepal-s-economy-is-gasping-as-india-a-huge-neighbor-squeezes-it-hard.html](http://www.nytimes.com/1989/04/11/world/nepal-s-economy-is-gasping-as-india-a-huge-neighbor-squeezes-it-hard.html) [perma.cc/J6NX-6AUF]; Dipanjan Roy Choudhary, *India Apprises Western Powers of Pakistan Blockade of Afghan Transit Route*, ECON. TIMES (Oct. 7, 2016), [www.economicstimes.indiatimes.com/news/politics-and-nation/india-apprises-western-powers-of-pakistan-blockade-of-afghan-transit-route/articleshow/54740741.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://www.economicstimes.indiatimes.com/news/politics-and-nation/india-apprises-western-powers-of-pakistan-blockade-of-afghan-transit-route/articleshow/54740741.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst) [perma.cc/2NUG-XZBD]; Thomas Snow et. al., *Country Case Studies on the Challenges Facing Landlocked Developing Countries*, U.N. Dev. Program Hum. (2003).

*B. Sovereignty Exception under Article 125(3) Presumes the Existence for the Right of Access*

We argue that this is in contravention with existing international law because the sovereignty exception under Article 125(3) needs to be understood narrowly and harmoniously with the rights of LLS. The existing practice of using sovereignty to justify restrictive covenants or simply denying the right absent such an agreement goes against the letter and spirit of the Convention. A bare perusal of the textual provision itself demonstrates this. The modalities clause reads, “The terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through bilateral, subregional or regional agreements.”<sup>124</sup>

The clause does not subject the right of access itself to agreements between parties. Instead, it presumes the existence of that right – which has been provided in the preceding clause – and only subjects an enforcement mechanism to be determined by the States themselves. That this distinction between execution and existence of a right was well known at the time the Convention was drafted can be borne out from the legislative history.

a. Legislative History

During the Second Session of the United Nations Conference on the Law of the Sea, the representative of Cuba – discussing the scope of Part X – noted that the “general principle [of the right of access] should be confirmed in the Convention.”<sup>125</sup> The representative further noted that bilateral agreements with the transit countries should regulate the “application of the principle in individual cases.”<sup>126</sup> During the same session, the representatives from Zambia noted the importance of alternative routes and the ability of LLS to have “their option[s] open.”<sup>127</sup> It is evident that such a statement presumes the existence of a distinction between the right inherited and its execution, since a right predicated on bilateral agreements would not require a clarification on alternative routes given that States are allowed to enter into agreements as they please. Several other statements also point to a common understanding that Part X enunciates such a distinction. The representative of Laos noted that the right was “an element of

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124. UNCLOS, *supra note 6*, at art. 125(2).

125. OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL FOR THE LAW OF THE SEA, LEGISLATIVE HISTORY OF PART X, ARTICLES 124 TO 132 OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 40 ¶ 60 (1987).

126. *Id.*

127. *Id.* at 41, ¶ 65.

the sovereign equality of States.”<sup>128</sup> Afghanistan noted that subjecting the rights of LLS to bilateral or multilateral agreements would be “restrictive and discriminatory.”<sup>129</sup> Algeria also noted that the Conference’s task was to provide “universal recognition” of the right of access and “specif[ied] the modalities of its implementation,”<sup>130</sup> in a further nod to the prevalence of this distinction.

b. Further Evidence from the Pakistani Representative

Further evidence that the issue of a right-execution separation was at the core of discussions during the conference can be gleaned from a statement by the representative of Pakistan. During the Second Session, the representative of Pakistan said in the context of Part X,

[A]s a developing country, Pakistan appreciated the aspirations of developing land-locked States to improve the life of their peoples and it had always extended full transit facilities to its neighboring land-locked States, under bilateral agreements. **It saw no justification for making the existence of transit facilities independent of agreement between the parties concerned . . .**<sup>131</sup>

This statement is intriguing for two reasons. First, given the context that Pakistan has often contested Afghanistan’s access to the sea,<sup>132</sup> it is noteworthy that it chose to contest it by using the phrase “existence of transit facilities,” instead of some formulation such as “existence of a right to access the sea.” The use of “transit facilities” is a clear nod to the idea that modalities of transit are distinct from the inherent right of transit. Second, even if this is not the case and Pakistan’s statement is interpreted as a demand for conditioning the right on agreements, a plain reading of the text of Article 125 demonstrates that this view was rejected by the final text of the Convention. As noted above, the article pointedly first *recognizes* a general right,<sup>133</sup> and then only subjects the “modalities for exercising” that right to agreements.<sup>134</sup> The very existence of the Modalities Clause, therefore, betrays the fact that any demand by countries to subject the general right to agreements was not incorporated into the final text of the Convention and does not constitute International Law. In practice therefore, the Modalities Clause – and consequently the sovereignty rider – have been used

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128. *Id.* at 41, ¶ 64.

129. *Id.* at 42, ¶ 66.

130. *Id.* at 44, ¶ 76.

131. *Id.* at 43, ¶ 71 (emphasis added).

132. *Pakistan and Afghanistan*, INST. FOR STUDY WAR, [www.understandingwar.org/pakistan-and-afghanistan](http://www.understandingwar.org/pakistan-and-afghanistan) [perma.cc/6FJX-S5LG] (last visited July 4, 2020).

133. UNCLOS, *supra* note 6, at art. 125(1).

134. UNCLOS, *supra* note 6, at art. 125(3).

to cause undue delay or obstruction in the ability of LLS to exercise their right of transit.

c. The Modality Clause Must Be Interpreted to Preserve Its Effect, Not Nullify It

That such use of the Modalities Clause is unreasonably expensive is also borne out by the application of principles of statutory interpretation emphasized by the Vienna Convention. The basic rule here is object and purpose, aka, teleological interpretation.<sup>135</sup> In *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, the ICJ emphasized that teleological interpretations are governed by the maxim “*ut res magis valet quam pereat*.”<sup>136</sup> In the legal sense, this means that of two possible constructions, the statute must be interpreted in a way that preserves an effect, rather than nullifying it.<sup>137</sup> Breaking down this principle, two principal aspects of the interpretational logic can be understood.<sup>138</sup> One, that a treaty must necessarily be interpreted such that all its provisions are taken into account when making an interpretation – i.e., a statute has no redundant text. This is governed by the maxim that all provisions of a text are intended to achieve a common goal. Two, in a choice between multiple interpretations, one which best serves the purpose of the text in totality must be operative.<sup>139</sup>

Harking back to the textual analysis we considered above and applying the two governing principles to the UNCLOS, we see that the sovereignty rider and the modalities clause must necessarily be interpreted in a manner that retains the guarantee offered in Article 125(1)<sup>140</sup> – the right of access. Furthermore, as was noted earlier in Part I, there is a clear intent on part of the framers to

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135. Vienna Convention on the Law of Treaties art. 31. May 23, 1969, 1155 U.N.T.S. 331.

136. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Second Phase), Advisory Opinion, 1950 I.C.J. Rep. 64, 229 (July 18) (hereinafter *Peace Treaties*).

137. *Construction*, BLACK'S LAW DICTIONARY (11th ed, 2019) (The relevant portion reads, “[Latin] ‘a construction that gives effect to the matter rather than having it fail’] (18c) A construction arrived at when alternative readings are possible, one of which (usu. the broader reading) would achieve the manifest purpose of the document and one of which (usu. the narrower reading) would reduce it to futility or absurdity, whereby the interpreter chooses the one that gives effect to the document's purpose.”).

138. Viljam Engstrom, *Implied Powers of International Organizations: On the Character of a Legal Doctrine*, 14 FINNISH Y.B. INT'L L. 129, 138 (2003).

139. C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 45 (2d ed. 1996) (providing a wholesome explanation of how Article 31 of the VCLT, 1969, must be read when interpreting treaties).

140. UNCLOS, *supra* note 6, at art. 125(1).



guarantee parity to LLS in the affairs of the Sea.<sup>141</sup> The bevy of provisions in the Convention detailed above and the painstaking efforts to ensure the incorporation of concepts such as “common heritage of mankind” are demonstrative of the legislative intent to cement this parity. A harmonious reading of the three subsections of Article 125 of the Convention, therefore, requires that Transit States act in good faith and implement their obligation of implementing the right of access without undue delay, and in a reasonably competent and reliable manner to ensure the fullest possible enjoyment of that right by LLS. Given that sea-based trade routes dominate global trade and are critical for economic development, such use of oceans constitutes the “common heritage of mankind”. A right of transit that cannot guarantee reliable, and consistent access to the sea is functionally meaningless from this perspective and hinders the LLS’ ability to enjoy the common heritage.

Consequently, a correct interpretation of the Convention requires that its functional intent be respected. Therefore, the implementation must meet the Standards of Effective Enforcement outlined in Part II. An implementation which is consistent with such enforcement can be achieved only on a limited reading of the sovereignty exception, i.e., to prevent a LLS from exercising its right of transit, the Transit State must demonstrate a compelling and overriding State interest. This is what leads us to interpret the Sovereignty Rider and the Modalities Clause in a narrow manner.

This demonstrates that States which have hitherto acted in bad faith to unduly delay negotiations of transit agreements; or have subjected such agreements to broad, arbitrary exceptions and used said exceptions to deny free transit without good cause; are in violation of their obligations under prevailing International Law and are infringing on the rights of land-locked States. Such States have unilaterally expended the Modalities clause beyond its textual remit and are abusing the same to unduly deny the rights of other sovereign States.

#### V. PART IV: THE UNITED NATIONS AS A REMEDY FOR EFFECTIVE ENFORCEMENT OF THE UNCLOS

For land-locked States the redressal of this abuse lies not only in the four corners of the Convention. We argue that it is possible for the United Nations to step in and create a mechanism for actively facilitating negotiations under the Modalities Clause and to monitor that the agreements made therein correspond to a correct reading of the Convention. This argument can be articulated through the following three-fold reasoning:

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141. See generally UNCLOS, *supra* note 6, at arts. 69, 71, 87, 124-132. (parenthetical).

Statutory International Law imposes an obligation on States to pursue cooperation in the interest of legitimate economic development goals of other countries. The United Nations is vested with the responsibility of ensuring such cooperation and has a broad range of powers in this regard;

Countries that lack access to the sea are significantly more economically disadvantaged, compared with the rest. As such, the UN is empowered and functionally responsible to redress the economic disadvantage arising out of lack of effective enforcement of the right to access the sea; and,

The UN therefore possesses an implied power to create mechanisms that can facilitate negotiations under the Modalities Clause. In so doing, the UN would be helping LLS to seek their right of access. Member States of the UN that are Transit States will be legally obligated to participate under such a process.

Let's analyze each of the above individually.

*1. Part IVA Obligation for Economic Cooperation under International Law*

The history of international cooperation for the purposes of economic prosperity and social progress is well documented. In the post war era, the principle found its most emphatic articulation in the Charter of the Nations. The Preamble refers to an aim of promoting "social progress and better standards in life for larger freedom";<sup>142</sup> and notes that the international system of cooperation ought to be used for "the promotion of the economic and social advancement of all peoples."<sup>143</sup> The advancement of economic interests as an end of international cooperation also finds reference in Article 1.<sup>144</sup> That this is not a general enunciation, but essentially a call to tangible action in specific fields can be demonstrated that the Charter itself created an Economic and Social Council (ECOSOC) as one of the central pillars of the UN System.<sup>145</sup> Chapter IX of the Charter is entirely dedicated to the promotion of International Economic and Social Cooperation. It contains remarkably far-reaching provisions, such as the compulsorily requirement that other international agencies in related fields

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142. U.N. Charter preamble.

143. *Id.*

144. *Id.* at art. 1, ¶ 3.

145. *Id.* at art. 7, ¶ 1.

coordinate with the UN through the ECOSOC;<sup>146</sup> and arming the UN with the power to foster coordination among the said agencies.<sup>147</sup> Perhaps the most remarkable provision in this regard is the pledge by member nations to take “joint and separate action in cooperation”<sup>148</sup> with the UN to achieve, inter alia, “higher standards of living, full employment, and conditions of economic and social progress and development.”<sup>149</sup>

Since the UN Charter came into force, the obligation on States to foster international economic and social cooperation has further solidified and evolved. Its evolution has tended to focus on the special circumstances faced by Least Developed Countries (LDCs) and provide several accommodations for them, in a recognition of their special circumstances. The Bretton Woods Institutions – World Bank and the IMF – have special financial structures with committed institutional funds and procedures specifically for the purpose of encouraging economic growth in LDCs, with varying degrees of success.<sup>150</sup> The World Trade Organization provides a litany of exemptions and staggered timelines for the implementation of its decisions in LDCs.<sup>151</sup> New LDCs joining the WTO also exclusively enjoy significant leeway in implementing the previously decided agreements of the WTO.<sup>152</sup> The UN Millennium Development Goals contained specific provisions for LDCs and Developing Countries.<sup>153</sup> This approach has been continued with the Sustainable Development Goals as well, including commitments for financial and technological resources.<sup>154</sup> International agreements addressing issues that may have a tangential economic impact also often ensure that provisions exist to mitigate any adverse impact on LDCs. Examples of such an

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146. *Id.* at art. 57, ¶ 1; *id.* at art. 63, ¶ 1.

147. *Id.* at art. 58.

148. *Id.* at art. 56.

149. *Id.* at art. 57(a).

150. *See, e.g.,* Prabirjit Sarkar, *IMF/World Bank Stabilisation Programmes: A Critical Assessment*, 26 *ECON. & POL. WKLY.* 2307 (1991); Dane Rowlands, *New Lending to Less Developed Countries: The Effect of IMF*, 29 *CAN. J. ECON.* S443 (1996).

151. *See, e.g.,* Kevin Kennedy, *The 2005 TRIPS Extension for the Least Developed Countries: A Failure of the Single Undertaking Approach?*, 40 *INT'L L.* 683 (2005).

152. *See, e.g.,* Victor Mosoti, *The Legal Implications of Sudan's Accession to the World Trade Organization*, 103 *AFR. AFF.* 269 (2004); BRIAN HINDLEY, *ACCESSION TO THE WTO: BACKGROUND* 11-16 (2008).

153. *See* LEAST DEVELOPED COUNTRIES INDEPENDENT EXPERT GROUP, *Redefining International Development Cooperation*, in *TRANSFORMING GLOBAL DEVELOPMENT: AN LDC PERSPECTIVE ON THE POST-2015 AGENDA* 10, 10-14 (2014).

154. *See, e.g.,* *KEY ELEMENTS OF A SUCCESSFUL ADDIS ABABA ACCORD ON FINANCING FOR SUSTAINABLE DEVELOPMENT* 21-23 (Leadership Council of the SDSN, Working Paper, 2015). / LEADERSHIP COUNCIL OF THE SUSTAINABLE DEVELOPMENT SOLUTIONS NETWORK, *KEY ELEMENTS OF A SUCCESSFUL ADDIS ABABA ACCORD ON FINANCING FOR SUSTAINABLE DEVELOPMENT* 21-23 (2015)

approach can be found in climate change agreements, such as the Paris Agreement of 2015, among others.<sup>155</sup> Similarly, in the realm of intellectual property, the Trade Related Aspects of the Intellectual Property System Agreement (TRIPS) and the World Intellectual Property Organization (WIPO) have worked to ensure effective access to information and technologies that could otherwise have been prohibitively expensive for LDCs.<sup>156</sup>

Above is a condensed analysis of the numerous ways in which international cooperation has been achieved for the purpose of economic progress of LDCs. That a separate carve-out for the economic benefit of LDCs is necessary is clearly borne out in consistent and repeated State practice. Furthermore, the invocations in the UN Charter, discussed above, also suggests that since at least 1945, there has been a statutory force driving this cooperation, lending the cooperation a color of legal obligation necessary for it to be considered a practice "*opinio juris*." Therefore, in addition to being statutorily mandated by the numerous agreements themselves, cooperation to ensure that economic and social justice is secured for LDCs and their citizens has been carried out by States as a consistent practice amounting to *opinio juris*. As has been analyzed in the section titled "Textual Analysis" above, consistent State practice with *opinio juris* is evidence of the existence of a Customary International Law.<sup>157</sup> Therefore, it can be argued with sufficient strength that a State is obligated under Customary International Law to provide its cooperation in ensuring that LDCs receive the necessary space to ensure economic and social development of their citizens. Per contra, any attempt to deny them the means of such development would be a violation of their rights and on part of the offending State, a violation of international law.

## 2. Part IVB Significant Overlap between LDCs and LLS

Studies have drawn a correlation between the level of development of a country and its status as a land-locked or coastal State.<sup>158</sup> The LLS' inability to access the High Seas severely hampers its ability to participate in international commerce. LLS are distant from the Sea, but certain remote areas of very large coastal States like Russia, China, Brazil, etc. are equally if not more distant. M.L. Faye et al. have shown that, "Distance alone, however,

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155. See, e.g., Helena Wright et. al., *Impact of Climate Change on Least Developed Countries, Are the SDGs Possible?*, INT'L INST. ENV. & DEV. (2015).

156. See generally B.N. Pandey & Prabhat Kumar Saha, *Technical Cooperation Under TRIPS Agreement: Flexibilities and Options for Developing Countries*, 53 J. IND. L. INST. 652 (2011).

157. See Cook, *supra* note 89 (provides elements required to prove *opinio juris*).

158. See e.g., *infra* note 1592;

cannot explain why landlocked countries are at a disadvantage compared with equally remote, inland regions of large countries."<sup>159</sup>

In addition to geography, LLS also must grapple with other hurdles that operate within the countries they need to use for transit. These include issues like the state of transport infrastructure; bureaucratic and administrative hurdles such as customs, taxes, and checkpoints; relations between the LLS and the transit state; political stability, and security within the transit states and along the routes.<sup>160</sup>

The condition of transport infrastructure in the transit State, especially along the routes used by the LLS are important in determining the cost of using those routes and the time taken for goods to travel through the route. Poor infrastructure raises both costs and time, affecting the competitiveness of the exports in the international market, and make it difficult, expensive and even longer for imports to reach LLS.<sup>161</sup> Transportation levies like customs and taxes also add to the costs of trading, whereas procedural and bureaucratic requirements like frequent checkpoints, upfront payment of customs, etc. create delays and other problems for efficiency. For example, containers from landlocked Afghanistan are subject to an arduous procedure while using Pakistani ports which increases delay and costs.<sup>162</sup>

Deterioration of political relations can lead to the imposition of blockages or embargos and LLS remain vulnerable to such tactics, such as when Mongolia was forced to apologize to the People's Republic of China in 2016 for a visit of the Dalai Lama in Ulaanbaatar.<sup>163</sup> Further, the security situation especially along the transit route can affect the LLS access to the sea. Outbreaks of protests, rioting, or an insurgency in a transit State can disrupt the movement of goods along the route, even if the Transit State and the LLS maintain friendly relations.

These factors have had a bearing on the economic development of LLS. LLS have lower GDP than their coastal neighbors, and "landlocked countries generally have significantly lower levels of

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159. Michael L. Faye et. al., *The Challenges Facing Landlocked Developing Countries*, 5 J. HUM. DEV. 31, 32 (2004).

160. *Id.* at 40.

161. Nuno Limão & Anthony J. Venables, *Infrastructure, Geographical Disadvantage, Transport Costs, and Trade*, 15 WORLD BANK ECON. REV. 451 (2001).

162. Martin Ira Glassner, *Transit Problems of Three Asian Landlocked Countries: Afghanistan, Nepal, and Laos*, 4 OCCASIONAL PAPERS/REPRINTS SERIES CONTEMP. ASIAN STUD. 1, 8-18 (1983).

163. Kallol Bhattacharjee, *Mongolia Seeks Support Against China's 'Blockade'*, HINDU (Dec. 7, 2016), [www.thehindu.com/news/national/Mongolia-seeks-support-against-China%E2%80%99s-%E2%80%98blockade%E2%80%99/article16769678.ece](http://www.thehindu.com/news/national/Mongolia-seeks-support-against-China%E2%80%99s-%E2%80%98blockade%E2%80%99/article16769678.ece) [perma.cc/D2FM-UV7S].

development than the maritime countries of their region."<sup>164</sup>

### 3. Part IVC Implied Powers of the UN

The discussion surrounding the implied powers of international organizations is a long-winded one. Two principal actors of international law are international organizations and States. The latter are often considered to be the principal actors in International Law<sup>165</sup> and have full-fledged legal personality. The legal personality of international organizations, however, depends on certain factors and is a matter of debate among scholars.<sup>166</sup> Even when an international organization is deemed to have an independent legal personality, its extent and the accompanying rights are not automatically decided. Scholars and jurists disagree on whether the character of personality possessed by international organizations is equal or subordinate to that of States.<sup>167</sup> While fascinating in and of itself, this is not a debate that falls within the remit of this Article. However, the debate is relevant as it informs our understanding of implied powers possessed by international organizations. For the purposes of this study, our focus will be on analyzing the implied powers doctrine with respect to the United Nations.

#### a. The Implied Powers Doctrine is Incorporated in the U.S. Constitution by the Necessary and Proper Clause

The Implied Powers Doctrine finds an emphatic and well-known statutory incorporation in the U.S. Constitution. Known as the *Necessary and Proper Clause*, it provides, "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof."<sup>168</sup>

A look at the legislative history of the U.S. Constitution points

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164. Faye et al., *supra* note 159, at 36.

165. Emerich de Vattel, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY* §§1-12 (Béla Kapossy & Richard Whatmore eds., 50th ed. 2008) (1797).

166. Manuel Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 44 *BRIT. Y.B. INT'L L.* 111 (1970).

167. Ingrid Detter, *LAW-MAKING BY INTERNATIONAL ORGANIZATIONS* 2 (1965) ("The fact that, for example, an organization has international personality does not indicate that it will enjoy any particular rights."); O'CONNELL, *INTERNATIONAL LAW*, 109 (1965) ("It is a mistake to jump to the conclusion that an organization has personality and then to deduce specific capacities from an a priori conception of the concomitants of personality.").

168. U.S. CONST., art. 1, §8, cl. 18.

to considerable discussion on the existence and scope of this clause. The two principal camps of the U.S. Constitutional Convention – Federalists and Anti-Federalists – sparred over its inclusion in the Constitution.<sup>169</sup> The latter feared that its language would grant *carte blanche* to the Federal Government in imposing its will upon the States.<sup>170</sup> The notoriety of the clause is evident in the nickname it received from the anti-Federalists – the “Sweeping Clause.”<sup>171</sup> Addressing these fears in the context of the power of taxation, Alexander Hamilton wrote that the clause is, “[O]nly declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers.”<sup>172</sup>

This phraseology suggests that while the clause may find its first written exposition in the U.S. Constitution, the framers were referencing a well-understood notion of law – presumably Anglo-Saxon law – prevalent at the time. The suspicion is confirmed when one looks at James Madison’s commentary on the subject. He notes, “No axiom is more clearly established by law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.”<sup>173</sup>

There is some agreement that the clause was borrowed from agency law principles in common law, existing at the time.<sup>174</sup> The Implied Powers Doctrine has since been a critical feature of American jurisprudence. The position safeguarding States’ rights in the U.S. has tended to limit federal powers by arguing that a congressional action qualifies the standard only if it is incidental to an enumerated power.<sup>175</sup> On the other hand, those arguing for a greater federal role in governance have taken the view that only an explicit prohibition can defeat a congressional recourse to necessity.<sup>176</sup> Among these two extreme positions lie several other interpretations and the U.S. Supreme Court’s jurisprudence has also shifted with the political character of the Court.<sup>177</sup> In the

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169. Gary Lawson & Neil S. Siegel, *Necessary and Proper Clause*, INTERACTIVE CONST., [www.constitutioncenter.org/interactive-constitution/interpretation/article-i/](http://www.constitutioncenter.org/interactive-constitution/interpretation/article-i/) [perma.cc/AFV9-APV6] (last visited July 4, 2020).

170. *Id.*

171. *Id.*

172. THE FEDERALIST No. 33 (Alexander Hamilton).

173. THE FEDERALIST No. 43 (James Madison).

174. Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 277 (2004).

175. Engstrom, *supra* note 138, at 132.

176. *Id.*

177. See generally James L. Buchwalter, *Construction and Application by U.S. Supreme Court of Necessary and Proper Clause of U.S. Constitution – U.S. Const. Art. I, § 8, cl. 18*, 65 A.L.R. FED. 2D 161 (2012); John T. Valauri, *Originalism and the Necessary and Proper Clause*, 39 OHIO N.U. L. REV. 773 (2013); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045

context of international organizations – given the absence of a written statute to consult – the existence of implied powers has been more complex. Rules of interpretation have been employed, which allow for the use of implied powers.<sup>178</sup> Before proceeding to this discussion however, it is important to establish if the United Nations as an organization has a legal personality and if so, the extent of that personality.

b. *Repatriations Case* Determines Whether the UN has a Legal Personality

The clearest enunciation of the legal personality of the United Nations came in the decision of the ICJ in the *Repatriations Case*.<sup>179</sup> The court was convened to discuss if the UN has the competence to bring an international claim for damages suffered by the organization and its agents in the performance of services to the organization, at the hands of States, some of which could also be members of the UN.<sup>180</sup>

c. Analysis of Four Conditions

One of the issues framed by the court was if the UN possessed the requisite international personality – as distinct from its constituent member States – to bring forth an international claim for damages.<sup>181</sup> In analyzing this issue, the court looked at four conditions surrounding the organization's formation and existence.<sup>182</sup> It noted that the Charter had created an organization that was a) not only a meeting point for member States for the achievement of certain ends enumerated in Article 1; but that it also b) possessed specific organs; c) clothed with specific and specialized functions; d) in which the member States occupied a position that was detached from the organization itself, in certain respects.<sup>183</sup> On the basis of these four findings, the court concluded that the UN was substantially more than a meeting ground where its members

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(2014); Ilya Somin, *Federal Power: Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal Power*, CATO SUP. CT. REV. 239 (2010); Lauren E. Marsh, *The Revival of the "Sweeping Clause": An Analysis of Why the Supreme Court Had to "Breathe New Life" into the Necessary and Proper Clause in United States v. Comstock*, 5 CRIM. L. BRIEF 23 (2010).

178. See, e.g., HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 29-30 (2nd ed., 1911). (for an analysis of techniques used in textual interpretation).

179. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep.174 (Apr. 11) [hereinafter *Reparations Case*].

180. *Id.*

181. *Id.* at 176-77, 185.

182. Manuel Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 44 BRIT. Y.B. INT'L L. 111, 125 (1970).

183. *Id.*



could hash out issues, and as such constituted an actor in its own right.<sup>184</sup> The analysis of the court corresponds to – and perhaps motivated – Brownlie’s characterization that proof of an international legal personality in an organization can be found by locating “the existence of legal powers exercisable on the international plane.”<sup>185</sup>

d. Assessment of Scope After Legal Personality is Recognized

Once a discernible legal personality is ascribed to the United Nations, an assessment of its scope becomes important. In this regard, the court’s opinion in the *Repatriations Case* is not as helpful from the perspective of deriving a general picture. However, Mr. Rama-Montaldo, former Dep. Director at the UN Office of Legal Affairs, analyzes the court’s reasoning by pointing to an intriguing conclusion. He divides the ruling into the following: rights arising out of the legal personality; and, rights not arising from legal personality but linked with the purposes and functions of the organization.<sup>186</sup> In the context of determining whether the UN had the right to claim for its agents – given that the agent concerned could also have claimed through her State, instead of the UN – the court raised a point about implicit powers.<sup>187</sup> This inquiry required the Court to determine if the provisions of the Charter and powers ascribed to the UN allowed it to afford protection to its agents when they were working for the organization.<sup>188</sup> The court noted that such a power was afforded to the UN as a “necessary intendment” of the Charter.<sup>189</sup> Rama-Montaldo concludes the court opinion by noting that, “. . . along with certain non-expressed rights which arise from the very international personality of an organization, there are other non-expressed rights which can only be inferred from the purposes and functions of each organization.”<sup>190</sup>

So, by virtue of its legal personality, UN gained standing to state a claim against members, generally. By virtue of rights inferred from the purposes and functions, UN gained the right to protect its agents in its own right. Considering that our discussion hinges on the ability of the UN to use its powers and functions under Part X of the Charter to create a mechanism compelling transit States to come to the negotiating table, we will focus on the latter aspect. To do so, we will have to examine the standards for application of the implied powers doctrine.

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184. *Reparations Case*, *supra* note 179, at 185.

185. Brownlie, *supra* note 7, at 520.

186. Rama-Montaldo, *supra* note 182, at 128-29.

187. *Id.*

188. *Reparations Case*, *supra* note 179, at 184.

189. *Id.*

190. Rama-Montaldo, *supra* note 182, at 131.

e. UN Gained the Right to Protect its Agents Via the  
*Implied Powers Doctrine*

In the *Repatriations Case*, the ICJ elucidated the “necessary implication” standard for determining the application of the doctrine.<sup>191</sup> The court summarized this by concluding, “[u]nder international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication, as being essential to the performance of its duties.”<sup>192</sup>

What constitutes “necessary implication” was debated even within the bench during this case.<sup>193</sup> The majority opinion notes that when performing an entrusted function, it was clear that the organization must have the ability to exercise functional protection of its agents. Such an exercise, according to the court, is a “necessary intendment” of the Charter.<sup>194</sup> The majority interpretation therefore presumes only a proximate relationship between an enumerated function and the implied power sought to be exercised. This is a comparatively liberal interpretation of the Implied Powers Doctrine because it opens space for the Organization’s discretion in choosing the mechanism through which it wishes to exercise the ability – in this case, the functional protection of its agents. The distinction is borne out in Judge Hackworth’s dissenting judgement. Criticizing the majority judgment, he argues that international organizations are formed of certain enumerated and delegated powers and “powers not expressed cannot be freely implied.”<sup>195</sup> The only scenario where implied powers may be exercised is one where it flows from, and is “necessary to the exercise of powers expressly granted.”<sup>196</sup> Thus, Judge Hackworth’s conception of the doctrine would require an actual necessity of the power exercised specifically, thereby eliminating the discretion granted to the organization by the majority. This is also reflected in the conclusion at which Judge Hackworth subsequently arrives. He notes that given the absence of a necessity for the UN to claim on behalf of the agent [since the agent has an alternative remedy to claim through her member State], the power could not be implied to have existed with the UN.<sup>197</sup>

The two views presented above would become easier to understand if the words “functions” and “powers” are understood to

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191. *Repatriations Case*, *supra* note 179, at 182-83.

192. *Id.* at 182.

193. *Id.*

194. *Id.* at 184.

195. *Id.* at 198-99

196. *Id.*

197. *Id.* at 204.

have distinct meanings. When the majority speaks of the need for the UN to “exercise a measure of functional protection of its agents,”<sup>198</sup> they are referring to a “Function” proper. This function is then implemented by the organization by using the power to sue for claims on behalf of the agent concerned. The majority’s reasoning therefore first contemplates the existence of an “implied function” of protecting the agents arising out of a function “entrusted to the Organization.”<sup>199</sup> This is then implemented by an implied power of suing to claim on behalf of the agent. On the other hand, Judge Hackworth seems to suggest that it would be wrong to adopt such an approach because powers exercisable by the UN should be limited to those directly flowing from, and necessary for the implementation of the *expressed powers*. He does not seem to agree with the idea that an expressed function of the UN may give rise to implied functions, which then create space for the application of the implied powers doctrine.

This distinction is also borne out further in the *Effect of Awards Case*<sup>200</sup> where the court was called to decide if the General Assembly possessed the authority to create a tribunal with the capacity to render binding judgements on the Organization. The tribunal was sought for the purpose of adjudicating disputes between the UN and its staff. The majority relied on the *Repatriations Case* and held that effective adjudication of disputes among Staff and the Organization was essential to the ensure the “efficient working of the Secretariat”;<sup>201</sup> as such, the capacity to establish a tribunal arose as a “necessary intendment” of the Charter.<sup>202</sup> Here again, Judge Hackworth disagreed. He argued that Article 22 of the Charter<sup>203</sup> gave an express power to the General Assembly to establish subsidiary organs for the performance of the Organization’s functions, when and of the character deemed necessary by the Assembly. In the face of this express power, according to Judge Hackworth, it was wrong to invoke the implied powers doctrine.<sup>204</sup>

The distinction between “Functions” and “Powers” has been one that academics and jurists have grappled with for quite some time. In the context of the UN, it has been elucidated by Ferrari-Bravo and Giardina using the *Certain Expenses of the United*

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198. *Id.* at 184.

199. *Id.*

200. *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 1954 I.C.J. Rep. 47 (July 13) [hereinafter *Effect of Awards Case*].

201. *Id.* at 57.

202. *Id.* at 57.

203. UN Charter art. 22.

204. *Effect of Awards Case*, *supra* note 200, at 80-81.

*Nations*<sup>205</sup> case.<sup>206</sup> However, while the analysis above borrows from their distinction between *poteri impliciti* (implied powers) and *funzioni impliciti* (implied functions) and is helpful in understanding the differing logic of the majority and the minority, it is legally untenable in the context of the UN. This is because, as Rama-Montaldo points out, the UN Charter does not allow for this distinction because it uses the words “Functions and Powers” interchangeably.<sup>207</sup> Therefore, while it is important from the perspective of understanding the scope of the Implied Powers Doctrine generally, the lexical distinction is not relevant for the UN.<sup>208</sup> There has been some argument that a distinction between *implied competence* and *included competence* may be better suited to the UN Context.<sup>209</sup> Drawn by Mr. Rouyer-Hameray, the distinction seeks to explain certain competences as being expressly attributed to the Organization (included), and certain others flowing as necessities from the former (implied).<sup>210</sup> Intriguing as it may be, the lexical difference does not do much to define the scope of the implied powers doctrine which, given the prevailing opinion of the court, seems to be set on a liberally constructed outlook. Further discussion on this subject, therefore, would be beyond the purview of this Article.<sup>211</sup>

The one limitation which seems to have emerged; however, pertains to specialization. In the *WHO Case* of 1996,<sup>212</sup> the ICJ

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205. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. Rep 151 (July 20).

206. RICCARDO MONACO ET AL., *Trattato istitutivo della comunità economica europea commentario* Art. 137 – 248, at 1702 (1965) (See commentary on article 235 of the Treaty).

207. Engstrom, *supra* note 138, at 149-52 (highlighting the use of “Functions and Powers” as the title of chapters relating to the General Assembly, Security Council, and other organs in articles 10-24 and 62-87 of the U.N. Charter).

208. See, e.g., Interpretation of Greco-Turkish Agreement of December 1st, 1926. (Final Protocol, Article IV), Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 16 (Aug. 28) (interpreting the implied powers of the Mixed Commission using the functions assigned to it under the Dec. 1st Agreement); Jurisdiction of European Commission of Danube Between Galatz and Braila, Advisory Opinion, 1927 P.C.I.J. (ser. B) No. 14, at ¶ 337 (Dec. 8) (highlighting the use of the phrase “jurisdictional powers” in Art. 14 of the impugned agreement to discuss implied authority); Competence of the Int’l Labour Org. in regard to Int’l Regulation of Conditions of Labour of Persons Employed in Agriculture, Advisory Opinion, 1922 P.C.I.J. (ser. B) No. 2, at ¶ 49 (Aug. 12) (interpreting the scope of powers in reference to the constitution of the organization.).

209. Engstrom, *supra* note 138, at 151.

210. See generally BERNARD ROUYER-HAMERAY, *Les compétences implicites des organisations internationales* (1962) (differentiation between powers and competence, and express and implied powers and competence).

211. See generally C.F. AMERASINGHE, *supra* note 138, at 138-57 (discussing the scope of implied powers doctrine.); see also, Miriam T. Rooney, *International Organizations and International Law*, 6 INT’L. L. 16 (1972); Wojciech Morawiecki, *Functions of International Organizations*, 3 POLISH ROUND TABLE 147 (1969) (discussing the attitude of the court in interpreting provisions).

212. Legality of the Use by a State of Nuclear Weapons in Armed Conflict,

considered a request by the World Health Organization to declare the use of nuclear weapons as violative of international law as well as the WHO Constitution.<sup>213</sup> In declining the adjudication as being *ultra vires* the WHO's competence, the ICJ evolved the principle of specialty.<sup>214</sup> The court held that, unlike States, international organizations do not possess general competence.<sup>215</sup> As such, their powers were entrusted by the States and the limits of such powers were a function of the common interest whose promotion those States entrust to them the organization concerned.<sup>216</sup>

## VI. PART IVD: A UN FACILITATED NEGOTIATION MECHANISM

Now, the UNCLOS was born out of negotiations coordinated and conducted under the aegis of the United Nations, and subsidiary organs of the Organization. As such, its goals, aspirations, and framework were designed by the Organization as a collective and the Convention incorporates the will of its signatories. We have already discussed in detail the scope of Convention and elaborated upon its textual intent of bringing parity among coastal States, LLS, and other geographically disadvantaged States. In the context of LLS in particular, the Convention contains detailed provisions – analyzed above – that seek to eliminate their geographical limitations and provide them with access to the “common heritage of mankind” located at sea. In doing so, the Convention recognizes the sovereignty of transit States, but as discussed above, this has been expanded beyond its rightful remit.

Furthermore, the United Nations has an obligation under Part X of its Charter to foster cooperation for the achievement of better socio-economic development across the world. In order to carry out this task, it has been vested with wide ranging powers exercised by a multitude of organizations. An emphatic approval of this mandate also comes from the long history of work undertaken by the organization in this regard which we have discussed in Part IVA above. We have also noted that access to the sea is a critical factor in improving a State's economic and social conditions and LLS have consistently lagged on this front, despite the guarantee afforded to them under the Convention.<sup>217</sup>

Therefore, it is well-within the competence of the United

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Advisory Opinion, 1996 I.C.J. 227 (July 8).

213.. World Health Organization Res. WHA46.40 (May 14, 1993).

214. Lawson and Siegel, *supra* note 17069, at 22.

215. Faye et al. *supra* note 159, at 25.

216. *Id.*

217. UNCLOS, *supra* note 6, at art. 125.

Nations to use its implied powers based on of its duties under Part X of the UN Charter to effectuate the numerous initiatives it has taken subsequently undertaken to remedy the economic and social losses incurred by LLS due to the inadequate implementation of their right of access. For this purpose, the UN should immediately institute a compulsory negotiation process, where it acts as a facilitator to negotiations under the Modalities Clause of the Convention. Given the broad scope of obligations that transit States have under the UN Charter and the Convention. For reasons highlighted above, any Transit State (which is also a member of the UN and signatory to the Convention) which refuses to participate in this process would be in clear violation of international law. In addition, bad faith attempts at delaying, or any attempt at denying the LLS of a proper right of access would also constitute a similar violation. A UN-facilitated process alone can ensure timely and proper implementation of the spirit of the Convention and respect the rights and sovereignty of all member States. Given the level of economic costs incurred by LLS due to inadequate access to the sea, it is also incumbent upon the UN to fulfill its mandate in this regard.

## VII. PART V: THE LAW OF NECESSITY AND EXIGENT CIRCUMSTANCES

The narrow sovereignty exception of “compelling and overriding interest” as envisaged in the UNCLOS can be further squeezed, if not altogether eliminated in situations where Necessity would operate. Such “emergency situations” are ones where we argue that a landlocked State has to resort to means of seeking access to the sea even if that means doing so in complete disregard of the sovereignty or territorial integrity of the transit State. In practice, it will be difficult for a landlocked developing country to be able to overcome the obstacles to its access placed by a more powerful and resource laden transit State, especially without assistance from a third country. This, however, does not mean that international law cannot recognize the availability of such a remedy.

### *A. The Doctrine of Necessity*

The Doctrine of Necessity acts as a remedy for a State to escape from its obligations under international law. This doctrine has a long history that stretches as far back as the seventeenth century to the works of Hugo Grotius.<sup>218</sup> The International Law Commission too, has enshrined it in its report the “Draft Articles on

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218. HUGO GROTIUS, *DE JURE BELLI AC PACIS* (Jean Barbeyrac & Richard Tuck eds., 1965).

Responsibility of States for Internationally Wrongful Acts.”<sup>219</sup> Initially, the Doctrine of Necessity was tied to the right of a State to act in self-preservation. According to Roman Boed, “That is to say, when a threat to self-preservation arose, it was considered justified to take any steps necessary to preserve one’s existence, even if such steps would have been unlawful had they been taken in the absence of a threat to self-preservation.”<sup>220</sup> Most early scholars like Grotius<sup>221</sup> and Vattel,<sup>222</sup> among others, agreed around this basic notion of Necessity. As the ILC itself explained,

This idea had its origin in the nineteenth century in the widespread belief that there were certain “fundamental rights” and that they necessarily prevailed over the State’s other rights. The so-called “right” defined as the “right of existence”, or more often as the “right of self-preservation” . . . was, it was held, the subjective right that should take precedence over the subjective rights of another State.<sup>223</sup>

### *B. Early Notions of the Necessity Doctrine*

The early notions of Necessity became the basis for a series of international legal precedent and state practice. As early as the Neptune Arbitration of 1797, the Commissioners reflected upon the writings of Grotius and deliberated the applicability of Necessity; though they rejected its applicability on the facts of the case but upheld it as a maxim of international law.<sup>224</sup> Over the years, as Sykes describes,

Necessity has been invoked to justify a wide range of actions under circumstances that seemingly satisfy this criterion, including a brief incursion into the territory of another state to interdict support for rebels (the Caroline case), measures to protect animal populations from serious overfishing or hunting to extinction (the Fisheries Jurisdiction and Russian Fur Seals cases), the destruction of a foundering ship to prevent a massive oil spill (the Torrey Canyon case), and the appropriation of foreign property that was necessary to provide subsistence to troops engaged in resisting a rebellion (the

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219. Report of the International Law Commission to the General Assembly, 56 U.N. GAOR Supp. (No. 10) at 26-30, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. INT’L L. COMM’N 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter *ILC Report* 2001].

220. Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L.J. 1,4 (2000).

221. Grotius, *supra* note 218.

222. Vattel, *supra* note 165.

223. Report of the International Law Commission to the General Assembly, 35 U.N. GAOR Supp. (No. 10) at 35, U.N. Doc. A/35/10 (1980), *reprinted in* [1980] 2 Y.B. INT’L L. COMM’N 34, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2) [refer to the commentary on Article 33].

224. Ryan Manton, *Necessity in International Law*, (2016) (unpublished PhD thesis, Oxford University) (on file with Oxford University Research Archive) at 20.

Anglo-Portuguese dispute of 1832).<sup>225</sup>

The International Law Commission, however, sought to expand the applicability of the Doctrine of Necessity. Article 25<sup>226</sup> of the Articles on Responsibility of States for Internationally Wrongful Conduct (or Articles of State Responsibility) reads:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril;

and

(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the State has contributed to the situation of necessity.

### *C. Expansion of the Necessity Doctrine*

The ILC's attempted expansion of this doctrine has led to a series of controversies and debates from the force of Necessity to its scope and applicability. The ILC in its report sought to expand the scope of Necessity from its traditional applicability when a State is facing a threat to its existence, to one where it is trying to safeguard an "essential interest."<sup>227</sup> Roberto Ago, in his Addendum to the Eighth report on State responsibility suggests this expansion by stating that "essential interest" would include threats to the "political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, the preservation of the environment of

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225. Alan O. Sykes, *Economic "Necessity" in International Law*, 109 AM. J. INT'L L. 296, 308 (2015).

226. ILC Report 2001, *supra* note 219, at 28 (art. 25).

227. *See supra* part V.



its territory or a part thereof, etc."<sup>228</sup>

The tribunal in *LG&E v. Argentina* drew upon the works of Robert Ago, Julio Barboza, and James Crawford and concluded that "[w]hat qualifies as an 'essential' interest is not limited to those interests referring to the State's existence. As evidence demonstrates, economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external situation, are also considered essential interests."<sup>229</sup> In *Impregilo S.p.A. v. Argentine Republic*, the tribunal held that "the term 'essential interest' can encompass not only the existence and independence of a State itself, but also other subsidiary but nonetheless 'essential' interests, such as the preservation of the State's broader social, economic and environmental stability."<sup>230</sup>

Necessity must not only be used by a State to defend its "essential interest," but it must also do so against a "grave and imminent peril."<sup>231</sup> "Grave peril" implies the gravity of potential damage to the essential interest. It appears the ILC has just adopted this condition from the "extreme necessity"<sup>232</sup> qualification of Grotius on the acquisition of property of neutral states at the time of War. The ICJ in the *Gabcikovo-Nagymaros Project* judgement held that "[i]mminence is synonymous with 'immediacy' or 'proximity' and goes far beyond the concept of possibility."<sup>233</sup> That does not exclude, in the view of the Court, that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable."<sup>234</sup> Although, the applicability of this provision will be highly dependent on the precise nature of facts and circumstances under which the State chooses to invoke Necessity.

States invoking Necessity must also establish that their actions were the "only way" of protecting their essential interest from a grave and imminent peril.<sup>235</sup> This means that the State has to show that no lawful alternative was available to the State. The ILC further explains that

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228. Mr. Roberto Ago, Special Rapporteur, Addendum to the eighth report on State responsibility, by Mr. Roberto Ago, U.N. Doc A/CN.4/318/ADD.5-7, 14 (1980). [hereinafter *addendum by Mr. Ago*]

229. *LG&E Energy Corp. v. the Argentine Republic*, ICSID Case No. ARB/02/1, (2006), 46 I.L.M. 36 (2014), ¶ 251 [hereinafter *LG Arbitration*].

230. *Id.*, ¶ 346.

231. ILC Report 2001, *supra* note 219, at 28 (art. 25).

232. Boed, *supra* note 220, at 5

233. *Gabcikovo-Nagymaros Project (Hung. vs. Slovak.)*, Judgment, 1997 I.C.J. 7, 42 (Sept 25) (hereinafter *Gabcikovo-Nagymaros judgement*).

234. *Id.*

235. See Article 25, Int'l Law Comm'n, Rep. on the work of its fifty-third session, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries. U.N. Doc. A/56/10, at 80 (2001).

the adoption by that State of conduct not in conformity with an international obligation binding it to another State must definitely have been its only means of warding off the extremely grave and imminent peril which it apprehended; in other words, the peril must not have been escapable by any other means, even a more costly one, that could be adopted in compliance with international obligations.<sup>236</sup>

However, scholars continue to debate on the nature of strictness applied to the interpretation of the “only way” condition. Ryan Manton discusses at length the strict approach adopted by the tribunals in the CMS, Enron and Sempra cases, as well as the lenient approach adopted by the tribunal in the *LG&E v. Argentina Arbitration*. Manton concludes that,

[t]here is clearly a middle ground to be reached between the uncontrollable looseness of the LG & E tribunal’s approach and the unrealistic strictness of the approach taken by the CMS, Enron and Sempra tribunals. The preceding discussion has contended that an appropriate middle ground can be reached by recognizing that ‘only’ means ‘only’, but also that the ‘only’ way must be understood as the only feasible and effective way.<sup>237</sup>

Although the scope of the “only way” condition is the subject of an enthralling discussion, it goes beyond the scope of this Article.

Another qualification that has to be satisfied by the State invoking Necessity is the condition of balancing interests.<sup>238</sup> According to Bin Cheng, “[a]s States are equal, the conflicting interests are thus also of equal importance.”<sup>239</sup> However, as Ryan Manton demonstrates, “necessity is designed to apply only in the most exceptional of situations. It is inherently unlikely that a State against which necessity is invoked will also happen to face a comparably, let alone more, exceptional situation.”<sup>240</sup>

LLS could use the Necessity clause to claim temporary access to the sea. This would be prevalent in the cases where the lack of access is causing or will necessarily cause severe hardship to the citizens of the country. LLS are dependent on access to the coastline for economically securing a supply of many essential goods and commodities. In 2017, when Pakistan closed its border with Afghanistan, despite having a Transit Agreement, it led to an economic crisis in Afghanistan.<sup>241</sup> Dr. Suraya Dalil, the Ambassador and Permanent Representative of Afghanistan to the UN office at Geneva, said, “[m]oreover, closing the entry points at the Durand

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236. Addendum by Mr. Ago. *supra* note 228.

237. Manton, *supra* note 237.

238. See *supra* note 235.

239. BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 75 (1953).

240. Manton, *supra* note 237.

241. Mujib Mashal, *Closed Afghan-Pakistani Border Is Becoming Humanitarian Crisis*, N.Y. TIMES (Mar. 5, 2017), [www.nytimes.com/2017/03/05/world/asia/afghanistan-pakistan-border.html](http://www.nytimes.com/2017/03/05/world/asia/afghanistan-pakistan-border.html) [perma.cc/RDW2-C8G8].

line had adverse effects on the entire economy and population of Afghanistan. After a few days, shortages occurred of basic goods, pushing their prices to levels where many Afghans cannot afford them.”<sup>242</sup>

In such cases, where the lack of access to a coastline could lead to a situation of complete political or economic breakdown, it would become legally possible for a LLS to claim access to the sea, in order to mitigate a humanitarian crisis. It is now accepted that a severe economic crisis can be used by a State to invoke Necessity.<sup>243</sup> Circumstances such as what was faced by Afghanistan would meet not just the threshold of “essential interest” contained in Article 25,<sup>244</sup> but also the much higher benchmark of an existential threat to the State. According to Vattel,

The earth was designed to feed its inhabitants; and he who is in want of everything is not obliged to starve because all property is vested in others. When, therefore, a nation is in absolute want of provisions, she may compel her neighbors, who have more than they want for themselves, to supply her with a fair share of them at a fair price: she may even take it by force, if they will not sell.<sup>245</sup>

Such situations not only lead to a “grave and imminent peril” but often enough also fulfil the “only way” condition. Examples of Afghanistan,<sup>246</sup> Mongolia,<sup>247</sup> among others have shown that the lack of access to the sea can bring a LLS’s economy to a point of near total breakdown, therefore causing “grave and imminent peril.” Alternative routes or methods, such as airlifting often also remain unfeasible, especially in economic crises as they make importing essential commodities unaffordable to the population.<sup>248</sup> Faced with such exceptional situations, we argue, LLS would be well placed to resort to a plea of Necessity as an “Emergency Provision.”

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242. Shreerupa Mitra, *Pakistan Closes Durand Line, Causes \$90 mn Trade Loss for Afghanistan*, FIRSTPOST, (Apr. 12, 2017, 8:27 PM), [www.firstpost.com/world/pakistan-closes-durand-line-causes-90-mn-trade-loss-for-afghanistan-3381260.html](http://www.firstpost.com/world/pakistan-closes-durand-line-causes-90-mn-trade-loss-for-afghanistan-3381260.html) [perma.cc/G7HY-PW9G].

243. Sykes, *supra* note 225.

244. *See supra* note 235.

245. Vattel, *supra* note 165.

246. *See supra* note 235

247. Lobsang Tenchoe, *Mongolia Seeks India’s Support After China’s Transportation Blockade*, TIBET EXPRESS (Dec. 7, 2016), [www.tibetexpress.net/4553/mongolia-seeks-indias-support-after-chinas-transportation-blockade/](http://www.tibetexpress.net/4553/mongolia-seeks-indias-support-after-chinas-transportation-blockade/) [perma.cc/H8GD-ETSP].

248. *Air Freight: A Market Study with Implications for Landlocked Countries*, WORLD BANK, [www.worldbank.org/en/topic/transport/publication/air-freight-study](http://www.worldbank.org/en/topic/transport/publication/air-freight-study) [perma.cc/9LEH-LYVJ] (last visited Sep. 9, 2020).

## VIII. PART VI: THE STRATEGIC CASE FOR INDIA

India has geopolitical interests in many LLS. Nepal and Bhutan are two LLS that border India. India also has strategic interests in Afghanistan, with whom India would effectively share a small border, were it not for territory currently occupied by Pakistan (see Map 1).

Map 1 (India-Afghanistan-Pakistan trijunction) – Source: Google Earth



Further, the resource rich Central Asian countries are important for India from an economic perspective; and India has also attempted to build a strategic relationship with Mongolia.<sup>249</sup> Further, India has also been working to expand its footprint in Africa, which is also home to several LLS.<sup>250</sup> Pioneering the rights of LLS not only helps India advance its strategic interests vis-a-vis these LLS but also increases its stature globally. Through this paper, we discuss the scenario in Nepal, Afghanistan, and Mongolia, along with India's interests and how India can make headway on them by supporting the Rights of these LLS to Access the Sea.

### 1. *The Case for Nepal*

Nepal is a major landlocked country in South Asia. Often

249. Anil Trigunayat, *India-Mongolia: The Spiritual Neighbours Embark on an Enhancing Journey*, FIN. EXPRESS (Sep. 23, 2019), [www.financialexpress.com/defence/india-mongolia-the-spiritual-neighbours-embark-on-an-enhancing-journey/1715139/](http://www.financialexpress.com/defence/india-mongolia-the-spiritual-neighbours-embark-on-an-enhancing-journey/1715139/) [perma.cc/T9DJ-P7UR].

250. Elizabeth Roche, *New Delhi Begins Expanding Its Diplomatic Footprint In Africa*, LIVEMINT (Feb. 4, 2019), [www.livemint.com/politics/policy/new-delhi-begins-expanding-its-diplomatic-footprint-in-africa-1549303805195.html](http://www.livemint.com/politics/policy/new-delhi-begins-expanding-its-diplomatic-footprint-in-africa-1549303805195.html) [perma.cc/EB3N-98DG].

described as a “yam between two boulders,”<sup>251</sup> it is surrounded by two larger and more powerful neighbors, India and China. Nepal’s links with India, however, run much deeper than those with China. Not only is Nepal surrounded by India on three sides, it also has deep cultural, ethnic, and historical links; apart from the commercial and political associations the two countries have enjoyed for decades.<sup>252</sup> Nepal’s foreign relations are largely shaped by its geographical considerations. Located in the Himalayas with its natural orientation towards India, Nepal has remained heavily dependent on its Southern neighbor, especially for its international commerce.<sup>253</sup> So much that even India’s main rival in South Asia and Nepal’s only other neighboring country, the People’s Republic of China, has shown reluctance to intervene in Nepal as a counterweight to India, despite official Nepali insistence.<sup>254</sup> As Constantino Xavier reports, “[s]uccessive generations of Nepalese leaders have, therefore, been politely cold-shouldered with typical Chinese aphorisms such as ‘there are two sides to a mountain, and you should always know on which side you are on’ or ‘distant waters don’t help put out a fire on your doorstep.’”<sup>255</sup>

Nepal’s orientation towards India has resulted in the former’s complete dependence on the latter for access to international markets. As a result, many scholars often suggest that Nepal is not just landlocked, but “India locked.”<sup>256</sup> Prior to the 1950s, most of Nepal’s trade was with India and a small portion with Tibet and hence no transit arrangements were needed.<sup>257</sup> In 1950, India and Nepal signed a Treaty of Trade and Commerce, by which India allowed Nepal transit rights through its territory and the use of Indian ports for the export of Nepali goods.<sup>258</sup> This was the first of many such agreements signed between the two countries; the latest of these were two separate treaties of trade and Transit signed in

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251. Rajeev Ranjan Chaturvedy & David M. Malone, *A Yam Between Two Boulders: Nepal’s Foreign Policy Caught Between India and China*, [www.cambridge.org/core/books/nepal-in-transition/yam-between-two-boulders-nepals-foreign-policy-caught-between-india-and-china/345A9D2EBFA84969967E67123D03D39A](http://www.cambridge.org/core/books/nepal-in-transition/yam-between-two-boulders-nepals-foreign-policy-caught-between-india-and-china/345A9D2EBFA84969967E67123D03D39A) [perma.cc/RDW8-KETS].

252. *Nepal-India Relations*, GOVERNMENT OF NEPAL, MINISTRY OF FOREIGN AFFAIRS, [www.mofa.gov.np/nepal-india-relations/](http://www.mofa.gov.np/nepal-india-relations/) [perma.cc/76HF-EX5G] (last visited Jan. 21, 2021).

253. *Nepal’s Trade Dependency on India Swells in 2000s*, KATHMANDU POST (Feb. 4, 2014) [www.kathmandupost.com/money/2014/02/04/nepals-trade-dependency-on-india-swells-in-2000s](http://www.kathmandupost.com/money/2014/02/04/nepals-trade-dependency-on-india-swells-in-2000s) [perma.cc/4RVY-UXA6].

254. Constantino Xavier, Opinion, *How Nepal and India Can Keep Their Relationship Special*, WIRE (Aug. 25, 2017), [www.thewire.in/diplomacy/nepal-india-relations-china](http://www.thewire.in/diplomacy/nepal-india-relations-china) [perma.cc/FB24-VFUP].

255. *Id.*

256. Sujeev Shakya, Opinion, *Freedom from being ‘India-locked’: on Nepal-India relations*, HINDU (July 5, 2018, 12:06 AM), [www.thehindu.com/opinion/op-ed/freedom-from-being-india-locked/article24333421.ece](http://www.thehindu.com/opinion/op-ed/freedom-from-being-india-locked/article24333421.ece) [perma.cc/G58X-CWAK].

257. Glassner, *supra* note 162, at 20.

258. *Id.*

1999, but revised subsequently.<sup>259</sup> Over the years, while India continued to be among its largest trade partners, Nepal was also heavily dependent on India for international commerce and third-party trade.<sup>260</sup> Since the 1950s, Nepal has used Indian infrastructure and ports to export to third party countries, due to the geographical circumstances of Nepal.<sup>261</sup> While the two countries share an open border and citizens of both countries can travel and reside in each other's territories without visa or passport, this openness and dependence has made Nepal vulnerable to pressures from India.<sup>262</sup>

For decades, India enjoyed a monopoly over Nepal's access to the sea.<sup>263</sup> Much of this was prompted by geography. The Himalayas acting as South Asia's natural boundary made it difficult for Nepal to access China via Tibet. For Nepal, access to the sea via India was not just financially viable, but infrastructurally allowed for a shorter route, easier terrain, and availability of multiple streams which historically aided river navigation (see Map 2). While Nepal did succeed in diversifying international markets for its goods, India remained its only access to those markets.<sup>264</sup> India's monopoly endured over the decades, despite highs and lows in the bilateral relationship between the two countries, which includes a thirteen-month long blockade starting in 1989.<sup>265</sup>

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259. *India, Nepal Review Trade and Transit Treaties*, SASEC (Apr. 30, 2018), [www.sasec.asia/index.php?page=news&nid=860&url=ind-nep-trade-transit-treaties-for-review](http://www.sasec.asia/index.php?page=news&nid=860&url=ind-nep-trade-transit-treaties-for-review) [perma.cc/8JRE-9HYR].

260. Catherine Wong, *China and Nepal Sign Off On Ports Deal to Ease Kathmandu's Dependence On India For Trade*, S. CHINA MORNING POST (May 2, 2019, 9:30 PM), [www.scmp.com/news/china/diplomacy/article/3008617/china-and-nepal-sign-ports-deal-ease-kathmandus-dependence](http://www.scmp.com/news/china/diplomacy/article/3008617/china-and-nepal-sign-ports-deal-ease-kathmandus-dependence) [perma.cc/5ZLK-GLJ3].

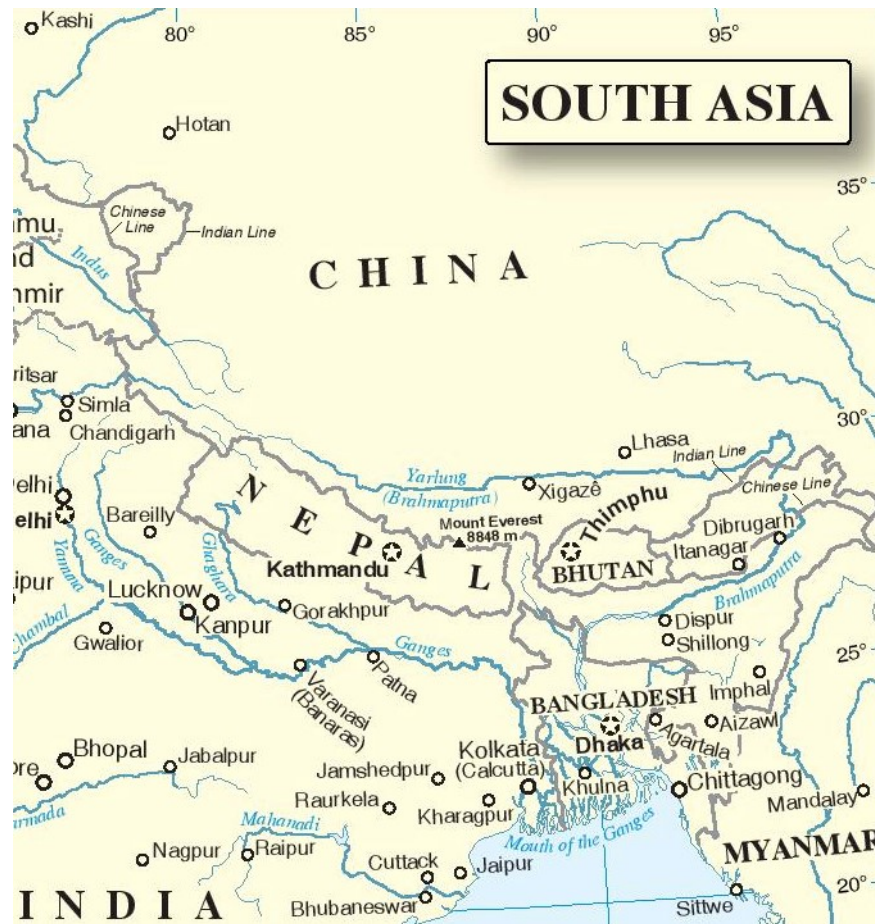
261. Glassner, *supra* note 162, at 21.

262. See Hari Bansh Jha, *Nepal's Border Relations with India and China*, 4 EURASIAN BORDER REV. 63, [www.133.50.171.227/BorderStudies/en/publication/review/data/ebr4/V4\\_N1\\_04Jha.pdf](http://www.133.50.171.227/BorderStudies/en/publication/review/data/ebr4/V4_N1_04Jha.pdf) [perma.cc/67E3-NHWD].

263. Gopal Sharma, *Nepal Says China to Allow Access to Ports, Ending Indian Monopoly On Transit*, REUTERS (Sep. 7, 2018, 7:44 AM), [www.reuters.com/article/us-china-nepal-ports/nepal-says-china-to-allow-access-to-ports-ending-indian-monopoly-on-transit-idUSKCN1LN1KJ](http://www.reuters.com/article/us-china-nepal-ports/nepal-says-china-to-allow-access-to-ports-ending-indian-monopoly-on-transit-idUSKCN1LN1KJ) [perma.cc/SJE7-BZY2].

264. Kathmandu Post, *Nepal Looks To End India Dependency For Overseas Shipping*, ASIA NEWS NETWORK, [www.asianews.network/2019/05/08/nepal-looks-to-end-india-dependency-for-overseas-shipping/](http://www.asianews.network/2019/05/08/nepal-looks-to-end-india-dependency-for-overseas-shipping/) [perma.cc/S8RN-P8JQ] (last updated May 8, 2019).

265. Suhasini Haidar, *Blame Game On India and Nepal as Trucks Pile Up*, HINDU, [www.thehindu.com/news/national/blame-game-between-india-and-nepal-as-trucks-pile-up/article7692820.ece](http://www.thehindu.com/news/national/blame-game-between-india-and-nepal-as-trucks-pile-up/article7692820.ece) [perma.cc/RN2X-TPXM] (last updated Sep. 27, 2015, 1:19 AM).



Map 2 (Terrain map of India, Nepal and China) (Source: Department of Field Support, Geographic Section, United Nations (Dec 2011).

However, Nepal renewed and made concerted efforts to seek an alternative route to access the sea after the 2015 Madhesi Blockade of Nepal.<sup>266</sup> Madhesi's, an ethnic group in the Terai foothills of Nepal had been clashing with two other groups in the region, the Tharus and the Kirantis over competing demands related to the new Constitution that Nepal had yet to pass.<sup>267</sup> The Madhesi had long asked for proportional representation in legislative bodies, but their major demand was for a separate province within Nepal which was separate from areas dominated by the Tharu community.<sup>268</sup>

266. See Krishna Pokharel, *The Two-Month Blockade of Nepal Explained*, WALL ST. J. (Nov. 25, 2015, 11:30 PM), [www.wsj.com/articles/BL-IRTB-30919](http://www.wsj.com/articles/BL-IRTB-30919) [perma.cc/8NJ7-8W4A].

267. Narayan Upadhyay, *Redrawing of Provinces Poses Difficulties*, RISING NEPAL, [www.therisingnepal.org.np/news/5715](http://www.therisingnepal.org.np/news/5715) [perma.cc/MR9J-FAZK] (last visited Sep. 6, 2020).

268. Pramod Jaiswal, *Nepal's Constitutional Questions and Madhesi Aspirations*, INST. PEACE & CONFLICT STUD. (Jan. 7, 2016), [www.ipcs.org/comm](http://www.ipcs.org/comm)

Thus, on September 20, 2015, when the Nepali Constitution was passed, the Madhesis who felt that their demands had not been met started an agitation. This agitation quickly turned into a blockade of Nepal, which meant that the landlocked state was short of fuel and supplies coming in from outside including India.<sup>269</sup>

Nepal maintained that the 2015 blockade was an “unofficial Indian blockade,” due to India’s support for the Madhesi community in Nepal.<sup>270</sup> Madhesis, as an ethnic group, are viewed not just as pro-India but also of Indian descent.<sup>271</sup> They also have cultural, ethnic, and linguistic ties to people living in the Indian States of Uttar Pradesh and Bihar.<sup>272</sup> The Indian government, on the other hand, denied any involvement and maintained that the blockade was a result of internal strife within Nepal, creating fear for those wanting to carry cargo into Nepal.<sup>273</sup>

However, the Nepali Government and the people squarely blamed this blockade on Nepal.<sup>274</sup> Protests erupted in Nepal and abroad against what was seen as India acting like a “big brother” and interfering in Nepal’s internal affairs.<sup>275</sup> Nepal’s economy, which was already struggling due to the devastating earthquake earlier in 2015, was hit very hard by the blockade.<sup>276</sup> There was a massive shortage of essential commodities across the country, especially of food and fuel causing a lot of hardship to the common

\_select.php?articleNo=4955 [perma.cc/UN5N-WM52]; see also *id.*

269. Anumeha Yadav, Opinion, *Is India Really Behind Nepal’s Economic Blockade?*, SCROLL (Feb. 4, 2016, 09:15 AM), [www.scroll.in/article/802653/is-india-really-behind-nepals-economic-blockade](http://www.scroll.in/article/802653/is-india-really-behind-nepals-economic-blockade) [perma.cc/5H3B-4DAK].

270. Tika R Pradhan, *Unofficial Indian Blockade Has Led To Humanitarian Crisis: PM*, HIMALAYAN TIMES (Nov. 16, 2015, 3:01 AM), [www.thehimalayantimes.com/nepal/unofficial-indian-blockade-has-led-to-humanitarian-crisis-pm/](http://www.thehimalayantimes.com/nepal/unofficial-indian-blockade-has-led-to-humanitarian-crisis-pm/) [perma.cc/38NL-T2K9].

271. ANI, *Wrong to Say Madhesis of Indian Origin: Nepalese Envoy*, BUS. STANDARD, [www.business-standard.com/article/news-ani/wrong-to-say-madhesi-of-indian-origin-nepalese-envoy-115112300869\\_1.html](http://www.business-standard.com/article/news-ani/wrong-to-say-madhesi-of-indian-origin-nepalese-envoy-115112300869_1.html) [perma.cc/ZEM6-Y37U] (last updated Nov. 23, 2015, 6:22 PM).

272. Puja Sen, *What Are Nepal’s Madhesis Fighting For?*, WIRED (Jul. 21, 2016), [www.thewire.in/external-affairs/nepal-madhesis-protests](http://www.thewire.in/external-affairs/nepal-madhesis-protests) [perma.cc/G8XQ-6VNJ].

273. Sugam Pokharel, *Nepal Accuses India of ‘Trade Blockade’ Amid Fuel Crisis*, CNN (Oct. 3, 2015, 9:41 AM), [www.edition.cnn.com/2015/09/29/asia/nepal-india-fuel-crisis/](http://www.edition.cnn.com/2015/09/29/asia/nepal-india-fuel-crisis/) [perma.cc/883W-4D8D].

274. Bishwanath Ghosh, *Anger Against India Over Blockade Snowballs In Nepal*, HINDU, [www.thehindu.com/news/national/anger-against-india-over-blockade-snowballs-in-nepal/article8032072.ece](http://www.thehindu.com/news/national/anger-against-india-over-blockade-snowballs-in-nepal/article8032072.ece) [perma.cc/Y7TF-HJUQ] (last updated Sep. 2, 2016, 12:05 AM)

275. PTI, ‘Big Brother’ Attitude of India Unacceptable: Nepal Leader, Indian Express (Nov. 29, 2015, 12:32 PM), [www.indianexpress.com/article/india/india-news-india/big-brother-attitude-of-india-unacceptable-nepal-leader/](http://www.indianexpress.com/article/india/india-news-india/big-brother-attitude-of-india-unacceptable-nepal-leader/) [perma.cc/2HN7-GQMG].

276. PTI, *Economic cost of blockade much more than impact of quake: Nepal*, Econ. Times (Dec. 16, 2015, 10:08 PM), [www.economictimes.indiatimes.com/news/international/world-news/economic-cost-of-blockade-much-more-than-impact-of-quake-nepal/articleshow/50208273.cms](http://www.economictimes.indiatimes.com/news/international/world-news/economic-cost-of-blockade-much-more-than-impact-of-quake-nepal/articleshow/50208273.cms) [perma.cc/QP2C-6XEH].



people. Nepal's Ambassador to India said that "the economic cost of the blockade is more than the cost we had to incur due to the massive quake."<sup>277</sup> According to Telegraph India, "[t]he loss to the Nepal economy because of the blockade is being pegged wildly at anywhere between USD 2 billion and 10 billion, depending on who one speaks to."<sup>278</sup> Nepal's GDP growth rate also plummeted from 6% in 2014, to 3.3% in 2015, to a further low of 0.6% in 2016.<sup>279</sup>

The 2015 blockade was a watershed moment for Nepal's foreign policy and its relations with India. As India was considered responsible for the blockade, the relations between the two countries also became bitter.<sup>280</sup> Nepal actively started searching for alternative routes to get supplies of essential commodities, not just to meet the immediate emergent demand but also for the long term.<sup>281</sup> The main impetus for this was to reduce, if not bring an end to, dependence on India. However, by now the scenario in South Asia had undergone a change. China, Nepal's northern neighbor, had earlier been reluctant to intervene on behalf of Nepal in its tensions with India due to the pragmatism of geopolitics.<sup>282</sup> Post the 2015 blockade, however, China had become more powerful and capable of committing more resources to Nepal. Furthermore, technological advances in infrastructure, communication, and transportation had made it much easier now to navigate the Himalayas and access Nepal via China.<sup>283</sup>

As a result, Nepal took a number of steps towards gradually ending Indian monopoly on Nepal. In October 2015, Nepal signed an agreement with China for the supply of petroleum products, which ended India's four decade old monopoly in this sector.<sup>284</sup> This

277. *Id.*

278. V. Kumara Swamy, Opinion, *'I Will Never Forgive What India Has Done To Me'*, TELEGRAPH (Oct. 25, 2015), [www.telegraphindia.com/7-days/39-i-will-never-forgive-what-india-has-done-to-me-39/cid/1313727](http://www.telegraphindia.com/7-days/39-i-will-never-forgive-what-india-has-done-to-me-39/cid/1313727) [perma.cc/J4GH-YWKV].

279. *GDP Growth Nepal*, WORLD BANK, [www.data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=NP](http://www.data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=NP) [perma.cc/HR64-SSDA] (last visited June 24, 2020).

280. Press Trust of India, *Nepal-India Ties Shouldn't Degrade, China No Substitute: Nepali Economist*, BUS. STANDARD, [www.business-standard.com/article/current-affairs/nepal-india-ties-shouldn-t-degrade-china-no-substitute-nepali-economist-120061500811\\_1.html](http://www.business-standard.com/article/current-affairs/nepal-india-ties-shouldn-t-degrade-china-no-substitute-nepali-economist-120061500811_1.html) [perma.cc/Y86Q-G3GF] (last updated Jun. 15, 2020, 11:25 PM).

281. Sanjeev Giri, *Blockade, Energy Shortages Goad Country Into Looking For Solutions*, KATHMANDU POST (Oct. 5, 2015), [www.kathmandupost.com/mon-ey/2015/10/05/blockade-energy-shortages-goad-country-into-looking-for-solutions](http://www.kathmandupost.com/mon-ey/2015/10/05/blockade-energy-shortages-goad-country-into-looking-for-solutions) [perma.cc/8TR8-2496].

282. Constantino Xavier, *supra* note 254.

283. Pradumna Bickram Rana, *China's Proposals for Trans-Himalayan Connectivity: Consider Four Economic Corridors*, 154 RSIS Comment. 1 (2014), [www.rsis.edu.sg/rsis-publication/cms/chinas-proposals-for-trans-himalayan-connectivity-consider-four-economic-corridors/#.Xy1HbCgzY2w](http://www.rsis.edu.sg/rsis-publication/cms/chinas-proposals-for-trans-himalayan-connectivity-consider-four-economic-corridors/#.Xy1HbCgzY2w) [perma.cc/FS4N-N7G3].

284. Utpal Parashar, *Ending Indian Monopoly, Nepal Signs Deal With*

was followed by Nepalese Prime Minister, KP Sharma Oli's visit to Beijing, where he signed a number of Agreements with China focused on improving transport and connectivity, including access to Chinese ports.<sup>285</sup> Transport infrastructure to improve connectivity between the two countries started almost immediately and progress has been ongoing.<sup>286</sup> This includes a number of strategically important projects such as a high-speed railway line connecting Xigaze, Tibet's second largest city to Kathmandu, Nepal's capital.<sup>287</sup> This was followed by an announcement in 2018, wherein China allowed Nepal access to the Chinese ports of Tianjin, Shenzhen, Lianyungang and Zhanjiang; thereby, at least in theory, ending Indian monopoly on Nepal's access to the Sea.<sup>288</sup>

Chinese ports can neither immediately nor entirely replace Nepal's dependence on Indian ports, but it can surely reduce India's coercive power vis-à-vis Nepal. Infrastructure along the route from Nepal to the ports of China needs to be developed, and there are various doubts about the feasibility of this project as far as distances and costs are concerned.<sup>289</sup> However, despite these

*China To Import Fuel*, Hindustan Times, (Oct. 29, 2015, 5:54 PM), [www.hindustantimes.com/world/fuel-starved-nepal-turns-to-china-after-india-restricts-supply/story-Nlpx8zyEuwlOVBBXxczSKP.html](http://www.hindustantimes.com/world/fuel-starved-nepal-turns-to-china-after-india-restricts-supply/story-Nlpx8zyEuwlOVBBXxczSKP.html) [perma.cc/L3A2-2N7Z].

285. Rishi Iyengar, Opinion, *What the Nepalese Prime Minister's Visit to China Says About the Wider Politics of Asia*, TIME (Mar. 24, 2016, 4:06 AM), [www.time.com/4270239/nepal-prime-minister-oli-visit-china-beijing-india/](http://www.time.com/4270239/nepal-prime-minister-oli-visit-china-beijing-india/) [perma.cc/KS53-7CR9].

286. See K J M Varma, *China Nepal Sign Protocol To Operationalise Key Transit Treaty To Access Chinese Ports*, WEEK (Apr. 3, 2020, 9:07 PM), [www.theweek.in/wire-updates/business/2019/04/30/fgn24-china-nepal-tta.html](http://www.theweek.in/wire-updates/business/2019/04/30/fgn24-china-nepal-tta.html) [perma.cc/6L73-JSAE]; PTI, *China Opens Dual-Use Highway To Nepal Via Tibet*, ECON. TIMES, [www.economicstimes.indiatimes.com/news/international/world-news/china-opens-dual-use-highway-to-nepal-via-tibet/articleshow/60730104.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://www.economicstimes.indiatimes.com/news/international/world-news/china-opens-dual-use-highway-to-nepal-via-tibet/articleshow/60730104.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst) [perma.cc/Z8LY-RWR9] (last updated Sep. 8, 2017, 1:15 PM); Ramesh Bhushal, *Nepal-China Railway Project: Fantasy Or Reality?*, THIRD POLE (Jun. 18, 2019), [www.thethirdpole.net/2019/06/18/nepal-china-railway/](http://www.thethirdpole.net/2019/06/18/nepal-china-railway/) [perma.cc/JRZ9-4A9W]; Prahlad Rijal, *Nepali And Chinese Officials Stress Road Connectivity To Boost Tourist Arrivals From China*, KATHMANDU POST (Dec. 13, 2019), [www.kathmandupost.com/money/2019/12/13/nepali-and-chinese-officials-stress-road-connectivity-to-boost-tourist-arrivals-from-china](http://www.kathmandupost.com/money/2019/12/13/nepali-and-chinese-officials-stress-road-connectivity-to-boost-tourist-arrivals-from-china) [perma.cc/W622-JR4Z].

287. Bikash Sangraula, *To Decrease Its Dependence On India, Nepal Eagerly Awaits China Rail Plan*, Japan Times (Oct. 11, 2019), [www.japantimes.co.jp/news/2019/10/11/business/dependent-on-india-nepal-awaits-china-rail/#.XljnMqgzY2w](http://www.japantimes.co.jp/news/2019/10/11/business/dependent-on-india-nepal-awaits-china-rail/#.XljnMqgzY2w) [perma.cc/K96T-6C68].

288. Rajeswari Pillai Rajagopalan, Opinion, *Why Nepal's Access to China Ports Matters*, DIPLOMAT (Sep. 14, 2018), [www.thediplomat.com/2018/09/why-nepals-access-to-china-ports-matters/](http://www.thediplomat.com/2018/09/why-nepals-access-to-china-ports-matters/) [perma.cc/VA5G-DCFV].

289. See Kamal Dev Bhattarai, *The Limits of Nepal's China Outreach*, DIPLOMAT (Sep. 13, 2018), [www.thediplomat.com/2018/09/the-limits-of-nepals-china-outreach/](http://www.thediplomat.com/2018/09/the-limits-of-nepals-china-outreach/) [perma.cc/K2MY-5FTE]; Ed Peters, *China-Nepal Railway: Debt Trap, Godsend, Threat to India, or Just a Pie in the Sky?*, S. CHINA MORNING POST (Dec. 1, 2019, 10:15 AM), [www.scmp.com/week-](http://www.scmp.com/week-)

hurdles, it has its own advantages for Nepal, chief of which is the end of Indian monopoly.

Afraid of losing its hegemonic cloud, India has taken various steps to discourage Nepal from taking the China route. These are also aimed at repairing Indo-Nepal relations and its image as a country which interferes in Nepal's internal matters.<sup>290</sup> As a result, India has decided to revamp and expand the infrastructure that connects Nepal to the Indian ports.<sup>291</sup> In 2016, India also opened up the port of Visakhapatnam, in addition to Kolkata for Nepal to export its cargo and therefore have access to the sea.<sup>292</sup>

Nepal, however, has made it clear that while it welcomes India's attempts to improve ties with Nepal and facilitate its access to the sea, it also wishes to explore the opportunity of accessing the sea via China. Kamal Thapa, Nepal's foreign Minister, said "We (Nepal) would like to take advantage from both our neighbors but not at the cost of each other. Nepal does not have a policy of playing cards against each other."<sup>293</sup> Irrespective of whether the 2015 blockade had Indian backing or not, the sheer hardship faced by the people of Nepal and its devastating impact on the economy means that it is highly unlikely that Nepal would get discouraged from looking for an alternate route to access the Sea.<sup>294</sup> Nepal has historically as well been at odds with India in cases involving transit access, and the issue has been a source of friction between the two countries.<sup>295</sup> Although the India route might appear more advantageous and economical for Nepal to access the sea, at least until the infrastructure across the proposed China route is fully developed, it appears highly unlikely that Nepal will be persuaded into abandoning the China route completely.

It is in the light of these circumstances that India must look to reorient its policy towards Nepal, especially over the issues of Trade and Transit. While Nepal, along with other LLS has been demanding a Right to Access the Sea along, India should look to

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asia/politics/article/3039995/china-nepal-railway-debt-trap-godsend-threat-india-or-just-pie [perma.cc/MXZ4-5FW7].

290. *India Nepal Agree on Key Infrastructure Projects*, DDNEWS (Jul. 14, 2018), [www.ddnews.gov.in/national/india-nepal-agree-key-infrastructure-projects](http://www.ddnews.gov.in/national/india-nepal-agree-key-infrastructure-projects) [perma.cc/3ZXX-AA8N].

291. Anil Giri & Suresh Raj Neupane, *Inland Waterways Become Part of Nepal-India Trade and Transit Treaties*, KATHMANDU POST (Mar. 20, 2019), [www.kathmandupost.com/national/2019/03/20/inland-waterways-become-part-of-nepal-india-trade-and-transit-treaties](http://www.kathmandupost.com/national/2019/03/20/inland-waterways-become-part-of-nepal-india-trade-and-transit-treaties) [perma.cc/BSP6-8USR].

292. *Id.*

293. Sangeeta Thapliyal, *Landlocked Nepal and Its Foreign Policy*, 149 J. UNITED SERV. INST. INDIA (2019), [www.usiofindia.org/publication-type/usio-journal/page/11/](http://www.usiofindia.org/publication-type/usio-journal/page/11/) [perma.cc/5UNL-VCAW].

294. TT Bureau, *I Will Never Forgive What India Has Done To Me*, TELEGRAPH INDIA (Oct. 25, 2015, 12:00 AM), [www.telegraphindia.com/7-days/39-i-will-never-forgive-what-india-has-done-to-me-39/cid/1313727](http://www.telegraphindia.com/7-days/39-i-will-never-forgive-what-india-has-done-to-me-39/cid/1313727) [perma.cc/6WWW-RV32].

295. *Glassner*, supra note 162, at 21-25.

support Nepal along with other LLS in this endeavor. Such a move will help India win back a lot of goodwill lost during the 2015 blockade, which was seen as India trying to coerce Nepal by cutting off its access to the Sea, and therefore essential supplies. If India offers support or even takes the initiative towards allowing LLS' access to the Sea, then it would convince Nepal that India no longer wishes to hold Nepal hostage over the issues of Transit and Trade. This would improve relations between the two countries and even solicit Nepal's cooperation over matters of greater importance to India such as the security of the Himalayas.

India's support to Nepal's right to access the sea would work to increase India's 'soft power' over Nepal at a time when its ability to exercise 'hard power' will be met with tough resistance due to the Chinese inroads in Nepal. As a result, Nepal would be more amenable to appreciate Indian concerns over the presence of China and be more cooperative when India asks for safeguards.

Such a position would also make India look like a better financial alternative to China. Despite China having much greater economic capacity than its regional rival, China's 'debt trap diplomacy' has been a concern for countries that seek Chinese investment. In Pakistan, the China -Pakistan Economic Corridor has been dubbed as the new East India Company.<sup>296</sup> This comment is significant because despite being a close ally of China, the view in Pakistan is that Chinese investment resembles the very corporation that brought 200 years of British Colonialism to South Asia. Further South, China managed to secure a 99-year lease for a port it built in Sri Lanka as the Sri Lankan government struggled to pay off Chinese debt, often seen as a classic example of a 'debt trap.'<sup>297</sup> In this context, if India was to be able to reassure Nepal that it supports Nepal's right to access the sea, its investments and involvement in Nepal and along the route to the Sea would appear to be a much more benign and friendly endeavor. This would assuage Nepal's suspicions vis-à-vis India and make it appear as a more trustworthy partner than a country that has often been compared to a "loan shark."

Furthermore, the international recognition of a right existing in favor of LLS' to the access the sea would drastically change the dynamics of the transaction between Nepal and its neighbors. While India could position itself as a champion of LLS' right to access the sea, Chinese endeavors in this regard would appear more obligatory than charitable. This itself will have a bearing on the relations between the two countries. It would also be in line with India's attempts to discourage Nepal from using Chinese ports by making

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296. Syed Irfan Raza, '*CPEC Could Become Another East India Company*', DAWN (Oct. 18, 2016), [www.dawn.com/news/1290677](http://www.dawn.com/news/1290677) [perma.cc/F2JJ-747Y].

297. Maria Abi-Habib, '*How China Got Srilanka to Cough Up a Port*', N.Y. TIMES (Jun. 25, 2018), [www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html](http://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html) [perma.cc/AR3D-RVM2].

the India route appear like a more feasible and profitable option.

Nepal, as a LLS, has been raising the demand for the recognition of a Right to Access to the Sea.<sup>298</sup> It will necessarily support India in any endeavor to collectively raise this issue among the international community. Nepal's support would add weight to India's argument which would help India advance its interests in making the same argument for other LLS in the continent.

## 2. *The Case for Afghanistan*

Afghanistan is a LLS that has been the center of international attention for many decades. It is located in the junction between Central Asia, South Asia, and the Middle East, and also shares a small border with the People's Republic of China. It is for this reason that Afghanistan is considered the gateway between South Asia and Central Asia. (See Map 1 above).

Afghanistan's unique geographical position has contributed to its history of turbulence and violence. During much of the 19th and 20th centuries, it acted as a buffer state between the Russian Empire and the British Empire in the Indian subcontinent. It was the subject of 'The Great Game' between the two empires and the center of numerous wars and armed conflicts that drained the Afghan economy.

Before the British left India, there was no specific treaty that regulated transit between them and Afghanistan. However, the Treaty for the Establishment of Neighborly Relations and the Anglo-Afghan Trade Convention, both emphasized the principle of the freedom of transit established in the Barcelona Convention and Statute on Freedom of Transit.<sup>299</sup>

After the Independence and Partition of India and Pakistan in 1947, Pakistan controlled the entire Southern border of Afghanistan. This border, known as the Durand Line, was disputed by Afghanistan, which also raised the demand of an independent Pakhtunistan to be carved from territory within Pakistan. This created tensions between the two neighbors and Pakistan responded by disrupting the movement of traffic from Afghanistan through its territory. Through the years, Pakistan would respond to tensions with Afghanistan by routinely disrupting such movements. For instance, in the first twenty years of Pakistan's existence, it had shut the border with Afghanistan during 1947, 1951, 1955, and

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298. See generally T. M. Franck et al., *The New Poor: Landlocked, Shelflocked and Other Geographically Disadvantaged States*, 7 N.Y.U. J. INT'L L. & POL. 53 (1974); Landlocked and Transit Countries and Donor Countries and International Financial and Development Institutions on Transit Transport Cooperation, International Organization for Migration 3 (Almaty, August 28–29, 2003).

299. Glassner, *supra* note 162, at 10.

1961-1963.<sup>300</sup> Despite a multitude of agreements signed between the two countries, the Afghan economy till date remains vulnerable to frequent closing and disruption of trade through its border with Pakistan. Shoaib Ahmad Rahim notes:

The evidence reveals that such closures take place when it is peak export time for Afghan fresh vegetables and fruits export... Afghan officials believe that Pakistan uses security issues as pretext to sabotage exports. On the other hand, Pakistani analysts and officials also believe such interruptions are merely political moves.<sup>301</sup>

Volatility on its southern border forced the Landlocked State to seek alternate trade routes. As a result, Afghanistan established extensive trading links with the USSR to its north, however that route was a long and arduous one for any access to the high seas.

Afghanistan also explored the avenue of developing a route to the Arabian Sea through its western neighbor Iran. However, for the most part of the 20th century, transport infrastructure across Eastern Iran remained poor and could barely cater to the requirements of traffic emanating from Afghanistan. However, traffic did flow through Afghanistan, and the first transit agreement between the two countries was inked in 1962. Over the decades, the political situation in the two countries over the decades prevented them from being able to realize the full potential of this route.<sup>302</sup>

China also shares a seventy-six kilometer narrow border with Afghanistan, that runs through the extremely arduous terrain of the Wakhan Corridor. The lack of adequate transport infrastructure, and extreme weather conditions make the corridor itself a difficult trade route. Additionally, it is also a very long and unfeasible route for Afghan goods to access the sea.<sup>303</sup>

Afghanistan's economic troubles got further accentuated due to the decades of conflict and instability on its land. Beginning with the Soviet intervention in December 1979, Afghanistan has almost constantly been at war and witnessed instability till date. This ruined the economic infrastructure and disrupted economic activity. Despite many estimates suggesting that Afghanistan has over 1 trillion USD worth of untapped natural resources,<sup>304</sup> Afghanistan remains among the least developed countries of the world.

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300. Shoaib Rahim, *Afghanistan's Dependence on Pakistan - Trade, Transit and the Cost of Being Landlocked*, 1 KARDAN J. ECON. & MGMT. SCI. 38, 41 (2018).

301. *Id.* at 49.

302. Thapliyal, *supra* note 293.

303. Conference Report, AM. INST. AFG. STUD. & HOLLINGS CTR. INT'L DIALOGUE (July 24-26, 2008), [www.hollingscenter.org/wp-content/uploads/2013/12/072008\\_Afghanistans\\_Other\\_Neighbors.pdf](http://www.hollingscenter.org/wp-content/uploads/2013/12/072008_Afghanistans_Other_Neighbors.pdf) [perma.cc/76BH-YZMG].

304. James Risen, *U.S. Identifies Vast Mineral Riches in Afghanistan*, N.Y. TIMES (June 13, 2010) [www.nytimes.com/2010/06/14/world/asia/14minerals.html](http://www.nytimes.com/2010/06/14/world/asia/14minerals.html) [perma.cc/AZC5-B662].

Economic development remains key to the establishment of securing a lasting peace in Afghanistan.

The decades of conflict also saw Pakistan increase its presence and influence in Afghanistan. The Pakistani intelligence agencies like the Inter Services Intelligence, had already been involved in propping rebels against the Afghan government led by Daud Khan, and then subsequently the Democratic Republic of Afghanistan.<sup>305</sup> However, their activities became far more potent and aggressive once Pakistan became the vanguard for American sponsorship of the Mujahideen against the Soviet military intervention in Afghanistan. American involvement in Afghanistan ended, at least for the time being, with the Soviet withdrawal in 1989, but the enlarged and enriched ISI continued its involvement. Afghanistan descended into a long and bloody Civil War as the Mujahideen splintered into various factions. Pakistan first supported the Hizb e Islami led by Gulebuddin Hekmaktayar,<sup>306</sup> and then after 1994 started supporting the Taliban in its conquest to take over all of Afghanistan.<sup>307</sup>

When the United States invaded Afghanistan, Pakistan reluctantly offered its support to the American led coalition. Pakistani President told the Americans, "You are there to kill terrorists, not make enemies, 'hoping the war would be short and limited.'"<sup>308</sup> However, Pakistan continued to maintain links with the Taliban leadership. When Pakistan saw the emergence of an insurgency in the areas bordering Afghanistan as a direct fallout of the War in Afghanistan, Pakistan responded by adopting a selective approach towards terrorists operating out of its territory, a policy that has often been criticized as Islamabad's "Good Taliban/ Bad Taliban" strategy.<sup>309</sup> Although Pakistan has often denied providing shelter or aid to the Taliban, its leaders often end up tacitly acknowledging this policy. Such as when former Pakistan Army Chief, Ashfaq Kayani stated that "If you think we are going to turn the Taliban and Haqqanis and others into mortal enemies of ours and watch you walk out the door, you are completely crazy. Are we

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305. Micheal Rubin, Opinion, *Who Is Responsible for the Taliban?*, WASH. INST. (Mar. 2002), [www.washingtoninstitute.org/policy-analysis/view/who-is-responsible-for-the-taliban](http://www.washingtoninstitute.org/policy-analysis/view/who-is-responsible-for-the-taliban) [perma.cc/9XVZ-RX6P].

306. AMIN SAIKAL, MODERN AFGHANISTAN: A HISTORY OF STRUGGLE AND SURVIVAL (1st ed. 2004).

307. The Afghan Taliban, STANFORD CTR. FOR INT'L SEC. AND COOP., [www.cisac.fsi.stanford.edu/mappingmilitants/profiles/afghan-taliban](http://www.cisac.fsi.stanford.edu/mappingmilitants/profiles/afghan-taliban) [perma.cc/X8QP-NGZK] (last visited Jun. 24, 2020).

308. Mark Mazzetti & Ismail Khan, *From the Afghan Peace Deal, a Weak and Pliable Neighbor for Pakistan*, N.Y. TIMES (Mar. 5, 2020), [www.nytimes.com/2020/03/05/world/asia/afghanistan-pakistan-peace.html](http://www.nytimes.com/2020/03/05/world/asia/afghanistan-pakistan-peace.html) [perma.cc/Q94T-ZTRJ].

309. Kunwar Khuldune Shahid, *Did Pakistan Win the Afghanistan War?*, DIPLOMAT (Mar. 31, 2020), [www.thediplomat.com/2020/04/did-pakistan-win-the-afghanistan-war/](http://www.thediplomat.com/2020/04/did-pakistan-win-the-afghanistan-war/) [perma.cc/HHF9-6NW8].

hedging our bets? You bet we are."<sup>310</sup>

Although the Taliban has remained key to Islamabad's influence over Afghanistan, Pakistan's geographical position comes a close second. Being located on Afghanistan's southern border, Pakistan became the most cost effective and politically viable option for supplying the NATO forces in Afghanistan. Washington's decades old hostility with Iran meant that the western route was never considered. The Northern Distribution Network was considered more expensive and politically less reliable due to the fragile and tense nature of Russo-American relations, and was finally closed by Moscow in 2015.<sup>311</sup>

Both the United States and Pakistan seem aware of Pakistan's impact on the Afghan peace process. U.S. President Donald Trump referring to American plans about withdrawing from Afghanistan said in July 2019 that "I think Pakistan is going to help us out to extricate ourselves"<sup>312</sup>; whereas nearly six months later the Pakistani Foreign Minister Shah Mahmood Qureshi held, "The deal will be signed in the presence of Pakistan because it was impossible for the deal to come through without our efforts."<sup>313</sup> It is safe to assume that such statements are a major cause of concern in New Delhi.

The fierce Indo-Pakistan rivalry is also present in the Afghan conflict. While Pakistan that a regime in Kabul that is friendly to India, would imply encirclement from New Delhi, India fears that an Afghan government friendly to Islamabad would become a safe haven for Pakistan sponsored anti-India terror groups. Hence, on one hand Pakistan states that "India has no role in Afghanistan,"<sup>314</sup> on the other India talks about a "lasting political settlement through an Afghan-led, Afghan-owned and Afghan controlled process"<sup>315</sup> – a thinly veiled comment on Pakistan's influence over

310. Zachary Constantino, Special Report, *The India-Pakistan Rivalry in Afghanistan*, U.S. INST. PEACE (Jan. 2020), [www.usip.org/sites/default/files/2020-01/sr\\_462-the\\_india\\_pakistan\\_rivalry\\_in\\_afghanistan.pdf](http://www.usip.org/sites/default/files/2020-01/sr_462-the_india_pakistan_rivalry_in_afghanistan.pdf) [perma.cc/RXT9-X6UC].

311. Abid Amri, Opinion, *Three Transit Routes for Landlocked Afghanistan*, DIPLOMATIC COURIER (Jan. 17, 2012), [www.diplomaticcourier.com/posts/three-transit-routes-for-landlocked-afghanistan](http://www.diplomaticcourier.com/posts/three-transit-routes-for-landlocked-afghanistan) [perma.cc/MJR5-PBSB].

312. Dipanjan Roy Chaudhary, *US Leans Heavily On Pakistan To Secure Its Afghan Interests*, ECON. TIMES (Jul. 24, 2019, 09:23 PM), [www.economictimes.indiatimes.com/news/international/world-news/us-leans-heavily-on-pakistan-to-secure-its-afghan-interests/articleshow/70355326.cms?from=mdr](http://www.economictimes.indiatimes.com/news/international/world-news/us-leans-heavily-on-pakistan-to-secure-its-afghan-interests/articleshow/70355326.cms?from=mdr) [perma.cc/N6BD-4TKT].

313. Sajjad Hussain, *US-Taliban peace talks were impossible without Pakistan: Qureshi*, OUTLOOK INDIA (Feb. 22, 2020), [www.outlookindia.com/newsscroll/ustaliban-peace-talks-were-impossible-without-pakistan-qaureshi/1741472](http://www.outlookindia.com/newsscroll/ustaliban-peace-talks-were-impossible-without-pakistan-qaureshi/1741472) [perma.cc/UFQ2-6NC6].

314. PTI, *Imran Khan Govt Says India Has No Role In Afghanistan*, INDIA TODAY (Jan. 18, 2019), [www.indiatoday.in/world/story/imran-khan-govt-says-india-has-no-role-in-afghanistan-1433506-2019-01-18](http://www.indiatoday.in/world/story/imran-khan-govt-says-india-has-no-role-in-afghanistan-1433506-2019-01-18) [perma.cc/5Y9A-TTG5].

315. Nayanima Basu, *India Hopes US-Taliban Peace Deal Will Bring*



the Taliban and as a result, on the peace process. During the Taliban regime in Afghanistan, India was a victim of various terror attacks from Pakistan based anti-India terror outfits. The hijacking of Indian Airlines Flight 814 in 1999 was a visual demonstration of India's concerns when the terrorist hijackers found sanctuary in Afghanistan, from where they secured the release of five terrorists imprisoned in India in return for releasing the hostages.<sup>316</sup> India has been a victim of terror attacks from Pakistan sponsored proxies since long before 9/11, and this past experience has led to India to limit Pakistan's influence in Afghanistan as a center of its Afghan policy.

It is because of the geographical dividend that Pakistan has historically opposed the rights of LLS's to access the sea. During the 1950s, Afghanistan took the lead in bargaining for Rights of LLS; where it received no support from Pakistan. It was the Pakistani delegate, who during the meetings of the Fifth Committee said "the Pakistani delegation explored each and every corner of international law without discovering the right or series of rights that the LLS claim to be endowed with."<sup>317</sup> In the various UN Conferences on the Laws of the Seas, the Pakistani delegation consistently opposed the recognition of any transit rights in favor of LLS's that were not subject to sovereignty of Transit States and regulated by bilateral or multilateral treaties. On the interpretation of the relevant portions of the UNCLOS, the Pakistani delegation declared "Another area that causes us concern is the possible interpretation of the question of access to the sea, which we believe is only a national right and will be governed by bilateral agreements regarding transit."<sup>318</sup>

Despite that India echoed a position similar to Pakistan during the Fifth Committee, it is in the strategic interest of India to support the right of Afghanistan as a LLS to have access to the sea. The right of LLS to access the sea directly undermines Pakistan's geographical stranglehold on Afghanistan. Pakistan has not only exploited the geographical circumstances to hinder any economic development, but also for excessive interference in Afghan internal affairs; thereby undermining their sovereignty.<sup>319</sup> A right to access the sea is a step towards greater autonomy for Afghanistan in the

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*'Lasting Political Settlement' To Afghanistan*, PRINT (Feb. 29, 2020, 9:12 PM), [www.theprint.in/diplomacy/india-hopes-us-taliban-peace-deal-will-bring-lasting-political-settlement-to-afghanistan/373476/](http://www.theprint.in/diplomacy/india-hopes-us-taliban-peace-deal-will-bring-lasting-political-settlement-to-afghanistan/373476/) [perma.cc/V9BT-KFX5].

316. Manvendra Singh, *Kandahar 1999: Story of a Hijacking*, OPEN (Dec. 20, 2019), [www.openthemagazine.com/cover-stories/kandahar-1999-story-hijacking/](http://www.openthemagazine.com/cover-stories/kandahar-1999-story-hijacking/) [perma.cc/F835-FW3F].

317. Uprety, *supra* note 29, at 64

318. Uprety, *supra* note 20, at 94

319. Yatharth Kachiar, *Afghanistan's Landlocked Trap*, VIVEKANANDA INT'L FOUND. (FEB. 8, 2019), [www.vifindia.org/article/2019/february/08/afghanistans-landlocked-trap](http://www.vifindia.org/article/2019/february/08/afghanistans-landlocked-trap) [perma.cc/372H-29XR].

international arena and will be well received by the government and the people in Afghanistan working to increase India's soft power in the country.

India has tried to advance this cause by attempting to develop an alternate route to Afghanistan via the Chabahar Port in Iran, in order to fully realize the Right of Afghanistan to Access the Sea. This has been followed by two countries' efforts to develop the transport infrastructure to link the Iranian Port city to major cities and provinces in Afghanistan and eventually to Uzbekistan and Central Asia.<sup>320</sup> The emergence of this route allows India to bypass Pakistan in accessing Afghanistan and Central Asia and advancing trade and development in the region. It will also reduce Afghanistan's dependence on Pakistan to access the seas and pursue international trade and commerce. This will increase the prospects of economic development of Afghanistan, and also give it larger bargaining power vis-a-vis its relations with Pakistan. Kabul will no longer be hostage to Pakistan's demographic dividend.

Economic development is also key to political stability in Afghanistan that has been the center of conflict for almost 40 years. With the United States on its way out, the Chabahar route has become important to sustain the hard fought yet fragile peace in the region. The route will allow India to play a larger and more substantial role in the development of the Afghan economy. Pakistan will not be able to impose its own terms. The legal argument in favor of LLS' right to access the sea will also help India to convince the United States of America to continue to exempt Chabahar from the economic sanctions that have been imposed on Iran as the relations between Washington and Tehran have been deteriorating rapidly. This exemption was first announced in November 2018, almost six months after the US withdrew from the JCPOA. Asha Sawhney says that "[i]t is in the United States' best interest to bolster the success of Chabahar Port as a means of responsibly reducing U.S. aid to Afghanistan in favor of regional cooperation and increased investment. Afghanistan has no prospects for stable security without greater avenues for economic empowerment."<sup>321</sup>

As the United States readies to withdraw from Afghanistan after inking an Agreement with the Taliban, the latter is set to play a larger and more influential role in the future of Afghanistan. The Chabahar route would not only be a means to strengthen the non-

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320. Sudha Ramachandran, *Iran's Chabahar Port Empowers India-Afghanistan Trade at Pakistan's Expense*, CACI ANALYST (2018), [www.cacianalyst.org/publications/analytical-articles/item/13492-irans-chabahar-port-empowers-india-afghanistan-trade-at-pakistans-expense.html](http://www.cacianalyst.org/publications/analytical-articles/item/13492-irans-chabahar-port-empowers-india-afghanistan-trade-at-pakistans-expense.html) [perma.cc/B4L7-NQNC].

321. Asha Sawhney, *Chabahar Port: Unlocking Afghanistan's Potential*, 17 NEW PERSP. FOREIGN POL'Y 48 (2019), [www.csis.org/chabahar-port-unlocking-afghanistans-potential](http://www.csis.org/chabahar-port-unlocking-afghanistans-potential) [perma.cc/3TRC-P5TB].

Taliban faction in Afghanistan but could also be a means to wean away Pakistan's influence or control over the Taliban. Although New Delhi sees the Taliban as a proxy for Pakistan in Afghan affairs, a closer look may suggest otherwise. According to Zachary Constantino their relationship "oscillates between compliance and obstinacy."<sup>322</sup> Taliban has time and again shown its willingness to move away from Pakistan's clutches. During the 1990s, the Taliban refused Pakistan's request to recognize the Durand Line as the border between the two countries. Beginning in 2011, the Taliban established a delegation in Qatar to conduct diplomatic negotiations in an attempt to loosen Pakistan's grip.<sup>323</sup> Over the years, this delegation has only grown in size. In furtherance of the same goal, then Taliban leader Mullah Akhtar Muhammad Mansour tried to establish links with Iran. These advances have led to the belief that Pakistan may have connived in the drone strike that killed him in 2016.<sup>324</sup>

Other than Iran, the Taliban has also established ties with Russia and a Taliban group also visited Moscow in 2019. Incidentally, Iran and Russia along with India were the three largest supporters of the Northern Alliance, the group which resisted the expansion of Taliban control in the late 1990s. According to Constantino, this not only forms a precedent for New Delhi to open talks with the Taliban but also is a "tacit acknowledgement from both powers that the Taliban may yet prevail in the Afghan conflict."<sup>325</sup> The Taliban has also made subtle overtures to India, such as when it condemned Pakistan's attempts to link the change in the autonomy of the Indian State of Jammu and Kashmir with the Afghan Peace talks.<sup>326</sup> Despite prodding from the U.S., India remains non-committal to holding direct talks with the Taliban. Should policymakers in New Delhi decide to enter into such talks, an alternative route to Afghanistan and a recognition of the LLS' Right to Access the Sea would assume importance. Pakistan would undoubtedly resist or even sabotage any attempt at such talks, and an alternate route through Chabahar would allow for an enhanced Indian presence that would help India engage with the Taliban while reducing Pakistan's influence on the same.

The international recognition of the Right of LLS to Access the Sea can act as a useful platform for India. It works to de-legitimize

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322. Constantino, *supra* note 310.

323. *How Qatar Came To Host The Taliban*, BBC (Jun. 22, 2013), [www.bbc.com/news/world-asia-23007401](http://www.bbc.com/news/world-asia-23007401) [perma.cc/8W5J-X3MM].

324. Carlotta Gall & Ruhulla Khapalwak, *Taliban Leader Feared Pakistan Before He Was Killed*, N.Y. Times (Aug. 9, 2017), [www.nytimes.com/2017/08/09/world/asia/taliban-leader-feared-pakistan-before-he-was-killed.html](http://www.nytimes.com/2017/08/09/world/asia/taliban-leader-feared-pakistan-before-he-was-killed.html) [perma.cc/LR6F-2Q4C].

325. Constantino, *supra* note 310.

326. Maria Abi-Habib, *Pakistan Runs Out of Options as India Tightens Grip on Kashmir*, N.Y. TIMES (Aug. 9, 2019), [www.nytimes.com/2019/08/09/world/asia/kashmir-india-pakistan.html](http://www.nytimes.com/2019/08/09/world/asia/kashmir-india-pakistan.html) [perma.cc/DU9F-LNQG].

Pakistan's geographical leverage in Afghanistan. It also provides a legal justification for avenues that lead to a larger role for India in being able to contribute to a stable government in Afghanistan.

### 3. *The Case for Mongolia*

Much like Nepal, Mongolia is another Asian landlocked country trapped between two large neighbors - China and Russia. During the Cold War, Mongolia remained under the Soviet fold both politically and economically. This meant that when the Soviet economy saw its crisis in the 1980s, Mongolia also experienced contraction.<sup>327</sup> The end of a Cold War brought the advent of a market economy and multiparty democracy. However, geographical constraints meant that its economic dependence merely shifted from one border to the other. Soviet dominance was replaced by that of the Chinese.<sup>328</sup>

Economic dependency is further exacerbated by Mongolia's lack of access to the sea. Naturally its two neighboring countries are not only its largest trading partners, but Mongolia also depends on them to have access to any other country. The nearest port is the Chinese port of Tianjin,<sup>329</sup> located nearly 1278 kms away from Ulaanbaatar as the crow flies.<sup>330</sup> In sharp contrast to Nepal, whose two neighbors China and India are often embroiled in conflict and competition over influence on neighbors, the increasing convergence between Russia and China has prevented Mongolia from even being able to play one of its neighbors against the other.<sup>331</sup>

Fears of domination have prompted Mongolia to look elsewhere. While Mongolia has pursued friendly relations with both its neighbors, and even initiated trilateral cooperation in the region, Ulanbataar has also sought to break out of its geographical constraints. These attempts have culminated in Mongolia's Third Neighbor policy. Beginning in 1990, Mongolia sought to build strong relations with countries other than its two neighbors.<sup>332</sup> Formally

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327. Morris Rossabi, *Will Mongolia Ever Escape the Shadow of its Soviet Past?*, WORLD POL. REV. (Sep. 12, 2017), [www.worldpoliticsreview.com/article/23121/will-mongolia-ever-escape-the-shadow-of-its-soviet-past](http://www.worldpoliticsreview.com/article/23121/will-mongolia-ever-escape-the-shadow-of-its-soviet-past) [perma.cc/C73C-RUV9].

328. Anudari Dashdorj, *Mongolia in Regional Economic Integration: Challenges and Opportunities* (Aug. 21, 2018) (unpublished research paper, University of Tokyo) (on file with the University of Tokyo).

329. Khalinun Nasanjargal et al., *Tianjin Port-Hinterland Connectivity to Mongolia: Challenges and Strategies*, 8 DEV. COUNTRY STUD. 71, 71 (2018).

330. DISTANCE FROM ULAANBAATAR TO TIANJIN, DISTANCE CALCULATOR, [www.distancecalculator.net/from-ulaanbaatar-to-tianjin](http://www.distancecalculator.net/from-ulaanbaatar-to-tianjin) [perma.cc/L4DP-4A6T] (last visited July 5, 2020).

331. Sergey Radchenko, *As China and Russia Draw Closer, Mongolia Feels the Squeeze*, ASAN F. (Oct. 11, 2018), [www.theasanforum.org/as-china-and-russia-draw-closer-mongolia-feels-the-squeeze/](http://www.theasanforum.org/as-china-and-russia-draw-closer-mongolia-feels-the-squeeze/) [perma.cc/HJ5E-2CBL].

332. Alicia Campi, *Mongolia and the Dilemmas of Deeping Eurasian Continentalism*, 20 MONGOLIAN J. INT'L AFF. 3 (2018).

recognized in 2011, this policy does not talk about a specific 'Third Neighbor' but seeks greater engagement with several of countries in the outside world but also greater participation in international organizations. Under this policy, Mongolia has reached out to countries in its neighborhood like Japan and South Korea, but also countries further away such as the United States of America.<sup>333</sup>

However, despite all its efforts, Mongolia still remains highly susceptible to Chinese domination. Mongol trade is closely tied to China and accounts for over ninety percent of its imports and nearly thirty percent of its exports.<sup>334</sup> Mongolia's landlocked status is made worse by its poor state of transport infrastructure. In the World Bank's Logistics Performance Index, Mongolia ranks very poorly across the globe.<sup>335</sup> This means that China remains the key market for Mongolia's natural resources, as Ulanbataar finds it difficult to export outside its immediate neighborhood.

As a part of its Third Neighbor Policy, Mongolia has sought to increase its engagement with India. In 2009, Mongol President Elbegdorj made his first state visit to India, and both countries explored opportunities that were mutually beneficial. This was followed by the visit of Elbegdorj's successor, President Khaltmaagiin Battulga, who arrived in New Delhi for a five-day visit.<sup>336</sup> In the interim, Indian Prime Minister Narendra Modi had visited Mongolia in 2015, becoming the first Indian Prime Minister. Mongol concerns about domination by Beijing are shared by India, which has witnessed the rapid increase in Chinese influence in its own backyard.<sup>337</sup> Modi's visit to Ulaanbaatar was seen as a response to China's forays in South Asia and the Indian Ocean region. Mongolia was delighted to sign a number of agreements with its 'Spiritual Neighbor'<sup>338</sup> and saw the one billion USD line of credit from New Delhi as a major foreign policy victory and a step towards greater independence in foreign affairs.<sup>339</sup>

However, despite these overtures by both countries, Indo-Mongol relations faced obstacles. The Chinese port of Tianjin remains the main port for trade, and the maritime distance between

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333. *Id.*

334. MONGOLIA TRADE ON WORLD INTEGRATED TRADE SOLUTIONS, [www.wits.worldbank.org/countrysnapshot/en/MNG](http://www.wits.worldbank.org/countrysnapshot/en/MNG) [perma.cc/ZM9S-FJR4] (last visited June 24, 2020).

335. Prabir De & Sreya Pan, *India-Mongolia Economic Relations: Current Status and Future Prospect*, 5 NORTHEAST ASIAN ECON. REV. 31 (2017).

336. Sidhant Sibal, *First Time In A Decade, Mongolian President To Visit India*, WION (Sep. 16, 2019, 8:55 PM), [www.wionews.com/india-news/first-time-in-a-decade-mongolian-president-to-visit-india-250052](http://www.wionews.com/india-news/first-time-in-a-decade-mongolian-president-to-visit-india-250052) [perma.cc/799J-Z7ZB].

337. *PM Narendra Modi Visits Mongolia: All You Want To Know*, FIN. EXPRESS (May 19, 2015, 8:07 AM), [www.financialexpress.com/photos/business-gallery/73409/pm-narendra-modis-mongolia-visit-top-10-things-you-want-to-know/](http://www.financialexpress.com/photos/business-gallery/73409/pm-narendra-modis-mongolia-visit-top-10-things-you-want-to-know/) [perma.cc/R7SH-NZWG].

338. Uradyn E. Bulag, *Mongolia in 2009: From Landlocked to Land-linked Cosmopolitan*, 50 ASIAN SURV. 97 (2010).

339. Campi, *supra* note 332.

the two countries amounts to nearly 7000 kilometers. Poor transport infrastructure means that a container from Ulaanbaatar takes around forty-five days to reach New Delhi.<sup>340</sup> It is due to the geographical constraints that Sergey Radchenko says that "the "third neighbor" policy was a luxury conditional on China's and Russia's indulgence."<sup>341</sup>

A glimpse of Chinese superintendence over Mongol foreign policy was visible in a crisis that erupted during the winter of 2016. Almost eighteen months after the visit of Indian Prime Minister and the announcement of the one billion USD credit line, Mongolia hosted the Dalai Lama in November. The Dalai Lama is widely revered in the majority Buddhist country and his ninth visit in Mongolia happened despite strong diplomatic protest by the People's Republic of China. This blatant defiance of China by Mongolia evoked a strong and swift response from Beijing. China imposed a virtual economic blockade of Mongolia, it hiked tariffs on trade and imposed an array of economic sanctions.<sup>342</sup>

According to the Mongol envoy to India, "With winter temperature already around minus-twenty degrees, transport obstruction by China is likely to create a humanitarian crisis in Mongolia as these measures will hurt the flow of essential commodities."<sup>343</sup> These were his words when he was seeking Indian assistance in a crisis precipitated by Beijing not long after Modi's show of strength in China's backyard. As the crisis worsened, New Delhi failed to step up to the assistance of its 'spiritual neighbor'. As a result, on 21st December Mongolia apologized for the visit of the Dalai Lama and stated that the Tibetan leader would not be invited in their country in the future.<sup>344</sup>

The crisis was a statement. It showed that despite Mongolia's attempts to establish relations with, not just India, but several other 'Third Neighbor' countries, the landlocked nation remained heavily dependent on China. A legal argument in favor of Mongolia's Right to Access the Sea would go a long way in attempting to break Mongolia out of the constraints of its two large neighbors. A Right of Access to the Sea would make such blockades

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340. De & Pan, *supra* note 365, at 51.

341. Radchenko, *supra* note 331.

342. Shastri Ramachandaran, *China Beats Mongolia into Submission, Friend' India Watches*, CITIZEN (Dec. 26, 2016), [www.thecitizen.in/index.php/en/NewsDetail/index/6/9527/China-Beats-Mongolia-into-Submission-Friend-India-Watches](http://www.thecitizen.in/index.php/en/NewsDetail/index/6/9527/China-Beats-Mongolia-into-Submission-Friend-India-Watches) [perma.cc/8TS5-MXKD].

343. Kallol Bhattacharjee, *Mongolia Seeks Support Against China's Blockade*, HINDU (Dec. 7, 2016, 12:55 AM), [www.thehindu.com/news/national/Mongolia-seeks-support-against-China-s-blockade/article16769678.ece](http://www.thehindu.com/news/national/Mongolia-seeks-support-against-China-s-blockade/article16769678.ece) [perma.cc/MY2D-ULBX].

344. James Crabtree, *Mongolia Needs Allies To Withstand China's Looming Threat*, NIKKEI ASIAN REV. (Oct. 9, 2019, 3:00 PM), [www.asia.nikkei.com/opinion/Mongolia-needs-allies-to-withstand-China-s-loomng-threat](http://www.asia.nikkei.com/opinion/Mongolia-needs-allies-to-withstand-China-s-loomng-threat) [perma.cc/QQ53-UCPC].

a violation of international law and become a justification for international intervention in Mongolia's backyard. It would also allow India to recover some of its lost diplomatic goodwill after the crisis of 2016. Eventually, it would allow Mongolia to strengthen relations with India, and many other countries. Development of transport infrastructure will allow Mongolia to participate and benefit from maritime trade routes, such as the Vladivostok-Chennai Maritime Corridor being developed by Russia and Mongolia. These steps will help Mongolia access diplomatic and economic opportunities outside its immediate neighborhood; and pursue a path towards economic development and prosperity.

#### 4. *The Ends for Advocacy*

India appears to benefit greatly from advocating for a greater right for LLS to access the sea. In Afghanistan and Mongolia, it would help India gain better influence by reducing the geographical leverage on these States by their coastal neighbors like Pakistan and China respectively. Whereas in Nepal, where India stares at its own geographical equation slipping away, its support for their access to the sea helps gain much of lost goodwill and soft power with the country and also helps strengthen whatever geographic dividend it already has left.

## IX. CONCLUSION

LLS and their citizens have suffered enormous disadvantage owing to the geographical handicap of which they find themselves inheritors. However, over the years, international law has clearly recognized this hindrance and attempted to remedy the same. Progressively, it has worked to ensure parity in the enjoyment of seas which are now characterized as the “common heritage of mankind.” The right of access enunciated in Part X of the UNCLOS is only the prevailing iteration of this philosophy and the culmination of over two centuries of cooperation. It, therefore, becomes important for countries – especially transit States – to recognize their legal obligations and work to afford this right to LLS, without preconditioning it on other strategic or diplomatic imperatives. As such, it is also a larger international concern to ensure the effective enforcement of this right given the significant economic and social consequences. India’s role in ensuring the implementation of this right is not just an important moral obligation for the world’s largest democracy, it also makes strategic sense for the country to undertake. Our Article attempts to provide a roadmap for this approach.