THE QUESTION OF ACCESS TO THE SEA FOR SOUTHERN AFRICA'S LANDLOCKED STATES: DEPENDENCE OR COOPERATION?

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LIST OF ABBREVIATIONS AND ACRONYNMS

AEC	African Economic Community
APoA	Almaty Programme of Action
ASYCUDA	Automated System for Customs Data
AU	African Union
COMESA	Common Market for Eastern and Southern Africa
EU	European Union
FDI	Foreign Direct Investment
GATT	General Agreement on Tariffs and Trade
IMF	International Monetary Fund
IPoA	Istanbul Platform of Action
IRU	International Road Transport Union
LLDC	Landlocked Developing Countries
MFN	Most-Favoured Nation
NEPAD	New Partnership for Africa's Development
ODA	Official Development Assistance
OHRLLS	Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States
PIDA	Programme for Infrastructure Development in Africa
REC	Regional Economic Community
SADC	Southern African Development Community
SSATP	Sub-Saharan African Transport Policy Programme
TIR	*Transports Internationaux Routiers*
TRACECA	Transport Corridor Europe Caucasus Asia
TTFSE	Trade and Transport Facilitation in South East Europe
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference Trade and Development

UNECA	United Nations Economic Commission for Africa
UNECAFE	United Nations Economic Commission for Asia and the Far East
UNECE	United Nations Economic Commission for Europe
WTO	World Trade Organisation

LIST OF CONVENTIONS AND PROTOCOLS

Barcelona Convention (1921)

1958 Convention on the High Sea

New York Convention on Transit Trade of Landlocked States (1967)

United Nations Convention on the Law of the Sea (1982)

SADC Protocol on Transport on Transport, Communications, Meteorology (1996)

SADC Protocol on Trade (1996)

COMESA Protocol on Transit Trade (1996)

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THE QUESTION OF ACCESS TO THE SEA FOR SOUTHERN AFRICA'S LANDLOCKED STATES: DEPENDENCE OR COOPERATION?

Introductory Background

A landlocked country is defined in the United Nations Convention on the Law of the Sea as a State that has no sea coast.[1] In practical terms, landlocked countries are located in the interior of continents, hundreds or even thousands of kilometres from maritime ports. The United Nations recognises the existence of 32developing countries as belonging to the group of landlocked States (LLS): 16 are located in Africa, 12 in Asia, 2 in Latin America and 2 in Central and Eastern Europe.[2] These countries harbour serious constraints on the overall socio-economic development front due to lack of territorial access to the sea, remoteness and isolation from world markets causing high transit and transportation costs.[3] These countries are among the poorest of the developing countries, with the exception of a few located in Europe.

The right to pass through other countries, the freedom of transit in order to have access to the sea and passage rights across the territories of States have been the subject of various international conferences and several international conventions which form the basis for the principle of freedom of transit; transit across other States' territories to access international markets and transport services is an essential condition for the integration into the international economy for land locked states. The remoteness from major world markets is the principal reason why many landlocked countries have not been very successful in mitigating consequences caused by their geographical disadvantage. Given the long distances and the nature of their exports, which are dominated by low-value bulky commodities, freight and related transit costs are burdensome relative to the value of exports.[4]The additional costs incurred together with problems of distance, make imports more expensive and render exports less competitive, thus putting landlocked countries at a disadvantage in the global economy.[5]

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[1]Article 124 1 (a) of the United Nations Convention on the Law of the Sea(1982)

[2]Africa: Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Ethiopia, Lesotho, Malawi, Mali, Niger, Rwanda, Swaziland, Uganda, Zambia, Zimbabwe, South Sudan. Asia: Afghanistan, Bhutan, Kazakhstan, Kyrgyzstan, Lao People's Democratic Republic, Mongolia, Nepal, Tajikistan, Turkmenistan, Uzbekistan. Europe: Armenia, Azerbaijan, Republic of Moldova, The Former Yugoslav Republic of Macedonia. Latin America: Bolivia, Paraguay

[3]The United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and the Small Island Developing States (UN-OHRLLS) July 2013 Report on THE DEVELOPMENT ECONOMICS OF LANDLOCKEDNESS: Understanding the development costs of being landlocked. http://unohrlls.org/about-lldcs/publications/

[4]UNCTAD Expert Group57 in the early 1970s noted that the average cost of access to the sea would be somewhere between 5 to 10 percent of the value of LLS imports and exports. Although these documents are outdated, the situation has not substantially improved, and the problem remains serious. UNCTAD, Transport Strategy for Landlocked Developing States, UN TDBOR, at 6, UN Doc. TD/B/453/Add.1, Rev.1 (July 20, 1973).

[5]It is estimated that the total cost of crossing a border in Africa is the same as the cost of inland transportation of over 1600km or the cost of 11,000 km of sea transport. Source; *Transit And The Special Case Of Landlocked Countries*, Jean Francois Arvis, The World Bank, http://issuu.com/world.bank.publications/docs/978082138416

The Republic of Malawi is one of the 16 landlocked countries in Africa and is sandwiched between the United Republic of Tanzania on the North, the Republic of Zambia on the West and the Republic of Mozambique on the South, East and part of the West. The country has a population of over 15 million, 80% of which resides in rural areas. Agriculture accounts for more than one-third of its Gross Domestic Product and 90% of its export revenues. The performance of the tobacco sector is crucial to short-term growth as tobacco accounts for more than half of its exports. The economy depends on substantial inflows of economic assistance from the International Monetary Fund, the World Bank, and individual donor nations. As per the criteria of the United Nations Office of The High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS)[6], Malawi's Gross National Income (GNI)/Gross Domestic Product(GDP) per capita of $100 or less, human assets and economic vulnerability to external shocks, share of manufacturing industries in GDP at or below 10 percent, and a literacy rate at or below 20 percent, qualify the country to be classified as both a Least Developed State and a Landlocked Developing State.

In tune with other landlocked states, Malawi faces challenges in facilitating trade due the astronomic costs of transporting goods from the coast into its jurisdiction. The lack of direct territorial access to the sea, remoteness and isolation from major international markets makes the country highly dependent on transit countries namely the Republic of Mozambique, the United Republic of Tanzania and the Republic of South Africa, for its seaborne trade. Malawi relies on overland transportation to sea ports for the movement of the majority of its imports and exports. This is mainly done through four corridors namely, Nacala, Beira, Durban and Dar es Salaam. The first three pass through the Republic of Mozambique whilst the Durban Corridor passes through the Republic of Mozambique as well as the Republic of Zimbabwe and the Dar es Salaam Corridor passes through the United Republic of Tanzania. The respective volumes of freight traffic using these corridors are: Durban (which handles 60% of Malawi trade of which only one third is destined for countries beyond the Republic of South Africa), Beira (19%) Nacala (17%) and Dar es Salaam(4%).[7] Below, are maps indicating the continental and regional location of Malawi respectively as well as the relevant ports.

[6] The United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and the Small Island Developing States (UN-OHRLLS) was established by the United Nations General Assembly in 2001 through its resolution 56/227 with functions recommended by the Secretary-General in paragraph 17 of his report A/56/645.

[7] Source: UN-OHRLLS report (World Bank Development Indicators)

Fig 1 Source: Free World Maps

Fig 2: Source Microsoft Corporation 1988-2009

Key: The blue lines show the existing routes to the ports of Dar es Salaam in the United Republic of Tanzania, Nacala in the Republic of Mozambique and Durban in the Republic of South Africa; the red line shows the proposed Nsanje inland port through Mozambique which would drastically cut the transit distance for Malawi.

OBJECTIVE

Land locked States face various challenges in accessing the sea. This thesis will analyse the prevailing situation in Southern Africa with a focus on the transit regime constraints which Malawi, encounters to identify the factors which contribute to the problems in the facilitation of the right to transit. The objective of this paper is to identify gaps, if any, in the existing legal regime as well as in the implementation of the provisions of the legal instruments and to propose possible solutions based on the findings.

METHODOLOGY

To conduct an in depth and comprehensive analysis of the question whether the relationship between land locked States and the neighbouring transit and coastal States is on a dependence or cooperation basis, the paper will outline the relevant global and regional instruments which govern the right to transit. The evolution of the legal framework will be traced from the jurisprudential perspective to examine the academic theories and doctrines which acted as the basis for the creation of the concretisation of the transit regime.

From the legal frame work, the paper will look at the implementation initiatives which have emanated from the transit regime through the creation of various bodies mandated with the specific tasks of assisting in the implementation of the right of transit to the sea from the United Nations down to the regional level under the auspices of the African Union as well as other Regional Economic Communities. At the Regional level the paper will examine the instruments which address the issue of transit and the extent to which the legal framework affords transit to landlocked States.

The implementation analysis section aims at the comprehension of whether the situation on the ground reflects on the adequacy of the legal regime as well as the institutional set up which facilitates and supports various aspects of transit. The section will also look into the physical factors which affect the transit regime and attempt to highlight the shortfalls as maybe be exposed in the analysis.

The proposal of solutions to the identified predicaments faced by the land locked States in question will be based on the analysis of the shortcomings identified in the implementation of the legally provided for concessions to the right to access to the sea. In this regard, the paper will analyse the situation of land locked states in Europe on a best practices basis to determine whether the shortcomings of the transit regime in Southern Africa can be addressed by borrowing some aspects of implementation undertaken in Europe since they are governed primarily by the same global legal framework.

In conclusion the thesis will determine whether indeed the relationship between the aforementioned land locked States is purely of dependence or whether there is mutual benefit to be gained from the successful implementation of the transit regime. The conclusion will also examine possible alternatives which land locked States may look into to circumvent the problems faced in accessing the sea.

PART ONE: CURRENT LEGAL REGIME

Introduction

The international community has recognized and addressed some of the constraints faced by landlocked States through a number of global legal instruments in attempts to facilitate transit and access to and from the sea. Part one of this thesis will outline the global framework and follow the evolution and development of international law related to the right to transit.

Chapter One, will analyse the underlying factors which affect the implementation of the transit regime and what exactly it means for a country to be landlocked and the implementation practicality of the right to transit and access the sea.

Chapter Two will discuss the theories and doctrines which are the historical bases for the claim by land locked States to the right to transit and access to the sea and will layout the various conventions, in historical chronology, which contain provisions to address the challenges faced by landlocked States.

CHAPTER ONE (PART ONE): DIMENSIONS OF LANDLOCKEDNESS

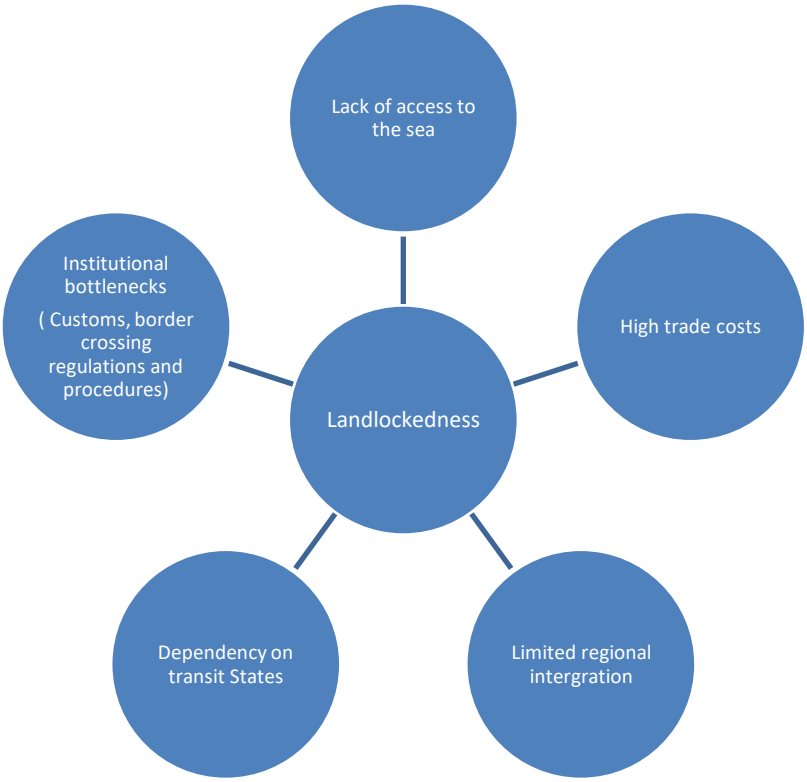
Section A: An Analysis of the Underlying Causes

Facilitating trade flows between countries in the same sub region requires not only an adequate transport infrastructure, but also competitive and reliable transport services. However, both requirements can be met effectively only to the extent allowed by the legal framework governing their operations. Similarly, better regional economic integration is achieved not only by the harmonization of national policies, but also, and perhaps to a greater extent, by the preparation, ratification and implementation of multilateral legal instruments, from the sub region to the continent and to the international level as is encouraged in paragraph 21 (x) of the 2050 Africa's Integrated Maritime Strategy[8]. Those instruments provide the framework needed to underpin the sustainable development of trade flows, themselves harbingers of economic growth and employment generation.

The effective implementation of the transit regime is dependent on various divergent factors. The figure below, although not all inclusive, illustrates some of the dimensions of the landlockedness challenge.

Figure 3: Challenges of landlockedness

[8] See page 66



Due to geographic and other related attributes, landlocked States are confronted with a range of special constraints that inhibit their full participation in the globalization process. Problems of distance are substantially compounded by the need to cross international borders.[9] As a result, the delivered costs of imports are higher, exports less competitive and attraction for foreign direct investment reduced. The economic development levels as well as the political dispensation of the transit States are some of the factors which affect the transit regime as they may impact the availability and state of infrastructure to be utilized in facilitating transit. The key challenge for landlocked States with regard to the implementation of UNCLOS is how both landlocked and transit developing countries fulfill their obligations under the Convention. The cooperation between the land locked States, their transit neighbours and the coastal States to effectively implement transit as provided for in Part X of UNCLOS to put in place facilities and to address all relevant factors affecting the movement of goods through the transit States' territories is crucial.

1.1 Aspects of Transit

The global legal framework creates obligations for transit and coastal States to grant transit in their territories to land locked States. This entails passage from the sea by way of roads, railway, over airspace, as well as sub terraneously and must be facilitated accordingly to accommodate the various facets. The established and most utilised transit transport for landlocked States is surface mode which is fraught with complications from ports as regards storage, customs procedures, availability and status of physical infrastructure as well as the crossing of several international borders which results in delays in delivery and elevated costs of goods to the consumers in the land locked States.

[9] The distances to the sea by road and rail range from 600 to 2,300 Kilometres for Malawi, Zambia, Zimbabwe as per data compiled by the UNCTAD secretariat based on data from the Economic Commission for Africa, Economic and Social Commission for Asia and the Pacific, ECLAC and the World Bank, 2013.

Geographical location is an important determinant of development and landlockedness is a major impediment to trade. The nexus between geographic location, trade and economic growth therefore needs to be examined. As illustrated in Figure 5 above there are several development challenges linked to landlockedness including long distances to the nearest sea ports, dependency on transit countries for access to the seaports, remoteness from markets, additional border crossings, high transport and transit costs, inadequate physical infrastructure, logistical bottlenecks and institutional bottlenecks. The biggest challenge for landlocked States is trading with a third country – while bi-lateral trade is important, most landlocked States can only trade with a third country after having its goods transit through a neighbouring country to a port with additional border crossings. Trade facilitation, the reduction of monetary expenses and bureaucratic hurdles that hinder trade is critical for the effective administration of the transit regime. Below[10] are the logistical indicators used to capture and illustrate these aspects:

Indicator	**Interpretation/Definition**
Documents to Export	Average number of formal documents that exporters need to compile/submit. This is an indicator of bureaucratic hurdles. A larger number of documents means that exporters have to spend more time, and most likely also more money, to be able to carry out their trade activities.
Days to Export	Time required (in days) to complete all procedures related to exporting, including custom clearances and unloading of cargos. Shorter procedures indicate greater easiness to trade
Cost to Export	Cost in US dollar of the fees levied on a 20 feet container to export merchandise out of the country. It is a measure of the monetary cost of trading.
Cost to Import	Cost in US dollar of the fees levied on a 20 feet container to import merchandise from the rest of the world. It is a measure of the monetary cost of trading.
Transport cost of being landlocked	Transport cost for developing landlocked countries in % of trade cost for a benchmark coastal economy

Figure 4: Trade Facilitation Indicators, Source World Bank

According to the World Bank indicators analysis[11], the primary sources of costs are associated with poor performance of transit logistics resulting from a combination of bad design or implementation of transit regimes and unfavorable political economy of transit. The problem of being landlocked has been analyzed mostly at a macro-level with a focus on the

[10] Source UN OHRLLS Study Report March, *THE DEVELOPMENT ECONOMICS OF LANDLOCKEDNESS: Understanding the development costs of being landlocked*, March 2013.

[11] Jean-François Arvis, Gael Raballand, Jean-François Marteau; World Bank Report June 2007; *The Cost of Being Landlocked: Logistics Costs and Supply Chain Reliability*

dependence over transit countries and on land locked States' transport cost disadvantage. Hence, emphasis has traditionally been set on three kinds of measures; transport infrastructure at the national level, international laws and treaties, and cross-border cooperation. The impact of land lockedness can be mitigated by the adoption of transit rules recognised under international law under which bilateral or multilateral agreements can be negotiated and entered into to effectively facilitate transit to the benefit of the land locked, transit and coastal States as well as the development of adequate regional infrastructure. Consideration should however be made that infrastructure development across national borders is more difficult to arrange than similar investments within a country.

The Almaty Programme of Action (APoA)[12] tackles the issues of dependency and accessibility by prioritizing the recognition of freedom of transit in international agreements, the development of transport infrastructure, and the encouragement of transnational cooperation. As illustrated in Chapter Two, Part One of this paper a number of instruments regulating transit have been signed following the recognition of the right to freedom of transit for landlocked countries by the General Agreement on Tariffs and Trade (GATT) Article V.[13]Despite the available facilitating legal framework, poor implementation due to lack of capacity and political will, has proven to be the main detractor to the transit regime in Africa.

1.2 The Transit Regime Logistic Chain

Article 125 of UNCLOS creates the right of transit for landlocked States and thus obligates transit and coastal States to grant and facilitate transit within the ambit of their sovereignty. The transit regime for Malawi, as a member of Southern African Development Community (SADC) and Common Market for Eastern and Southern Africa (COMESA) is regulated by the protocols under the two Regional Economic Communities (RECs) as well as by bi/multilateral arrangements. The effective implementation of transit albeit being regulated at the policy level is also dependent on the availability and quality of infrastructure.

1.3 Marine Port Infrastructure

Ports around the world are key channels of sea borne trade and should offer efficient methods of handling goods, at the most competitive cost and should have well developed corridors linking major economic hinterlands of countries; they are the heart of the logistics supply

[12]The APoA Conference" (2003) highlighted five priority areas for landlocked countries;
• Transit Policy and Regulatory Frameworks: Both landlocked and transit countries should review their transport regulatory frameworks and establish regional transport corridors;
• Infrastructure Development: The need for the landlocked countries to develop multimodal networks (rail, road, air, and pipeline infrastructure projects);
• Trade and Transport Facilitation: The need for the landlocked countries to implement the international conventions and instruments that facilitate transit trade (including the WTO); Development Assistance: The need for the international community to assist by: (1) providing technical support, (2) encouraging foreign direct investment and (3) increasing official development assistance; and
• Implementation and Review: monitoring the implementation of transit instruments and conducting a comprehensive review of their implementation in due course.

[13] See page 40 below.

chain, as they link countries with trading partners. The ports of Southern Africa[14] play an important role in the economies of each country and those of neighbouring landlocked members in the SADC region. Approximately 95 percent of all trade to the region passes through these ports and those of East Africa, providing a vital link in the logistic chain that binds Southern Africa inextricably together. If one port experiences any sort of delay or interruption the effect is often felt across the entire region. Thus efficiency, speed, cost and security are the requisite factors that impact transit trade at the port of entry. For land locked States, ports constitute a crucial link to the global marketplace. The challenges faced at these ports are principally, inadequate physical infrastructure resulting in congestion and weak institutional development.

To function efficiently ports should have both "hard" infrastructure which entails seaport infrastructure and superstructure facilities for loading and unloading cargo and "soft" infrastructure which includes all the administrative and customs services necessary to facilitate the transit of goods, plus the supportive information and communications technologies (ICT). The efficiency of ports is also determined by the "dwell time" i.e. the duration of time cargo remains in-transit storage pending shipment for exports or onward transportation by rail or road for imports. According to the Port Management Association of Eastern and Southern Africa (PMAESA)[15], it is determined that port congestion is a major contributor to dwell time due to among others,

- Increased container traffic volumes not consistent with infrastructure development, thus growth outstrips available capacity;
- Long container dwell times, caused by inter alia, poor off-take by rail and the use of ports as storage areas;
- Lack of adequate capacity and poor hinterland transport infrastructures, especially rail and road;

Another factor which contributes to the inefficiencies in port logistics is customs clearance. As per the African Development Report[16], Sub-Saharan port delays due to customs procedures are more than eleven days. All these contribute to the high costs faced by land locked States as they claim their right to transit.

1.3.1 Port Assessment

The main ports utilised by Malawi are Durban (South Africa), Dar es Salaam (Tanzania), Beira, Nacala and Maputo (Mozambique). South Africa's Durban port is the most developed and second busiest port on the continent and consequently the major problem faced by the Durban port is congestion. However the port is equipped with modern equipment and

[14] The main ports in Southern Africa used by the land locked States under discussion are Durban in the Republic of South Africa, Walvis Bay in Namibia, Beira and Nacala in Mozambique and Dar es Salaam in the United Republic of Tanzania.

- [15] The Port Management Association of Eastern and Southern Africa (PMAESA) was first established as the Port Management Association of Eastern Africa, in Mombasa, Kenya, in 1973, under the auspices of the United Nations Economic Commission for Africa (ECA) with the objective of providing its member`s with a chance to exchange ideas and information through conferences, workshops and media interfaces in matters related to transport and trade facilitation.

[16] African Development Report on Port Development in Africa, 2010.

facilities as well as upgraded infrastructure to accommodate larger ships to dock. South African ports play an important role for the landlocked economies of the sub region, including Botswana, Lesotho, Swaziland, Malawi, Zimbabwe, and Zambia.

The Mozambican ports are of strategic importance to the neighbouring countries Malawi, Zambia, Zimbabwe, Swaziland and South Africa. The port of Maputo offers rail connections to South Africa, Zimbabwe, and Swaziland. Similarly, the port of Beira has rail connections to Zimbabwe and marginally to Malawi and Zambia, while the port of Nacala connects to Malawi. The port of Maputo is Mozambique's largest port and handles cargo to and from Swaziland, South Africa and Zimbabwe but has a small capacity[17] which is inadequate for the traffic which it accommodates. The port of Beira which links directly to Zambia and Zimbabwe by rail and road but only by road to Malawi has more facilities for loading and offloading than the port of Maputo. The Nacala harbor serves its own hinterland and with Malawi to the west, to which it is connected by rail, it also has the potential to service Zambia through Malawi. Because of it natural deep water and sheltered position, Nacala has no restrictions on ship movement or size. The main challenge faced by land locked States in the usage of the Mozambique ports was the civil war but since the end of the strife there have been major reforms with positive opportunities for coastal shipping. However due the legacy of war there is inadequate investment in infrastructure rehabilitation and construction requiring major upgrading.

1.3.2 Customs

Another important aspect in the transit chain is the application of customs processes on transiting goods. This has long been recognised on the international scene and has been provided for in the instruments which facilitate the global transit regime. The Barcelona Convention (1921) in its Articles 3 and 4 provides that, "*Traffic in transit shall not be subject to any special dues*". The GATT (1947) in its paragraph V also provides, "…*such traffic…shall be exempt from Customs duties*." The New York Convention (1967) also makes a recommendation on the same in its Principle IV and states, "…*Goods in transit should not be subject to any Customs duty*." The position was further concretised in Article 127 of UNCLOS which makes provision for the non-subjection to customs duties, taxes or other charges on transit traffic and further provides that means of transport in transit are not to be subject to taxes or other charges higher than those levied on means of transport of the transit State.

On the regional scene the transit facilitating instruments such as the African Economic Community Treaty (1994) in Article 39 provides that Member States, "…*shall take all necessary measures for harmonising and standardising their Customs regulations*" and in Article 42 it takes cognizance of the GATT which as stated earlier provides for the exemption from Customs duties for transit traffic. The African Maritime Transport Charter (revised 2010) makes no direct relevance to the aspect of Customs but states that, "*States Parties are encouraged to enter into bilateral and multilateral transit agreements and apply in a concerted manner…international conventions*."
The SADC Protocol on Trade (1996) provides for "…*the phased reduction and eventual elimination of import duties*…" but this is only as regards goods originating in the Member States. Article 45 of the COMESA Treaty provides for the creation of a Customs Union and states that, "…*within the Customs Union, customs duties and other charges…on imports shall be eliminated.*" The SADC Protocol on Transit Trade and Transit Facilities (1996) in

[17] The port has small storage capacity of 1,504 TEUs. Source: African Development Report 2010

Article 2(3) provides that, "*Member States undertake not to levy import or export duties on transit traffic*." It is clear from the above cited instruments that recognition is granted to the need for the elimination of custom duty on transit traffic. On the regional front the most enabling provision is Article 45 of the COMESA Treaty as it clearly provides for the elimination of customs duties. As regards the bilateral and multilateral agreements the areas for negotiation will be on charges relating to administration costs of effecting the transit since the instruments both at regional and international level all require such charges to be reasonable and not higher than those levied on goods local in the transit States.

Further to the enabling provisions in these instruments the United Nations Conference on Trade and Development ASYCUDA is available to assist in the computerised customs management system which covers most foreign trade procedures. The system handles manifests and customs declarations, accounting procedures, transit and suspense procedures. The system assists countries in the COMESA under its Customs Procedure Code to determine levels of import and export flows and aims to determine the treatment which goods are subjected to at customs points. However COMESA and SADC countries face several challenges in pursuing open regionalism in the form of a commitment to nondiscriminatory tariff liberalization due to dependence on trade taxes. For almost all member countries in COMESA and SADC, revenue from trade taxes is at least 10 percent of total government revenue and harmonizing a common external tariff involves significant adjustments and carries the risk that some countries will end up closing rather than opening their economies.[18]

1.4 Transit Corridors - Surface Infrastructure/Route Choices

The availability of sound infrastructure from the maritime ports through the territories of the coastal and transit States to the final point of delivery in the land locked States is the backbone for the successful implementation of the transit regime. In recognition of this aspect of the improvement of the implementation of transit The Almaty Programme for Action in its Priority Area 2 focuses on the improvement of rail, road, air and pipeline infrastructure. In Southern Africa the available modes of transport are rail, road and air; road transport being the most predominant form. Transit corridors are therefore the most practical route choices for the transportation of goods for Malawi.[19] However, infrastructural bottlenecks along these corridors such as poor roads and bridges, confusing border logistics, and complex customs procedures often hamper operations. SADC recognises that these transport corridors require special attention. Therefore, in its Protocol on Transport, Communication and Meteorology[20], it calls for the creation of Corridor Planning Committees to focus on specific strategies for development along the region's key corridors.

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[18]International Monetary Fund Working Paper Policy Development and Review Department, COMESA and SADC: Prospects and Challenges for Regional Trade Integration Prepared by Padamja Khandelwa Authorized for distribution by Hans Peter Lankes December 2004.

[19] The shortest distance to the sea for Malawi is 815Kilometers. Source: UNCTAD Report to the First Session of the Intergovernmental Preparatory Committee Of The International Ministerial Conference On Transit Transports Cooperation on the Improvement of Transit Systems in Southern and Eastern Africa, New York 2003.

[20] *See* below p67 Article 3(5) provides, "*Member States shall promote the establishment of cross-border multimodal Corridor Planning Committees comprising of public and private sector stakeholders in the Member State or States whose territory or territories are traversed by such corridors."*

These Corridor Planning Committees are cross-border entities comprised of both public and private stakeholders from transport and infrastructure authorities, customs authorities, trade and industry bodies, and users of the development corridors. These Committees are charged with determining specific requirements of their respective corridor and overseeing plans for their development. The key corridors for Malawi are the Nacala, Beira, Dar es Salaam and the North South corridors. Below is an illustrative map of the corridor routes.

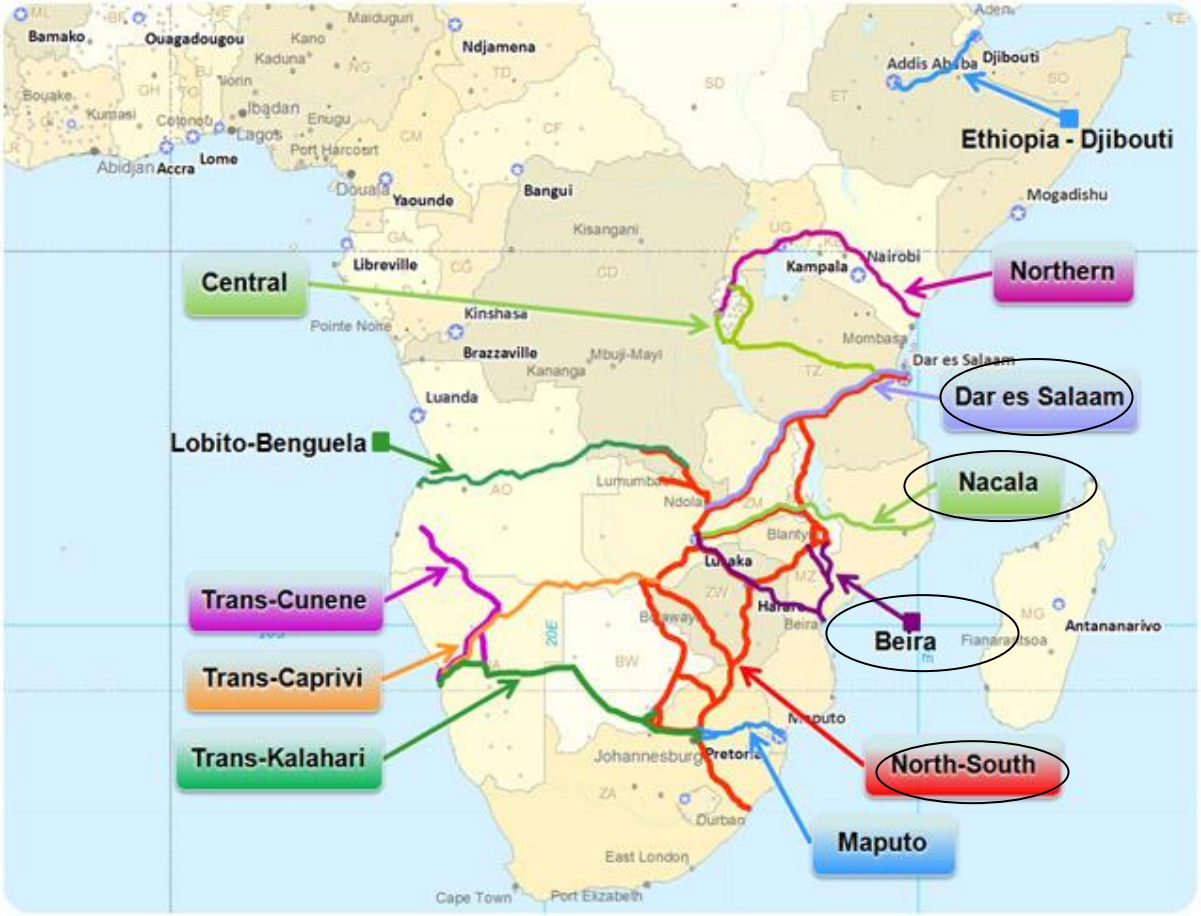

Figure 5: Transit Corridors. Source: earthdar.wordpress.com

1.4.1 Corridor Infrastructure Assessment

The purpose of the corridor clusters in SADC is to facilitate joint planning, implementation, coordination, monitoring and reporting of regional trade, transport facilitation and implementation of infrastructure projects by the grouping of countries served by a set of corridors which share ports and or other transport and logistics infrastructure. The Corridor Cluster is used as an organisational vehicle for consultations and convening technical and ministerial meetings that address the common issues across a set of corridors shared by countries. This approach is motivated by the absence of formal and functional joint corridor management committees in the majority of corridors and the need to rationalise corridor

institutions and meetings. The cluster approach allows Member States where justified to meet at specific corridor level or bilaterally as necessary.

The clusters relevant to this discussion are the Eastern Corridor Cluster which encompasses the Dar es Salaam Development corridor (Dar es Salaam port in Tanzania) and serves the Democratic Republic of Congo, Malawi, Tanzania and Zambia; the Nacala Development corridor (Nacala port in Mozambique) which serves Malawi, Mozambique and Zambia; the Beira Development corridor (Beira port in Mozambique) which serves Malawi, Mozambique and Zimbabwe and the North South Corridor Cluster which through the port of Durban (South Africa) serves Botswana, The Democratic Republic of Congo, Malawi, Mozambique, South Africa, Zambia and Zimbabwe.[21]

The effective implementation of the corridor infrastructure development is dependent on the existing legal framework at the regional level as well as agreements entered into at the bilateral and multilateral levels. The regulations at the national level in the concerned States in the corridors also play a significant role in the facilitation of the infrastructure development.

1.4.1.1 Dar es Salaam Development Corridor

The Dar es Salaam Corridor to Zambia and Malawi comprises road, rail and pipeline to the two States. The Malawi northern route connecting to the Corridor includes combined rail/lake/road and road routes. The connection is at Mbeya in Tanzania (close to the Malawi border) where Malawi has got an important cargo terminal, which has recently been converted into a dry port. The Dar es Salaam Corridor Constitution was signed by the corridor stakeholders from Tanzania, Malawi and Zambia in 1996 with the exception of The Democratic Republic of Congo which has not yet signed pending conclusion of a Memorandum of Understanding amongst corridor State parties which was still under discussion as of 2009. A survey carried out in 2009[22] indicated that of the 606.7 kilometers on the Dar es Salaam Corridor from Malawi, 5.9% of the road network was in poor condition, 59.7% was in fair condition and 34.4% was in good condition. The report indicated that as regards the road network from Zambia, 56% of the road was in poor condition, 16% was in fair condition and 28% was in good condition.

1.4.1.2 Nacala Development Corridor

The Nacala corridor is the main transit route to Malawi by rail and it also offers transit routes to Mozambique and Eastern Zambia. A Memorandum of Understanding was signed by Mozambique, Malawi and Zambia for the operationalisation of the rehabilitation of the corridor in the year 2000. The corridor is 466 kilometres from the port of Nacala to Zambia. The Memorandum catered for the rehabilitation of the Nacala port from 2009 to 2017, to include the dredging of the channel as well as the construction of a container terminal. The

[21] *See* Figure 5, page 13

[22] SADC Regional Transport Corridors Status and Progress Reports, Meeting Of The Committee Of Ministers Responsible For Transport And Meteorology, SADC Regional Transport and Development Corridors: Progress and Status Report, 16th October 2013, Zimbabwe

aforementioned report[23] stated that the immigration system at the Mchinji /Mwami border post between Malawi and Zambia was still manual, resulting in delays to traffic; the border post is the only border post which opens 24hours to facilitate trade. However the customs procedures were computerized and Malawi Revenue Authority uses Automated System for Customs Data (ASYCUDA).
The road network is under rehabilitation with combined funding from the Malawi Government, the European Union and the African Development Bank[24] on the section which passes through the territory of Malawi. The section of the road in Mozambique is awaiting asphalting pending the conclusion of agreements for funding from the Exim Bank of Korea and with contractors to carry out the work.[25]The Zambian section of the road which is 360 kilometers long is also undergoing rehabilitation with funding from the European Union.

The report also noted that there is slow progress regarding the commencement of the commercial operations of the Nacala Port Railway line which will run from the port through Malawi to Zambia. However in 2011, Malawi commenced the construction of a railway line from the port of Nacala through the existing railway network in Malawi and Mozambique.

1.4.1.3 Beira Development Corridor

The Beira Corridor is a gateway to the sea for Malawi, Zambia and Zimbabwe. The route to Malawi has two parallel links, one rail and one road. The Beira route to Zimbabwe and Zambia is a network of road and rail route. A Memorandum of Understanding was signed between Mozambique and Zimbabwe in 2007 and is under revision to include Zambia, Malawi and the Democratic Republic of Congo. In 2013 the inaugural Beira Corridor Development Summit was launched and the event focused on the development of transport infrastructure in the region. A feasibility study[26] for the Inland Cargo Terminal on the Beira Corridor was undertaken and a final report was submitted on the 6th September 2013 to SADC and it indicated that the rail track infrastructure, signalling and telecommunication system requires rehabilitation from Zimbabwe through Malawi to Beira. The dredging of the port was completed in 2011. In October 2014 the Beira Corridor Development Summit will meet in Mozambique to assess the progress of a comprehensive range of topics relating to the growth of Beira Development Corridor.[27]

1.4.1.4 The North South Corridor

The North-South Corridor is a combination of two traditional corridors, Durban Corridor and the Dar es Salaam Corridor linking the port of Durban and other ports in Southern Africa to the Eastern Port of Dar es Salaam. It comprises access routes to South Africa, Zimbabwe, Zambia, Democratic Republic of Congo and potentially the Great Lakes Region countries and it is the busiest corridor in the region in terms of values and volumes of freight. However as of 2013 the draft Memorandum of Understanding between the States through which this corridor passes was still under review resulting in the failure to establish the Corridor Management Committees as required by the SADC Protocol on Transport, Communication and Meteorology. Poor road and rail infrastructure and long waiting times at borders and ports create significant costs and hamper access to regional and international markets.The aforementioned SADC report indicated that the railway network is in need of serious

[23] See footnote 22
[24] See footnote 22; Implementation matrix
[25] *ibid*. footnote 22
[26] *ibid*. footnote 22
[27] Infrastructure Trust Fund European Union Africa, Beira Corridor Project report, August 2014

rehabilitation and recapitalisation especially in the Democratic Republic of Congo, Zambia and Zimbabwe.

In light of the challenges identified, the North-South Corridor programme aims at the maintenance and upgrading of roads, establishing a system to more efficiently control axle loads, reduce border post delays and rehabilitate rail track along the corridor. Faster border crossings and improved port facilities, railways and highways will enable producers and traders, especially in landlocked countries, to transport their goods quickly and access more easily regional and international markets. It also aims to simplify regulatory processes to speed up cross border clearing procedures, harmonise transit and transport regulations, and simplify administrative requirements. Expected outcomes[28] from improvements along the Corridor include, overall reduction of the transport costs and transit times for traffic between Dar es Salaam and Lusaka of at least 25%, a reduction in travelling times by road from Lusaka to Durban of at least 10 per cent, a reduction in transit times at the border post between Zimbabwe and Zambia of at least 20 percent and latent reduction of transit costs and times for traffic between East Africa and southern Africa.

Conclusion

It is evident that the surface transport infrastructure in the SADC transit regime is in need of sustainable and coordinated rehabilitation efforts since the rate of the reconstruction is at different paces in each State mostly dependent on the national legislation and financing sources and funding allocation. In order to establish national and regional transport policy linkages it is necessary for member States to develop national transport policies which create a legal frame work for the joint governance of the transit corridors. Corridors without established monitoring institutions are coordinated bilaterally or through cluster structures which is not an effective mode of operation as the corridor management is inadequately monitored at the bilateral level despite such agreements being reflective of the interests of the States party to them. Accordingly, the implementation of the regional agreements, protocols, memorandum of understanding and other cooperative frameworks can serve a good purpose as instruments for cost and time effective transit systems. This means that tremendous progress would be made in alleviating the burden of land-locked countries should these cooperative transit arrangements be fully implemented and complied with.

The harmonization and coordination of transit transport systems in the region remains a big challenge as transit operations still tend to be fragmented rather than integrated. This is applicable to all aspects of transit as discussed in this section of the paper from port administration, customs procedures, other administrative charges and costs imposed on transit traffic through to route choices and the construction and rehabilitation of surface infrastructure.

[28] North-South Corridor Conference Press Release, COMESA-EAC-SADC Tripartite Aid for Trade Programme, April 2009, Lusaka, Zambia.

The next chapter of this paper will proceed to discuss the implementation practicality of the transit regime in relation to the discussed legal framework, the institutional efforts and the underlying factors at the regional level.

CHAPTER ONE (PART ONE)

SECTION B: Implementation Practicality (Prisoners of Geography)

Due to globalization and the resultant economic integration, all countries of the world have become part of a "global village." This integration of world economies has proven to be a powerful means for countries to promote economic growth and development and to reduce poverty. All countries should thus be able to participate in the world market and have equal opportunities to access world markets. Unfortunately, land locked States do not possess that equal level of privilege to enter the market for one reason – geography. The impact of geographical location varies on each landlocked State depending on whether they are more or less favourably located as regards the distance and other factors required for them to access the sea.

2.1 Factors Affecting Implementation of the Transit Regime

The effective implementation of the right of transit to the sea is affected by various factors including but not limited to, the political environment and policies in the transit States, the level of economic development which strongly impacts on the type, status and quality of transit infrastructure which may result in the most convenient route as per Article 2 of the Barcelona Statute,[29] being granted not being as feasibly convenient for transit, sources of donor funding and Foreign Direct Investment which may indirectly impact on policy direction in the relations with certain States, as well historical influences which may affect present day relations between these States.

2.1.1 Implementation of the Governing Legal Framework

Territorial sovereignty vis-a-vis the right to transit as guaranteed by Article 125 (2) of UNCLOS seems to have placed the land lacked States at a disadvantage since for passage to be granted through the territory of the transit States, "*The terms and modalities…shall be agreed…through bilateral, sub regional or regional agreements*". As has been discussed in preceding chapters, despite there being regional instruments which cater for the implementation of transit, transit is facilitated under bilateral agreements under which, "*Transit States…have the right to take all measures necessary to ensure that the rights and facilities provided for…for land locked States shall in no way infringe their legitimate interests*.[30]" State sovereignty is an important principle of general international law[31] and the international instruments earlier reviewed refer to three main situations that trigger protection of the interests of transit States and restrict right of access namely, security and health, exceptional circumstances, and superior conventions. As such, transit States may undertake various measures to protect their territorial integrity and legitimate interests against all foreign risks.

Many of the regional and bilateral agreements governing transit transport for land locked States do not go so far, as to specifically "*define the conditions, obligations and rights under which the parties will use the transit facilities*,"[32] but rather, are usually more general in nature. For instance, the EAC merely provides for "*cooperation*" between landlocked States and coastal States,[33] COMESA similarly proposes "*cooperation*" and provides for "*special treatment*" for landlocked States,[34] and the SADC provides for "*unimpeded access*" to the sea for landlocked States,[35] while the Treaty of Montevideo of 1980 proposes "*collective and partial cooperation actions*," "*support*," "*effective compensation mechanisms*," and the establishment of "*free zones, warehouses or ports*" for the benefit of landlocked States in the territory of member coastal States.

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[29] See page 39

[30] Article 125 (3) UNCLOS.

[31] See Helmut Steinberger, *Sovereignty,* in *Encyclopedia of Public International Law* vol. 10, 397–418 (North-Holland 1997)

[32] *See, e.g.,* Mongolia-Russia Treaty Art. 2; EAC Art. 93; COMESA Arts. 84 & 88; SADC Protocol Ch. 3.2; SADC Private Sector; NCTA §§ 4-9; Mercosur Art. 1, Treaty of the River Plate Basin Art. 1, LAIA Treaty Arts. 18, 21, 22 & 23; Bolivia-Peru Agreement Art. 2. *Cf.* APTTA (which is fairly comprehensive in comparison to most of the other agreements referenced in this footnote).

[33] EAC Art. 93.

[34] COMESA Arts. 84 & 88.

[35] SADC Protocol Ch. 3.2.

The implementation of provisions of the global and regional legal framework facilitating transit on the continent has met challenges. However the encompassing nature of these regional arrangements, while providing structural integrity for the area concerned, may not adequately address the unique needs of the individual land locked States located within the region. It was reported by the representative of the Sub-Saharan African Transport Policy Programme (SSATP) on the Review of Legal Instruments for Trade and Transport Facilitation in Sub-Saharan Africa at the African Regional Review Meeting of the Almaty Programme of Action[36] that although there is no shortage of legal instruments in Africa, the challenge is the implementation and the lack of enforcement. Participants[37] to the meeting stated that some of the reasons why only few African countries are signatories to major international treaties and conventions related to transit transport and trade facilitation include the fact that that African countries are not sufficiently aware of the existence of the major international Treaties and Conventions nor informed of the key issues contained in them due to lack of information.

Moreover, they generally lack the capacity to analyse technical issues dealt with by major international treaties and conventions and to fully appreciate the implications of signing these instruments. It was felt that this partly explains why many African countries have adopted a prudent approach with regard to signing international treaties and conventions. It was also noted that most African countries are not associated with major treaties and conventions because they were not active participants in the negotiation processes nor find sufficient incentive to ratify or accede to them. In essence, the absence of a sense of ownership among African countries makes it difficult for them to ratify them.

It was also reported by the SSATP representative that the SSATP carried out a study[38] on the International Legal Instruments which were grouped into three categories, namely worldwide conventions, regional instruments covering the whole of Africa and sub-regional instruments such as the REC and corridor instruments. Lessons learned from the study indicated that the treaties, conventions, protocols and other instruments, often either overlap or contradict each other. In drafting the instruments, the hierarchy is not respected. In some cases, the statutes include provisions extracted from an international convention that has not been accepted by other countries, which may result in conflict. The lack of effective implementation of relevant conventions and regional agreements on the ground therefore renders land locked States to continue to incur high transport and trade transaction costs.[39]

In effect the negotiation of bilateral agreements for transit leaves the landlocked States at the mercy of the factors pertaining in the transit and coastal States as the facilitation of transit is through bilateral conventions, notably those between landlocked and transit countries, under the umbrella of the legal framework of sub-regional and regional programmes and projects,

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[36] United Nations Economic Commission for Africa, African Region Review Meeting of the Almaty Programme of Action Report, June 2008, Addis Ababa, Ethiopia, E/ECA/ALMATY/08.

[37] See footnote 22 at page 3 paragraph 22 of the Report.

[38] Sub-Saharan African Transport Policy Programme (SSATP) Study Report 2004, presented at the Seminar on International Treaties and Conventions in the area of Transit Trade, 17 June 2008, Addis Abba, Ethiopia.

[39] According to World Bank 2013 estimates landlocked States spend, on average 2.5 times more than transit/coastal countries to export or import a standardized container of cargo. See Report of a Brainstorming Meeting held as part of the preparatory process for the Comprehensive 10 Year Review of the Implementation of the Almaty Programme of Action United Nations Headquarters, New York, March 2013

including those of RECs and corridor management organisations.[40] It has however been posited by some economists that the inherent weaknesses in the negotiating position for land locked States is abetted by the fact that the transit States are often economically dominant.[41] Because the negotiating power of all states is dependent in part upon the degree of economic power exercisable by an effective government, some developing land locked countries are at an even further disadvantage than that presented by mere geography. This imbalance in the level of development creates problems in balancing equitably the interests of land locked States and their transit neighbors. Access of to the sea and ports for land locked States is dependent on their immediate neighbours, and is thus subject to their ability to establish appropriate political and commercial relationships with them.

Land locked and transit States have taken a number of initiatives to coordinate transit transport operations as an integral part of formal bilateral and sub regional transit agreements or ad hoc consultative arrangements. The implementation of these coordination arrangements, however, remains generally weak because of the lack of effective monitoring and enforcement mechanisms.[42] As such, structures need to be put in place to effectively take up the task of monitoring and identifying gaps in the system and be used as a basis for the improvement on the same. Such structures would be more effective as national focal points with a reporting mechanism at regional level for accountability purposes. The implementation of transit agreements is complicated by various protectionist measures imposed by Governments, as well as overlapping customs and transit documents, which in turn create the need to harmonize and unify the facilitating documents. While bilateral, sub regional, and regional arrangements may consist of notable efforts to provide for the unique needs of land locked States,[43] there seems to be an insufficient international surveillance and enforcement system to guarantee that state-state or regional agreements actually work in practice.

2.1.2 Trade Facilitation

Trade facilitation or soft infrastructure includes transactions that allow trade to be processed such as customs and border procedures, automation of processes, transparent and consistent fees and charges as well as regulatory consistency in how rules at borders are applied. Good trade facilitation procedures are crucial for landlocked States and there is a need to have a set of principles agreed by all involved in the transit chain. Land locked States depend on their neighbours to have smooth procedures for clearing transit goods. Transparency, consistency and predictability are not just of theoretical utility for the effective facilitation of the transit regime, they are the necessary ingredients for making trade flow in and out of their borders. The adoption of the UNCTAD ASYCUDA has also contributed to easing of procedural steps

[40] The participants further reported at the meeting (see note 159) that most African landlocked countries have signed separate bilateral customs and border agreements with their transit neighbours with the view to facilitating international trade which was however inefficient and it was proposed that there was need for the shifting from bilateral to regional agreements would result in efficiency gains.

[41] The GNP (gross national product) per capita of both land locked States and coastal developing countries varies greatly but on average it is considerably lower on average in the landlocked States. See *Landlocked Developing Countries: Their Characteristics and Special Development Problems,* report prepared by David M. Nowlan, UNCTAD/ST/LDC/5 (July 11, 1985) at paragraphs 26–27.

[42] See section on Corridor Assessment. Page 12 supra.

[43] *See*, *e.g.,* EAC; COMESA; SADC Protocol.

of trade and thereby diminishing transaction costs since when adopting ASYCUDA, countries are also expected to adopt and implement relevant international standards and best practices.

However it has been reported that corruption through bribery of a range of officials having a combination of discretionary power and a quasi-monopoly position in the logistics chain, is a critical problem.[44]Transit operations are vulnerable to fraud and extortion because they take place over an extended period of time, over long distances, and often with minimal supervision. For example, corruption can increase the total shipping costs, including costs of overland transport, port clearance, and ocean shipping, of a standard 20-foot container traveling between South Africa's economic hub and eastern Africa or the Far East by up to 14 percent and the total port costs by up to 130 percent. In a comparison between the ports of Maputo (Mozambique) and Durban (South Africa), bribery of *customs* officials accounted for 80 percent of total bribery in Maputo, but only 10 percent in Durban (2009).[45] The explanation was that, in Maputo, a low level of automation existed and both monitoring and sanctioning were weak, whereas in Durban, the opposite was the case. In contrast, bribery of *port* officials was lower in the privately concessioned Maputo port, where a higher level of automation, monitoring, and sanctioning exists than in the publicly operated Durban port, where automation is low and monitoring and sanctioning are weak. Petty corruption involving illegal and undocumented payments is found among frontier staff at all levels. It is simple for officials to turn the regulations to their advantage, and if no payment is made they can deliberately delay operations or apply any measure to the letter, thus making any border crossing a challenge.[46]

The efficient operation of transit corridors is crucial for the enhancement of trade facilitation. Thus the quality of service provided along a corridor is very important in assessing the performance and effectiveness of corridor groups. Indicators for measuring the quality of service include time and cost. These indicators contribute to identifying those components of a corridor that would offer the greatest savings if they were improved and these include traffic volumes, transport cost, turnaround time of trucks and wagons, port dwell time, border post transit times, and variation of all the above times. The development of coherent and comprehensive transport policies by land locked and transit States to support the transit corridors is therefore important to facilitate trade.

It was reported at the Africa Trade Forum 2011[47] that institutional and staff capacity building is an important aspect in the improvement of transit transport. Hence it is important that landlocked and transit countries embark on public administration reforms to improve the performance of all agencies involved in trade facilitation, particularly the development of a single-window concept and the streamlining of one-stop-shops for import and export clearance. The strengthening of the whole institutional framework of stakeholders involved in the facilitation should be ensured. Initiatives include the establishment and implementation of region-wide harmonized transit procedures or trade facilitation measures should be embarked

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[44]*Africa's Infrastructure: A Time For Transformation*, Vivien Foster & Cecilia Briceño-Garmendia, African Development Bank Group.

[45] See note 39

[46] René Peña Castellón, Improvement of Transit Systems in Latin America, Trade and Development Board, at 31, UNCTAD/LDC/2003/6, UNCTAD.ORG (7 April 2003), http://archive.unctad.org/en/docs/ldc20036_en.pdf (Improvement in Latin America)

[47] Meeting on the Development of Trade Transit Corridors in Africa's Landlocked Countries, under the Accelerating Intra-African Trade and Enhancing Africa's Participation in Global Trade UNECA-UNCC, November 2011, Addis Ababa, Ethiopia.

on since most of the challenges stem from a lack of coordination between the landlocked and transit countries.
Efforts to reduce administrative charges and delays have however taken place at the regional level in SADC and COMESA, for example, where the States have introduced common licenses and third-party insurance guarantees across countries, significantly reducing transit costs.
In December 2013, World Trade Organisation members concluded negotiations on a Trade Facilitation Agreement[48] which contains provisions for expediting the movement, release and clearance of goods, including goods in transit. It also sets out measures for effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues. The Agreement contains unique special and differential treatment (SDT) measures that link the requirement to implement with the capacity of developing and least developed countries. It further contains provisions for technical assistance and capacity building in this area. The Agreement will enter into force when it has been ratified by two thirds of the WTO Membership. This is a positive development which landlocked States should take advantage of at the bilateral and regional level by ratifying the Agreement and thus the benefits provided for there under.

2.1.3 Political Environment

It has been earlier alluded to that the prevailing political situation in the transit and coastal States may affect the facilitation of the transit regime. An illustration of the political environment[49] affecting the right to transit is the case of Malawi and Zambia failing to utilise the Nacala Port in Mozambique which is the nearest maritime port in the region for the two countries due to the civil strife[50] which destroyed the connecting railway line and rendered the port practically inaccessible; the port and the railway line as earlier discussed are both currently undergoing rehabilitation. During the Mozambican civil war, Malawi was forced to reroute its freight, 95% of which normally passed through the ports of Beira and Nacala, to the much more distant ports of Durban and Dar es Salaam. It is estimated[51] that the average surface costs to these ports are more than double those to Nacala and Beira via the traditional rail routes. The average transit times to Durban (7 days) and Dar es Salaam (6 days) are also nearly double that to Nacala (4 days) and Beira (3 days). The rerouting is estimated to have cost Malawi an additional US$50–80 million (4–6% of the GDP) per year, with insurance and freight costs doubling from 20% of the import bill in the early 1980s to 40% by the latter half of the decade.

Furthermore, if a land locked State and its transit neighbor are in conflict, either military or diplomatic, the neighbour can easily block borders or adopt regulatory impediments to trade. Even when there is no direct conflict, land locked States are extremely vulnerable to the political vagaries of their neighbors. The meeting of the APoA Implementation review aforementioned further noted that political instability reverses gains in trade facilitation. The participants acknowledged that landlocked countries are particularly vulnerable, as their trade is

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[48] WT/MIN (13)/36

[49] *See* Jeffrey Sachs, *Making Globalization Work* (JAMA Lecture, Elliott School of International Affairs, George Washington University, February 15, 2000), http://www.gwu. edu/~elliott/news/transcripts/sachs.html;

[50] The civil war in Mozambique lasted from 1977 to 1992, a total of 15 years.

[51] *The Challenges Facing Landlocked Developing Countries* Michael L. Faye, John W. Mcarthur, Jeffrey D. Sachs and Thomas Snow, *Journal of Human Development* page 47, Vol. 5, No. 1, March 2004, Carfax Publishing.

not only hampered when they face internal crisis but also when such crises destroy trade infrastructure and disrupt transit operations in neighbouring transit countries.[52]

It is obvious that politics determine policies regarding relations with other States and extends to what agreements each State enters into at all levels. Governments will enter into arrangements which are of benefit to their economies and thus when negotiating transit operation agreements the mutual benefit factor must not be underplayed. Consultations or alliances with neighbouring landlocked or transit countries can thus help to share experiences, to economize on costs and to increase bargaining powers. Each land locked State has its own challenges peculiar and specific to the factors prevailing within its borders and those in the transit States it deals with, which must be factored when policies are being made regarding what aspects to be prioritised in bilateral arrangements whilst striking a balance with the interests of the transit States. While land locked States share the common attribute of geographic location in terms of distance and separation from the sea and ports, they differ considerably in a number of other important aspects. These differences are the basis of the divergent policy directions. To some extent, different policy responses to overcome geographical disadvantage are reflective of the different nature of each land locked State's particular competitive and comparative advantages.[53]

Clearly, land locked States thus depend heavily on the transport policies of transit States. As Jeffrey Sachs said, "A landlocked country is in the distant, distant periphery [of economic development]. Being landlocked is a major barrier to international trade because the costs are simply much higher." Sachs further noted: "Generally, coastal countries don't like to help their landlocked neighbors. The weaker the better is often the reasoning, from a military point of view. So they don't build the roads, they don't give access to the ports."[54]

The relations between the States may also be predetermined by historic influences due to the border demarcations made by the colonial masters. The arbitrary nature of the boundary demarcations which are based on the ancient administrative subdivisions of the colonial masters have resulted in some tensions between landlocked States and their transit neighbours.[55] The current political boundaries in Africa were created by European powers during the Berlin Conference of 1884-1885, whereas trade between Africans had endured for centuries beforehand.[56] It need hardly be mentioned that the people living in landlocked areas in Africa were not consulted about their preferences or thoughts on rights of sea access during a Conference at which they were not present.

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[52] See report in footnote 22 at paragraph 59 page 10 of Report cited.

[53] For example, in the apartheid years of the late 1980s and early 1990s, investors circumvented economic sanctions against South Africa by using neighbouring Lesotho and Swaziland as a base for reaching the large South African market. These two land locked States thus benefited from considerable investment by virtue of their neighbouring South Africa.

[54] *See* Jeffrey Sachs, *Making Globalization Work* (JAMA Lecture, Elliott School of International Affairs, George Washington University, February 15, 2000), http://www.gwu. edu/~elliott/news/transcripts/sachs.html (noting that landlocked states depend on strong political relations with transit countries)

[55] The wrangle over Lake Malawi between Malawi and Tanzania is a case in point. Also see M. A. Sulaiman, *Free Access: The Problem of Land-locked States and the 1982 United Nations Convention on the Law of the Sea,* 10 S. Afr. Yrbk. Int'l L. 145 (1984); *see also* Anthony D'Amato, *International Law: Process and Prospects* (Transnational Publishers 1987).

[56] Theophilus Fuseini Maranga, *The Colonial Legacy and the African Common Market: Problems and Challenges Facing the African Economic Community*, 10 HARV. BLACKLETTER J. 105, 113-14 (1993) (Maranga).

2.1.4 Economic Development

The level of economic development is another factor which impacts the facilitation of transit as it affects the availability as well as the quality of infrastructure in the transit State. Most transit States although in better economic standing than their land locked neighbours, still fall in the category of developing countries with similar deficiencies in their transport systems economic structures and thus have high dependency on donor funding to sustain their economies.[57] To access donor assistance, countries usually have to satisfy minimum standards such as good governance and hold good human rights records among others[58]. In the event that the land locked States and the transit States are at opposing ends of the spectrum as regards their respective donors' standards, the government policies pertaining to their relations with each other may resultantly be strained and thus affect their ability to negotiate and enter into bilateral agreements to facilitate transit. This also trickles down to the withholding of donor assistance to finance infrastructure development and rehabilitation.

In Sub-Saharan Africa the biggest financier of capital investment are the governments. However the main challenge they face in this regard is under spending on infrastructure asset maintenance which results in major waste of resources because the cost of rehabilitating infrastructure assets is several times higher than the cumulative cost of sound preventive maintenance. Because central governments are such key players in infrastructure investment, inefficiencies within the public expenditure management systems are particularly detrimental. To close funding gaps inevitably requires undertaking needed policy reforms to reduce or eliminate the inefficiencies of the system. Only then can the infrastructure sectors become attractive to a broader array of investors and other financiers.

Official development assistance to developing countries is required and it should give special attention to the unique needs of those that are landlocked. In particular, official development assistance strategies should recognize low-income landlocked countries' large infrastructure needs and the requirement for increases in direct assistance to support large-scale investments in roads and railways. Such investments need to include not only the up-front improvements of the transport infrastructure, but also operations and maintenance. Since the landlocked developing countries typically suffer from a general lack of resources and under-funded social sectors due to their inherent structural barriers in trading with the international economy, they typically require even greater external resource support than their low-income maritime neighbours, which also need to be a priority for official development assistance flows.

Regional integration of coherent transit policies and a unified position of economic development goals may assist in the attraction of Foreign Direct Investment (FDI). The land locked States in southern African are small in terms of market size, and by entering into regional agreements they increase their attractiveness by providing access to a larger market than their own. The reduction and/or elimination of tariffs and other barriers among countries comprising a region bloc creates, in effect, one large market that is attractive to market seeking investment. In this context, landlocked States may search for complementarities with neighbouring transit countries on specifically mutually beneficial investments on which policies can be based to source official development assistance and other international funding assistance on joint FDI promotion programmes. The lack of a coordinated front has affected the development of infrastructure in the transit regime more specifically the corridors

[57] See previous chapter on infrastructure assessments.
[58] See page 9, note 12

as discussed earlier as the requisite soft infrastructure is not in place. Success in attracting investments therefore requires FDI policies that establish a favourable investment environment which is grounded in coordinated national policies.

However, the fact that geography is unchangeable should be acknowledged and should receive an adequate policy response. This implies that, for purposes of formulating policy on FDI, the approach of land locked States cannot be the same as that of other States or other developing countries; a common approach may lead to generalizations that often are inappropriate for individual land locked States.[59] As each landlocked country has different coastal neighbours, each is impacted to a varying degree by the stability and relative development of its neighbours. For instance, the position of landlocked countries in Europe as will be discussed in the forthcoming chapter will illustrate the impact that the development of a land locked State's neighbours has on the facilitation of transit.

The high level of dependence that land locked States have on the development of their coastal neighbours is exemplified by the situation in southern Africa where Swaziland which borders South Africa performs significantly better than the other land locked States which are geographically further.[60]

It was emphasized by UNCTAD's Trade and Development Board[61] that there is need for co-operation in infrastructure to evolve co-ordinated, harmonized, and complementary transport and communication, improving the existing transport and communication links and establishing new ones as a means of furthering the physical cohesion of the Partner States and facilitating and promote the movement of traffic within the community. On a positive note land locked and transit developing countries have continued to make significant investments in their infrastructure development, subject to the availability of financial resources. The major sources of such investment, in the form of grant aid or soft loans have been their development partners with regional development banks, the World Bank, the European Union and Japan prominent among them.[62]

2.1.5 Documentation and Data

Another factor to be considered in attempting to comprehend the dimensions of land lockedness and the challenges in the facilitation of the transit regime is the reality that the improvement of transit transport is often hindered by a lack of reliable data on the costs of alternative routes, including the potential for uncertainty and delay on such routes.[63] A dearth

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[59] While the EAC, COMESA, SADC all make noble efforts to address the problems of landlocked states as a group, the regional nature of the arrangements to a certain extent obscures the unique needs of individual landlocked states within those groups, which might need to be addressed in further detail to achieve the highest levels of sea access for the states. *See, e.g.,* EAC Art. 93; COMESA Art. 84 & 88; SADC Protocol Ch. 3.2

[60] See note 52

[61] UNCTAD Trade and Development Board, Review of Progress in the Development of Transit Transport Systems in Eastern and Southern Africa, pages 1 & 21, UNCTAD/LDC/115, UNCTAD.ORG (20 July 2001), http://archive.unctad.org/en/docs/poldcd115.en.pdf (Review of Progress)

[62] Ben C. Arimah, *Poverty Reduction and Human Development in Africa*, 5 J. HUM. DEV. 399, 411 (2004), http://www.equinetafrica.org/bibl/docs/ARIpov.pdf

[63] Jack I. Stone, UNCTAD (consultant), Infrastructure Development in Landlocked and Transit Developing Countries: Foreign Aid, Private Investment and the Transport Cost Burden of Landlocked Developing Countries, page 12, UNCTAD/LDC/112, UNCTAD.ORG (28 June 2001), http://unctad.org/en/docs/poldcd112.en.pdf

of internationally available data that relates the value of goods imported into and exported from a country and differentiates the associated freight and insurance charges makes it difficult to compare the total transit costs for individual landlocked countries and their maritime transit partners, though customs services for some countries have attempted to provide such reports.

Concluding Observations

A study conducted by a UNCTAD Consultant[64]made findings based on the above discussed factors and established from a review of the existing regional cooperative transit arrangements that:

- There is a prevalence of cases whereby domestic laws are not enacted to enable enforcement of regional arrangements locally;
- Some countries adopt laws conflicting with regional arrangements due to national interests conflicting with regional interests;
- The fact that regional arrangements tend to be broad and general combined with lack of detailed guidelines, rules of procedure and operational manuals impede implementation;
- Inability of states, RECs to monitor corridor performance and to enforce regional arrangements due to inadequate institutional and human resource capacity;
- Lack of or weak corridor management mechanisms and national institutional structure frameworks (corridor forums, corridor planning comities, trade facilitation countries);
- Need for updating of regional arrangements where recent issues such as those related to multi-modal transport and application of IT solutions were not captured;
- Limited private-public partnerships;
- Weak regional inter-agency (RECs, Donors) coordination frameworks.

The study recommended that an assessment of the existing transit transport cooperative arrangements should be made and outdated provisions should be updated. Operational manuals, guidelines and toolkits should be prepared and consequent training organised as a way of facilitating their implementation. Tactful advocacy and championship involving regional organisations and other key players and aiming at securing firm government commitment to the implementation of transit arrangements are also recommended. The study highlighted the need for bringing domestic legal and regulatory provisions in line with the regionally agreed upon protocols.[65]

The enhancement of the capacity of regional organisations as well as inter-agency coordination mechanisms was also identified as a step to be taken by the UNCTAD Consultant study and that support needs to be provided to these organisations by the donor community and development partners. The study particularly noted that the corridor approach is emerging as the preferred mechanism in addressing transit transport issues throughout the Southern African region. The financial sustainability of corridor management institutions was also identified as an area that needs to be acted upon. Other identified areas of action include

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[64] Infra Africa (Pty) Ltd., UNCTAD Consultant, Report on Improvement of Transit Systems in Southern and Eastern Africa. The study was part of the preparatory process of the ministerial conference of Landlocked and Transit Developing countries and the Donor community to be convened by UNCTAD following the UN General Assembly resolution 56/180. The meeting was held in Almaty, Kazakhstan from 28th to 29th August 2003

[65] *Id.* note 63 at page iv.

the establishment of corridor performance monitoring systems as well as the enhancement of exchange of experience between corridors.[66]

Further, the transit transport facilitation programs were reviewed particularly in terms of status of implementation and scope and it established that implementation is slow paced requiring that efforts should also be made for increased advocacy and championship in order to secure governmental commitment and accelerate implementation. The study finding[67] is that what needs to be done has been identified in many areas but action has been forthcoming at a rather slow pace. Therefore, what is mostly needed is securing firm commitment from governments, involving and enhancing the capacity of the private sector, a regional consensus on a framework for prioritisation of various programs as well as accelerated and coordinated implementation. The efforts made to coordinate infrastructure development and harmonize domestic regulations, procedures and documentation are commendable, but a greater commitment by landlocked and transit developing countries to effective implementation of their bilateral and regional agreements is now required. Determined and coordinated support from donors was also identified to be critical.

The study highlighted six themes[68] as priorities for the RECs to enhance transit transport efficiency namely, (i) Efficient Corridor Operations for the facilitation of the removal of impediments to the efficient flow of traffic in order to reduce transport and transactional costs of trade,(ii) Corridor Management Arrangements for the establishment of efficient, effective and sustainable public-private sector partnership corridor management arrangements, including institutional frameworks, (iii) Common policies and Strategies to establish a uniform approach to developing integrated transport policies and strategies pertaining to such issues as infrastructure development, maintenance, overload control and safety are needed amongst RECs in order to facilitate smooth operation of transport through Member States (iv) Harmonisation, rationalisation and implementation of Legal/Regulatory and administrative procedures which is critical for ensuring that a consistent approach is followed in creating a conducive environment for facilitating a smooth flow of traffic , (v) RECs Institutional Capacity Strengthening to create mechanisms and institutions to oversee the implementation of the Corridor approach in the region so that common standards and practices are applied in order to strengthen their capacity to provide effective leadership in the design and implementation of sound transport policies and programs and (vi) RECs Coordination to ensure that common standards, procedures and practices can be adopted and applied both within and between RECs so as to avoid duplication of effort and, in so doing, optimise the use of available resources.

Having delved into the factors which contribute to the difficulties faced by the land locked States subject to this discussion in their claim for their right to transit to the sea, it is clear that the main obstacle is grounded in the need for striking a balance between the sovereignty of the transit States and the right to access to the sea as provided for in UNCLOS despite there being quite a comprehensive legal framework catering for the transit regime. The following chapter of the thesis will discuss how the transit regime has been better implemented in Europe and what dynamics contribute to the efficient implementation of transit to the sea.

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[66] *Id*. note 63 at page vi.
[67] *Id.* note 63 at page vii
[68] *See* note 64

CHAPTER TWO (PART ONE): THE GLOBAL LEGAL REGIME ADDRESSING THE RIGHT TO TRANSIT FOR LANDLOCKED STATES

SECTION A: Theories and Doctrines Influencing the Claim for the Right to Transit and Access to the Sea

From the premise that all countries are sovereign, arises the question as to why transit and coastal States should concede part of their territorial sovereignty to accommodate the needs of landlocked States. What is the basis of the claim by land locked States which ultimately gave rise to the call for the establishment of a universally accepted right to transit and access to the sea? In granting the concession to landlocked States what benefits do the transit and coastal States derive there from? And what are the disadvantages, purported or otherwise?

The contentions between the proponents for and reservists on the applicability of the right to transit and access to the sea rests between the principles of (State) territorial sovereignty and that of freedom of communication among peoples. There are a number of theories rooted in international law, derived from these principles, which have provided the basis for the creation and evolution of international instruments related to land locked States. This section of this paper will delve into some of these bases and theories and may shed more light into the current status and implementation of the rights accorded to landlocked States by virtue of the international legal regime. Although the access of land-locked countries to the sea is essentially a practical problem, it is worthwhile to review the theoretical foundations on which various writers have based their proposed solutions.

3.1 Theories based on the Freedom of Transit and Compensating for Geographical Inequalities

This theory proposes that there is a general duty of coastal States to grant the right of transit to the neighbouring land locked State that suffers from an unfavourable geographic position as the freedom of transit plays an important role to land-locked countries' fundamental economical interest.

There are two opposing approaches to the Freedom of Transit Theory. The doctrinal view which supports the existence of this theory claims that when a State is dependent on the existence of a transit right in terms of economic interdependence, denying this right would be

obsolete. Based on a point of view that freedom of transit through the territory of the transit State may represent a disadvantage of inconvenience for a coastal State, but for the landlocked State, it is a question of survival; the landlocked States are to legitimately demonstrate necessity in order to enter into agreement with the transit State. Senior World Bank counsel Dr Kisher Uprety pointed out that,

> "...it may be argued that *under certain conditions*, the grant of transit freedom for landlocked States is an obligation of the State of passage, independent of all international agreements. Freedom of transit is thus not a "right" that any State can exercise in other transit States without their consent. To be eligible to claim this right, the demanding State must fulfil certain eligibility criteria. The criteria are considered fulfilled for land locked States specifically due to their geographical position and economic dependence, which together create a presumption in their favour of a right of transit"[69]

The opposing view bases its claims on the simple fact that States have sovereignty which should not be disrupted by an obligation to provide landlocked States with a transit right.[70] Charles De Visscher, in his important work on the international law of communications, states that the problem of free access to the sea is created by the clash of two great ideas which have always conflicted, that of ". . . freedom of communications, the expression of a universal community of interests . . ." and that of territorial sovereignty which, for its part, "...opposes by its particularism the indefinite extension of international regulation...". The function of international law is, accordingly, to strike "... a balance, reconciling these naturally opposing principles"[71].The balance of the interests of the landlocked States and the transit States is always of paramount consideration. The right of passage can be exercised so long as it does not cause any damage or prejudice to transit State. Sir Hersch Lauterpacht QC, United Nations International Law Commission member and judge of the International court of Justice, summarized that the State claiming transit should be able to justify its claim under considerations of necessity or convenience on the existence of a *bona fide* and legitimate interest.[72]The claim on the principles of territorial sovereignty by transit and coastal States has been the major obstacle to the development of a guaranteed right of transit and access to the sea. The claim is that the right cannot be properly resolved through a single international rule but ideally through bilateral or regional agreements, which would factor in specific issues of concern at the material time such as security and other related implementing

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[69]Uprety, Kishor, The Transit Regime for Landlocked States, The World Bank, (2006) at page 29

[70] This notion is reflected in modern day instruments as illustrated by the position stated in UNCTAD Trust Fund for Trade Facilitation Negotiations Technical Note 8, of 2009 which says, "…the ability to enjoy freedom of transit is limited by the sovereignty of states over their territory and because of this, the question of the right to transit and the duty of the transit state to allow transit across its territory remains a contentious issue in international law. As such, the texts of the New York Convention and UNCLOS III stipulate that the exercise of the right of free and unrestricted access to the Sea shall in no way infringe the legitimate interests of the transit state. Consequently, it is understood, that whilst enjoying freedom of transit, there is also a right for the transit state to set requirements for granting access or transit rights. Such access and transit rights regulate the terms and modalities of the exercise of this freedom and are in general subject to bi-or multilateral negotiations"

[71] Charles De Visscher, *Le droit international des communications,*1924, Ghent and Paris, pp. 6 *et seq*

[72]Lauterpacht, "Freedom of Transit in International Law", in Transaction of the Grotius Society 320 (1958-59).

arrangements.[73]This position found its way into in Article 125(2) of UNCLOS which provides for the agreement of terms and modalities for facilitating freedom of transit and Article 125 (3) underscores the sovereignty of the transit States.

The burden of proof in laying a claim on the basis of the freedom of transit principle therefore lays with the land locked State to prove their need for the usage of that particular route, at that particular time on grounds of necessity, convenience and economic survival upon also proving that no harm would be done within the jurisdiction of the transit State, under the cover of an implementing (bilateral) agreement. In practicality, State sovereignty is seen to supercede claims for freedom of transit and that it can only be granted on the sole authority of the transit and coastal States.

Modern doctrines on the basis of the claim to the freedom of transit and access to the sea look at more adaptable approaches which emphasize the economic repercussions stemming from the disadvantaged geographical positions of land locked States. Proponents for this view considered that the law of the sea although of universal application, it should not be generalized but should apply to each State and its specific needs at a particular time. Professor R.J. Dupuy considered that the primary aim of the law of the sea is "…to resolve particular cases and problems specific to a single State."[74]

The concept was further advanced in the post second World War era with the United Nations being bound by its Charter, Article 55 to "…*the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations*." This position was further advanced by the United Nations General Assembly in Resolution 1028 (XI) concerning land locked States and the expansion of international trade which invited member States to recognise fully, in the area of transit trade, the needs of States with no coastlines and to grant them proper facilities in law and in practice, taking into account future needs of such countries resulting from their economic development.

The United Nations Conference on Trade and Development (UNCTAD) in one of its principles also makes a proclamation which recognises that the right of every land locked State to free access to the sea constitutes a principle which is indispensable for the expansion of international trade and economic development.[75] The conditions permitting a more advanced expansion of trade were defined in the Charter of Economic Rights and Duties of States with the view of eliminating obstacles to trade and the equitable resolution of problems of all States, particularly developing ones.[76]

Several other international instruments proceeded to make more consideration of the particular economic and geographical posture of land locked States to provide for their being

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[73]Representative of Kenya to the Third UN Conference on the Law of the Sea stated that, " [n]o State could allow any other State the right of transit through its territory outside the framework of bilateral or regional agreements…" 2 UN GAOR, Conference on the Law of The Sea (33rd mtg.)253, UN Doc. A/Conf.62/C.1/SR.1-17

[74]See Rene-Jean Dupuy, *The Law of The Sea: Current Problems* (Oceana Publications 1974).

[75]This was reflected in the preamble of the New York Convention on Transit Trade of Land-Locked States (1967*) infra* at page

[76]Articles 14 and 21 of the Charter of Economic Rights and Duties of States, G.A. Res 3281 (XXIX) (Charter of Rights and Duties of States), 2315th plenary meeting UN G.A.O.R (1974)

granted an objectively preferential status, which would make the right to transit and access the sea a compensation for their geographical inequality and to reduce or attempt to eliminate obstacles to their trade and economic development. This principle made (some) advancements towards the universal acceptance of the right of transit by the inclusion of its proposals in international instruments. This may have been facilitated by the good will of States after World War Two and the inception of the United Nations. The said instruments which make such provisions will be discussed in more depth and detail in section two of this part of the paper to further analyse what specific rights are granted to land locked States under them.

3.2 Theories Based on the Principle of the Freedom of the High Sea

The theory that access to the sea is a corollary of the principle of the freedom of the high seas, rests upon the argument that the recognized right of all States to use the high sea, and clearly presupposes a supporting right of passage to it, for without the latter right the former would be impossible to exercise.[77]It is maintained that because the oceans are open to all nations alike, land locked States are entitled to free transit in the exercise of their equal rights within the natural law principle of *res communis.* Despite the undoubted cogency of this argument it has nevertheless met resistance by the majority of transit and coastal States as they refused to accept the connection between freedom of the sea and the right of passage to it.[78] During the Fifth Committee of the UN Conference on the Law of the Sea session the representative of Italy stated,

> "It had never been proved either in the documents before the Committee or in the statements made during the general discussion that [in respect of a right of access to the sea] the coastal States were under any obligation towards the land-locked States or that the latter could make claims on the coastal States on the strength of general international law…it had not been proved that there was any tacit agreement limiting the most precious possession of all States, their sovereignty. Yet to recognize the free access of landlocked countries to the sea as part of general international law would, in fact, limit that sovereignty"[79]

The legal tenability of the "freedom of the seas" theory depends ultimately upon its general acceptance, and since the lack of an *opinio juris* in favour of an autonomous right of access to the sea has already been shown, it would appear that the Italian declaration correctly reflects the positive law.

Other proponents for the right to transit and access the sea as a right engrained in the principle of the freedom of the high seas defended the right as a logical consequence of the freedom of the high seas. Professor of Law Marcel Sibert[80] states,

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[77]Sibert, Traite de Droit International Public (Dalloz, Paris, 19 5 1) vol. 1 ,660 (cited in UN doc. A/CONF. 13/29 of 1 4 January 1958).

[78]See the Official Records of the Fifth Committee (UN doc. A/CONF. 13/43)

[79] *See* note 87

[80]Marcel Sibert, *Traite de droit international public,* vol. I, Paris, 1951, p. 660, paragraph 397.

> "Since the high seas form an asset the use of which is common to all, it would appear that the right to navigate freely on the high seas should be enjoyed by all members of the international community, including those which have no coastline"

Similarly, Hyde[81] seems to agree with Sibert cited above, for he said that no State, however remote from the sea, should be isolated from it by the will of the riparian State but however went on to articulate that these, are not principles recognized by international law but arrangements made by agreement between the States.

The rights offered are largely theoretical, as the majority of the landlocked States do not possess the capacity to effectively participate in this common heritage, although it is inherently tied to the ability of landlocked States to pass through the territories of transit and coastal States. If the territorial sea is subject to universal rights of innocent passage in recognition of this universal right of access to the sea, the same logic should compel recognition of a right of innocent passage across land territory to reach the sea.

3.3 The International Servitude Theory

The historic basis for the claim to the right to transit is derived from the Roman concept of "servitude", wherein under Roman law the owner of a piece land which was so located that to enjoy his property it was necessary to cross the land of his neighbour, the land owner was said to have a natural servitude across his neighbour's property.[82]An international servitude is a right, based on an agreement between two or more States, by which the territory of one State is subjected to the permanent use of another State for a specified goal, and can be differentiated from the Freedom of Transit theory which is grounded on economic dependence but which is on a case by case basis upon the satisfaction of the requisite conditions as explained above. It can be argued that landlocked States have a similar servitude to cross neighbouring States as a logical and necessary extension of their enjoyment of their territorial sovereignty as oceans provide the most economical means of transporting goods among world markets and no State can remain isolated from this aspect of international trade without suffering from dire economic stagnation. However where transit may have been allowed on the basis of bilateral arrangements there was no guarantee of non-disruption due to the lack of universally accepted and binding instruments.

In both civil law and common law systems, a servitude is recognized as a right *in rem* that will survive a change in ownership of either the 'dominant' or 'servient' tenement. It might be possible to claim that the land-locked State has a servitude based on local custom. Such a claim succeeded in the *Rights of Passage over Indian Territory*[83]case on the basis of long-user alone, but there are important features in that case which make such a claim, in practice, difficult to sustain. The most important feature is that Portugal's right of access to its enclaves

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[81]Charles Cheney Hyde, International law, chiefly as interpreted and applied by the United States, 1947, vol. I, p. 618.

[82]W.W.Buckland and A.D. McNair, Roman Law and Common Law: A Comparative Outline 103 (1936)

[83]Rights of Passage over Indian Territory case (Portugal *v.* India), Preliminary Objections, 1957 ICJ Rep. 125.

existed for more than a century, continuing for almost thirteen years after India's independence, and that, over this time, numerous treaties had been concluded between Portugal and pre-colonial India, regulating Portuguese access to the enclaves. This, therefore, sets a very high burden of proof for the existence of such a servitude: nothing less than a clear and uniform practice over a very long period of time will suffice. Anything less than that could be classified as acts of mere courtesy. From the *Rights of Passage* case it is clear that such rights would survive a change in state sovereignty,[84] although it is disputed that there is no evidence that the servitude "will survive a change in sovereignty of either of the two States concerned in the transaction".[85] What is much less clear is whether, unlike the *Rights of Passage* case which concerned a change in sovereignty of the 'servient' or transit state, the right will survive a change in sovereignty of the 'dominant' or land locked State. The proponents of the doctrine consider international servitudes to be real rights, imposed by treaty, whereby the territory of one state is subject to permanent use by another state for some specific purpose.[86]If an international servitude is to differ at all from any other treaty-right, it must likewise survive a change in the identity of the original parties to the treaty; for if it does not, the whole concept of international servitudes becomes meaningless.

Further, proponents for the theory of international servitude also liken the right of transit of land locked States to an easement or right of way under public law. Scelle for example says[87]:

> " Under French municipal law, enclosed properties have by statute access to means of communication . . . the same rule was necessary, *mutatis mutandis*, in international law as regards the access of peoples to the sea, with the corollary that land-locked States may, consequently, have a maritime flag."

Scelle claims for this thesis has the merit that it makes the right of passage of land-locked States over territories separating them from the sea independent of any treaty and, in theory, even of an international agreement. The right of transit belongs to the "dominant tenement" by virtue of its geographical position in relation to the "servient tenement"; the right will disappear if a union is formed between the two countries concerned, and will revive in the event of secession.

Reference to early case law may determine if the doctrine of international servitude has received recognition in the practice of states. The leading case is that of the *North Atlantic Coast Fisheries* arbitration,[88] where the submission of the United States of America that a

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[84]D.P. O'Connell, The Law of Succession 49-63 (1956). *See also* O'Connell, *Reconsideration of the Doctrine of International Servitude*, 20 Can. Bar Rev. 810 (1952).

[85]J.L. Brierly (C.H.M. Waldock, Ed.), The Law of Nations 191, 6th ed. (1963).

[86]Among those who support the doctrine arc: Kelsen, General Theory of Law and State (Russel, NY, 1961) 2 32-3; E. Lauterpacht, op. cit., 3 33-4; Fenwick, op. cit., 458-9 ; Scelle, Manual de Droit International Public (cited in UN doc. A/CONF.1 3/29). For other writers see O'Connell, State Succession in Municipal Law and International Law (Cambridge U. Press, London, 1 9 6 7) vol. 2 , 1 8, note 3

[87]Gorges Scelle, *Manuel de droit international public,* 1941, part I, P. 389

[88](Great Britain - USA), PCA (1910) (as reported in Green, International Law through the Cases (Stevens, London, 1 9 59) 245-2 5 7 .

fishing treaty of 1818 had created a servitude in its favour was rejected on the grounds, *inter alia*, that there was no evidence that either British or American statesmen were conversant with the doctrine of international servitudes in 1818, and that "a servitude in international law predicates an express grant of a sovereign right". The Court went on to state that the doctrine was, "but little suited to the principle of sovereignty which prevails in States under a system of constitutional government . . . and to the present relations of sovereign States"

In the case of the *S.S. Wimbledon*,[89]wherein an English steamship, the "Wimbledon" chartered by French Company *Les Affréteurs réunis* which was taking a cargo of munitions and artillery stores from Salonica to the Polish Naval Base at Danzig and upon arrival at the Kiel Canal was refused permission to pass through due to German neutrality in the Russo-Polish war and the ship was forced to take a longer route to Danzig, the Permanent Court refused to concern itself with the question of whether Article 380 of the Treaty of Versailles which provides,

> "*The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality*"

had subjected Germany to a servitude by stating that, "…it was very controversial whether in the domain of international law, there really exist servitudes analogous to the servitudes of private law".

In the *Aaland Islands* dispute[90] a Commission of Jurists, appointed in 1920 to advise the Council of the League of Nations, rejected Sweden's contention that a Convention of 1856 had created a servitude of non-militarization in her favour, and stated that the concept of servitudes was "not generally admitted" in international law. The Commission nevertheless found that the obligations created by the Convention were "true objective law" in accordance with the intention of the parties. The above cited cases do indicate that the doctrine of international servitude being a basis for claiming the right of transit has not been well received in international law as the grant of freedom of transit is subject to the goodwill of the servient or transit State.

Despite the strong resistance from the transit and coastal States to fully recognize the right of transit under international law rule, the arguments from land locked States have been recognized to some extent as can be illustrated by the articulation at the at the third UN Conference on the Law of the Sea.[91]

3.4 Access to the Sea as an Abstract Conventional Right (*Pactum de Contrahendo)*

Transit and access to the sea as an abstract conventional right is a novel theory which incorporates natural law principles and postulates that the right is abstract and only

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[89]Permanent Court of International Justice, Ser. A, No. 1 (1923).
[90](1920) L.N.O.J. Spec. Supp. No. 3, see alsoO'Connell, State Succession, vol. 2, 2 67-7 0.
[91]UNCLOS Articles 56(2), 140 as well as Part X

concretises upon implementation by agreement between the land locked States and the transit State.

Proponents of the theory claim that the right of a State not to enter into a treaty is not absolute and can be limited as evidenced by a number of cases in which a State is obliged to negotiate or conclude agreements by virtue of a previous *pactum de contrahendo*. If States can be so obliged by a *pactum*, so the argument runs, there is no valid reason why they cannot, in a proper case, be similarly obliged by a rule of customary international law. However a *pactum de contrahendo* is in itself a treaty by which the parties undertake to enter into a later and final treaty.[92] As such the fact that a *pactum de contrahendo* may oblige a State to enter into an agreement, in no way derogates from the principle that the conclusion of a treaty is completely optional. Thus while the existence of a *pactum* may well modify the freedom of contract that a State enjoys at customary law, it certainly cannot support the proposition that there exists an autonomous rule of customary international law requiring a State to enter into a particular agreement whether in the context of transit or otherwise. The validity of this theory is therefore questionable and has not been accepted in law as conferring transit rights to landlocked States as it is in conflict with the established international law principle that entry into and conclusion of treaties is optional to States.

The rejection of the above discussed theories would seem to vindicate the view expressed that international law knows of no “natural" right of States to free access to sea, and that land locked States either depend upon the goodwill of States more fortunately situated, or must secure rights of access through treaty.[93]

Conclusion

Of the doctrines and theories discussed it is the Freedom of Transit and Compensation for Geographical Inequalities which holds more practical tenets since the principles pronounced are reflective of the economic dependence due to the geographical positioning of landlocked States. The basis of the claim for the right to transit is the economic survival of the landlocked States which imposes a general duty on the transit States to grant passage. Of course such grant is grounded in the ability of the landlocked States to prove the necessity of such a concession of the sovereignty by the transit State. The landlocked State must also prove that the transit would not be prejudicial to the transit State. The contention against the claim to passage is that sovereignty cannot be disrupted by an obligation to grant transit. The bottom line is therefore that the claim is rooted in the arrangement being facilitated by way of bilateral or regional agreements since at that level the grounds for the request can be determine. The requirement of entering into such agreements to claim the right to transit although cumbersome is also favourable as it gives room to negotiate for conditions favourable to both the land locked and transit States depending on the factors at play at a given time. It therefore strikes a balance between the claim for transit rights and the preservation of the territorial sovereignty of the transit States. A common thread running through the theoretical basis of the claim for the right to access the sea by way of transit

[92]Lord McNair, *The Law of Treaties*, Oxford Press (1986) 27-9.
[93]Georg Schwarzenberger, *A Manual of International Law*, Praeger (1967) page 138-9

through the sovereign territories of the transit States includes the requirement of some form of agreement to concessions between the land locked States and the transit States.

The theory based on the Principle of the Freedom of High Sea in its position that all States have the right to access the sea proposes that the recognition of transit rights is a limitation of the sovereignty of transit States. This limitation however is the weakness of this theory as transit States hold the position that this principle is not recognised by international law but through arrangements at the bilateral level. The same sentiments underlie the International Servitude theory. Natural servitudes presuppose the right to enjoy "property" ie the status of being a landlocked State. International servitudes are again based on agreements between States bilaterally or regionally. As well as the claim to transit being based on an Abstract Conventional right which only concretises upon agreement between the States.

In effect the claim for transit rights according to these theories can only balance the interests of the landlocked States and those of the transit States by being facilitated through bilateral agreements. The enforceability of these arrangements at the international scale may be problematic since the terms and conditions of these agreements are negotiated at bilateral level. In recognition of the reality of the implementability of passage rights, UNCLOS Article (2) caters for such bilateral and regional arrangements which can then be enforced under the Treaty.

The following section of this paper will outline and follow the progression of developments in the law of the sea which culminated in the inclusion of Part X and other related provisions of UNCLOS which provides specifically for the rights of transit and access to the sea for land locked States.

CHAPTER TWO (PART ONE)

SECTION B: Legal Instruments

In this section, this paper will look at the most relevant global instruments that contain specific provisions to secure and maintain freedom of access and transit. They provide a framework and a springboard for more agreements pertaining to the subject. The main international instrument which couches the right of transit and access to and from the sea for landlocked States is the United Nations Convention on the Law of The Sea (UNCLOS) 1982, Part X.[94]

The question of the right of transit and access to the sea has been tackled by earlier international instruments to be discussed in detail below; however Part X of UNCLOS specifically provides for the aspect of the right of access to the sea and the transit rights necessary for the facilitation of passage. The main focus of the discussion of this paper will be on the implementation of the transit regime, rather than the access to resources aspects, which deal with access to the living resources of the Exclusive Economic Zone and the resources in the international seabed area which are provided for in other parts of the Convention.[95]

4.1 The Journey to Part X of UNCLOS

Passage rights across the territories of other States have been the subject of various international conferences and conventions which form the basis for the principle of freedom of transit. Primarily, due to the drastic political, cultural, economic and social changes in the post World War One era across Europe, Asia, and Africa various attempts to foster a conducive environment for economic development were made including the insertion by member States of the then League of Nations of Article 23 paragraph (e) in the Covenant of the League of Nations (1919) which reads,

> "*Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:*
>
> *(e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League*."

This is has been the foundation for the global legal regime whose focus is facilitating the right of transit for landlocked States. This was an extension of the spirit of the legal theory of the claim of transit on the basis of Freedom of Transit and Compensating for Geographical Inequalities which is grounded on the economic dependence that landlocked States have on transit States. A number of instruments have since emanated there from and shall be outlined hereunder to discern the girth of this body of law. From the 1919 Covenant, the adoption of the 1921 Convention and Statute on the Freedom of Transit (The Barcelona Convention) followed, as well as Article V of the General Agreement on Tariffs and Trade(GATT) 1947, the New York Convention on Transit Trade of Landlocked Countries (1965),The International Convention on the Simplification and Harmonization of Customs procedures (Kyoto Convention)(1974), The Customs Convention on the International Transport of

[94]See Annex 1
[95]Part V UNCLOS; Part XI UNCLOS

Goods under Cover of TIR Carnets (1975) (TIR Convention), culminating in the United Nations Convention on the Law of the Sea (UNCLOS III) (1982).

4.2 The Barcelona Convention

It was the Convention and Statute on Freedom of Transit (the Barcelona Convention) of 1921 which recognised the right to a flag to States with no coastlines for the first time and established the view that land locked States have the same navigational rights as coastal States. The Convention provides a framework for agreements dealing with transit, sets forth the basic principles of any transit policy and enshrines general transit rights. Its Article 1defines transit as, "*...the passage of persons, goods, means of transport, etc. through a territory that is only a portion of a complete journey beginning and terminating beyond the frontier of the state across whose territory the transit takes place"* thus representing the main initial collective effort by landlocked States to gain global recognition of a guaranteed right of transit. One of the objectives of the 1921 Convention was to provide a means of enforcing the right of free transit without prejudice to the rights of sovereignty of transit States over the available routes and provided for this Article 2 by stating, "*This article recognizes the freedom of sovereign governments to make transit arrangements within their territories. Measures taken by Contracting States for regulating and forwarding traffic shall facilitate free transit. No distinction shall be made based on the nationality of persons, flag of vessel, etc., or any circumstance related to the origin of goods or of means of transport."*

Although the Convention provided a platform for securing an internationally recognised right of transit, it was viewed by the landlocked States as having a number of shortfalls[96] in its scope and coverage since it is limited to providing for only transit by rail and on internal navigable waterways.[97] It is Eurocentric since its creation was aimed at catering for international regime of transit in order to guarantee the communication amongst the European land locked States that had emerged after the dismemberment of the Russian and Austro-Hungarian Empires after World War One.[98]

The right of transit was not declared to be of universal application but confined only to States party to the Convention. Moreover, it does not deal with an absolute right of free transit. It only deals with the "freedom" of transit as it does not make transit enforceable *erga omnes* by including Article 2 which recognises the sovereignty of the transit State therefore subjecting the facilitation of transit and related aspects to measures put in place by the transit States. It

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[96] From Barcelona to Montego Bay and Thereafter: A Search for Landlocked States' Rights to Trade through Access to the Sea – A Retrospective Review, *Kishor Uprety*, Singapore Journal of International & Comparative Law (2003) 7 p204.

[97] Article 2 of the Convention reads "Subject to the other provisions of this Statute, the measures taken by Contracting States for regulating and forwarding traffic across territory under their sovereignty or authority shall facilitate free transit by rail or waterway on routes in use convenient for international transit. No distinction shall be made which is based on the nationality of persons, the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods or of vessels, coaching or goods stock or other means of transport. In order to ensure the application of the provisions of this Article, Contracting States will allow transit in accordance with the customary conditions and reserves across their territorial waters."

[98] Eg Yugoslavia, Czechoslovakia, Serbia, Estonia, Lithuania, Poland, Ukraine

appears that the Convention attempted to establish some equilibrium between the principle of freedom of transit for the landlocked States and the principle of sovereignty of the transit States. This Convention however did create an important step toward the formation of a set of "minimum standards" in favour of landlocked States such as illustrated in Articles 3 and 4 which cater for the non subjection to Dues and Tariffs on traffic in transit which state, "*Traffic in transit shall not be subject to any special dues. Dues should be levied only to defray the expenses of supervision and administration."*

4.3 The General Agreement on Tariffs and Trade (GATT) and World Trade Organisation (WTO)

The 1947 General Agreement on Tariffs and Trade (GATT) extended the establishment of the transit regime with the aim of reducing tariffs and other international trade barriers; although it makes no specific reference to the issue of land locked States it still reinforces the principles of the Barcelona Convention. Article V of this Agreement regulates the conditions which a member of the Barcelona Convention could apply to goods of another member passing through its territory to a third destination. The Article deals with the transit of vessels, land vehicles, and cargoes. It defines traffic in transit similarly to Article 1 of the Barcelona Convention as traffic whose passage across a territory "*is only a portion of a complete journey beginning and terminating beyond the frontier of the country where the passage takes place*." The provision admits a basic right to transit which can be invoked by the concerned States.

Article V paragraph 2 stipulates that "*there shall be freedom of transit through the territory of each Contracting Party, via the routes most convenient for international transit, for traffic in transit to or from the territory of Contracting Parties*." Article V paragraph 3 states that "*such traffic . . . shall not be subject to any unnecessary delays or restrictions and shall be exempt from Customs duties and from . . . all other charges imposed in respect of transit, except charges for transportation or . . . administrative expenses*." Such charges must be reasonable and in relation to the actual administrative costs of service rendered.

Article V obliges the transit State not to hinder traffic in transit by imposing unnecessary delays or restrictions or by imposing unreasonable charges; and to accord Most-Favoured-Nation (MFN) treatment to transiting goods of all Members. The GATT, unlike the Barcelona Statute, also covers overland transport and therefore provides contracting States wider coverage; it however does not precisely outline specific rights and obligations and makes no reference to the specific needs of landlocked countries and neither does it make an express declaration that freedom of transit is a general principle applicable to all States. The panel in the *Colombia- Indicative Prices and Restrictions on Ports of Entry* case emphasized the exercise of sovereignty of the transit States by concluding that as per Article V the provision of "freedom of transit" requires extending *unrestricted* access via the most convenient routes for the passage of goods. But "…while a Member is not required to guarantee transport on necessarily any or all routes in its territory, transit must be provided on those routes 'most convenient' for transport through its territory"[99]which in effect leaves the land locked State to be granted routes which are deemed 'convenient' by the transit State. It is a reflection of the sentiments expressed in reservations to granting passage under the theory

[99] Report of panel, WT/DS366/R, 28 April 2009, para 7.401

of Freedom of Transit and Compensating for Geographical Inequalities which made the basis of granting transit on, among other conditions, no prejudice to the territory of the transit State.

In 1948 the United Nations Conference on Trade and Employment adopted the Havana Charter, Article 33 of which provides for the freedom of transit for landlocked States. The language of the provision was similar to that of GATT Article V but it widened its scope in its interpretive provision by stating in its official commentary that:

> "If as a result of negotiations in accordance with paragraph 6 a Member grants to a country which has no direct access to the sea more ample facilities than those already provided for in other paragraphs of Article 33, such special facilities may be limited to the land locked country concerned..."

The widening of the scope is as regards the "more ample facilities" and in effect the arrangement is bilateral in nature. The Havana Charter never entered into force due to a number of factors including the inadequate ratification of instruments.[100] Despite this, the Charter made an important contribution to the transit regime which was carried forward to future instruments.

The World Trade Organisation (WTO) which came into existence after the 8th trade rounds negotiations from 1986 to 1994 replaced GATT as an international organization, but the General Agreement still exists as the WTO's umbrella treaty for trade in goods. In the WTO context, goods are defined to be in transit when the crossing of the territory of another WTO Member, constitutes only part of the journey between departure and final destination country, whether or not trans-shipment, warehousing, breaking of bulk or change in transport mode are involved. GATT Article V only refers to so-called through-transit, i.e. transit in the GATT context, normally involves at least three states. Article V ensures that goods shipped from Country A to Country C may past through Country B on their way to Country C. This guarantee is particularly important for landlocked countries.[101] Enforceability of Article V is however only between members of WTO and by virtue of its Article IX, (Accession), members of GATT 1947 automatically became members of WTO. Article IV (1) of the GATT provides that decisions of the WTO are backed by sanctions "*... if a member does not follow the WTO's recommendation to cease a wrongful trade practice within a reasonable time...*" compensation and the suspension of concessions or other obligations may be imposed. In effect the GATT created the freedom of transit which could be facilitated with the concession of the transit State that the transit should be via the "most convenient route" through the territory of the transit State and this was extended through to the WTO regime.[102]

4.4 The 1958 Convention on High Seas

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[100] Twenty seven instruments were required to be ratified for its entry into force but only two States satisfied the condition. Kishor Uprety, Singapore Journal of International & Comparative Law (2003) 7 pp 201–235

[101] K Kennedy, 'GATT 1994' in P F J Macrory (eds), The World Trade Organization: Legal, Economic and Political Analysis (Vol. IA, Springer Science+ Business Media, New York 2005) 140

[102] Also refer to note 48

This Convention contains two Articles which refer to the matter of transit for landlocked States. Article 2 provides, "*The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States…"* It is an extension of the sentiments which support the theory of Freedom of the High Sea which postulates that all States have the right to access the high sea; It also incorporates the limitation aspect of the theory by stating in Article 3 (1) that, *"In order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea-coast should have free access to the sea. To this end States situated between the sea and a State having no sea-coast shall by common agreement with the latter, and in conformity with existing international conventions, accord: (a) To the State having no sea-coast, on a basis of reciprocity, free transit through their territory…*" The concession of sovereignty by the coastal and transit States is on a reciprocity basis and on common agreement between the States which in effect opens the scope for negotiation. Article 3 (2) gives more leeway for the implementation of transit and attempts to strike a balance between the mutual interests of the parties and provides that, "*States situated between the sea and a State having no sea-coast shall settle, by mutual agreement with the latter, and taking into account the rights of the coastal State or State of transit and the special conditions of the State having no sea-coast, all matters relating to freedom of transit and equal treatment in ports, in case such States are not already parties to existing international conventions*."

Although the transit regime is contained in only two Articles of the 1958 Convention, the provisions are wide and flexible to be implemented on terms which are practical to the contracting parties. However the openness of the provisions is also the weakness of the Convention as regards transit rights as it leaves a lot of room to overlook the more minute details of passage such as customs duties, treatment at ports, avoidance of delays among other aspects which form part of the logistics and administration of the transit chain.

4.5 The New York Convention

The 1967 New York Convention on Transit Trade of Land locked States is significant since it addresses the aspect of *how* transit can be facilitated. In its Principle IV it incorporates some administrative aspects and modalities thus improving on the 1958 Convention and states that, "*In order to promote fully the economic development of the land-locked countries, the said countries should be afforded by all States, on the basis of reciprocity, free and unrestricted transit, in such a manner that they have free access to regional and international trade in all circumstances and for every type of goods. Goods in transit should not be subject to any customs duty. Means of transport in transit should not be subject to special taxes or charges higher than those levied for the use of means of transport of the transit country"*

The only multilateral treaty endeavouring to prescribe solutions to the specific problems of landlocked States, the New York Convention, was created following a statement issued by the United Nations Economic Commission for Asia and the Far East (ECAFE)[103], declaring

[103]1 UN ESCOR, UN Comm. On Trade and Development(35th plen.mtg.) 3, UN Doc. E/Conf.46/141 (1964)

that the bilateral agreements regulating trade between land locked States of the region, inadequately protected the rights of land locked States and that there was need for a general Convention to address the subject. This was a positive departure from the Barcelona Convention and the principles posited by Article V of GATT.

The Convention in its Principle I, affirmed that the "…*recognition of the right of each land locked State of free access to the sea is an essential principle for the expansion of international trade and economic development*."Unlike the Barcelona Convention, the New York Convention scope of application is more specific in that it exclusively deals with the access to and from the sea of land locked States and not only with transit in general. This is entrenched in its Principle VI which recognises the special and particular problems of landlocked States and says, "*In order to accelerate the evolution of a universal approach to the solution of the special and particular problems of trade and development of land-locked countries in the different geographical areas, the conclusion of regional and other international agreements in this regard should be encouraged by all States"*

The Convention provides a good foundation for negotiations on the question of transit and creates room for the implementation of the transit regime at the bilateral, regional and Regional Economic Community levels by stating in its Principle VIII that, "*The principles which govern the right of free access to the sea of the land locked State shall in no way abrogate existing agreements between two or more contracting parties concerning the problems, nor shall they raise an obstacle as regards the conclusions of such agreements in the future, provided that the latter do not establish a regime which is less favourable than or opposed to the above-mentioned provisions.*"

The Convention also protects the interests and sovereignty of the transit States in its Principle V which provides, "*The State of transit, while maintaining full sovereignty over its territory, shall have the right to take all indispensable measures to ensure that the exercise of the right of free and unrestricted transit shall in no way infringe its legitimate interests of any kind.*

As of June 2014, the treaty has been ratified by 43 States, made up of an approximately even split of land-locked and coastal states.[104]Malawi is party to the Convention;[105]however the relevant transit States namely Mozambique, Tanzania and the Republic of South Africa are not party to it which raises the question of applicable enforcement mechanism.

Despite the New York Convention being lauded for its progress in establishing the first multilateral agreement that deals exclusively, through a single instrument, with the specific problems of transit trade, it has been criticised on a number of areas. The limitations of previous instruments are also included in this Convention. By its Article 15 which reads,

"***Reciprocity***

[104] United Nations Treaty Collection 2014

[105] Malawi ratified the Convention on 28th September 2010, Zambia on 7th March 1983 and Zimbabwe on 24thFebruary 1993, Division for Oceans and law of the Sea, chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 29 October 2013

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

landlocked States must grant reciprocal rights to transit States, which in effect is a failure to distinguish between the special needs for transit arising from geographical location as against any other transit for regular transportation purposes.

The main proponent behind the position of the landlocked States as regards this Convention was their limited participation in international trade and their poor economic development due to the limitations caused by their geographical positioning. However the New York Convention was further criticised for its reliance on the principles of economic necessity and for failing to proclaim these principles as international law.[106]

4.6 United Nations Convention on the Law of the Sea

Despite the growing body of law addressing the predicament of land locked States, and the general acceptance of the existence of the right to access to and from the sea as was acknowledged by a majority of States in the several earlier treaties, its internationally binding status, particularly from the aspects of practicality of enforcement, still needed improvement. The land locked States therefore continued to demand a formulation that was more valid, objective, and universal. In this context, attempts towards reformation of the status of the right of access were made by the United Nations Convention on the Law of the Sea (UNCLOS), signed at Montego Bay in 1982.[107] It is a comprehensive and complex instrument that covers issues ranging from a State's rights over foreign ships in its territorial sea to who controls minerals at the bottom of the ocean. Paragraph four of the Convention's preamble outlines the scope of the applicability of the Convention and provides,

> "***Recognizing*** *the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans, which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment*."

The Convention however deals with the issue of the right of transit for landlocked States specifically, in a relatively brief manner in its Part X[108], from Articles 124 to 132 where it is provided that they "*shall have the right of access to and from the sea*" and "*shall enjoy freedom of transit through the territory of transit states by all means of transport*."[109].

The UNCLOS is universally referred to and accepted as the Constitution of the oceans and is deemed to espouse certain minimum standards of equality among States and it defines the rights and responsibilities of nations in their use of the oceans. In his remarks entitled 'A

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[106]Explanatory paper on the draft articles relating to land-locked States, Third UN Conference on the Law of the Sea: Official Records 206, 207, UN Doc. A/Conf.62/C.2/L.29(1974)

[107]The U.N. Convention on the Law of the Sea was adopted on April 30, 1982, by 130 votes against four (USA, Israel, Turkey, and Venezuela), with 17 abstentions

[108]See Annex 1

[109]Art. 125, para. 1, Part X, United Nations Convention on the Law Of Sea (UNCLOS)

Constitution of the Oceans' Tommy T.B. Koh President of the third United Nations Conference on the Law of the Sea stated,

> "...It represents a monumental achievement by the international community, second only to the Charter of the United Nations. The Convention is the first comprehensive treaty dealing practically with every aspect of the uses and resources of the sea and oceans. It has successfully accommodated the competing interests of all nations"[110]

4.6.1 Rights of Land Locked States under UNCLOS

Part X of the Convention deals with the right of access of landlocked States to and from the sea and freedom of transit. Article 124 (1) (a) defines a land locked State as "*...a State which has no sea-coast.*"

"Transit State" is defined as a State, with or without a seacoast, situated between a landlocked State and the sea, through whose territory traffic in transit passes.[111]Similarly, as with the WTO definition, "traffic in transit" is said to be the transit of persons, baggage, goods, and means of transport across the territory of transit States, with or without trans shipment, warehousing, breaking bulk, or change in the mode of transport where only a portion of a journey begins or terminates within the territory of the landlocked State.[112]As in the past, the "means of transport" means rolling railway stock; sea, lake, and river craft; road vehicles; and, where local conditions so require, porters and pack animals.[113]This paragraph is relatively flexible because landlocked States and transit States may, by agreement, include as means of transport pipelines and gas lines and means of transport other than those included above.

Article 125 is the core provision of Part X and its paragraph (1) outlines the general principles of access and free transit. In balancing conflicting concerns regarding the transit regime, Article 125 (3) goes further to authorise transit States to "…*take all measures necessary in protection of their legitimate sovereign interests*". This recurrent theme is in effect a curtailment of the guaranteed rights to access as the principle of state sovereignty of the transit States is dominant in paragraph 3.Article 125(2) entails that such right of access is made reliant upon bilateral, sub-regional or regional agreements and should be negotiated with transit States, while Article 125 (3) underscores the principle of sovereignty of the transit States. The continued emphasis on the sovereignty of the transit State leaves little room for leverage and negotiation for the land locked States as it implies the conclusion of transit agreements at the satisfaction of "certain conditions" or "eligibility criteria" as was posited by the academic Theory based on Freedom of Transit. At the bilateral level, however,

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[110]Statement by the President on 6 and 11 December 1982 at the final session of the Conference of the Law of the Sea at Montego Bay. UNCLOS replaced the four treaties ratified in 1958 after the first Conference on the Law of the Seas held in Geneva in 1956.As of November 2013, 166 countries and the European Union have joined the Convention, including most African countries.

[111]See art. 124(b), UNCLOS

[112]*Id.*, art. 124(c).

[113]*Id.*, art. 124(d).

such agreements are best postured as they are reflective of the specific peculiar needs of the land locked States existing at the time.

Where there are no means of transport available within the territory of the transit States to give effect to the freedom of transit or where the existing means are inadequate in any respect, the transit States and landlocked States concerned may cooperate in constructing or improving such means of transport.[114] As with previous conventions, specifically Article 2 of the Barcelona Convention and Principle V of the New York Convention, the transit States are not obligated to ensure transit for land locked States so long as the transit has not been facilitated by some bilateral agreement. Essentially a convenient transit for land locked States may be refused at anytime by transit States depending on a number of various factors ranging from geopolitical influences, infrastructure inadequacies, and weak negotiating capacity among others.

Article 125 offers a framework for negotiating bilateral arrangements to facilitate transit. However this is disadvantageous to land locked States since the negotiating platform is not level and is tilted in favour of the transit States as transit may be granted but may then be hindered by internal administrative processes such as those pertaining to customs facilitation, among other factors despite the provisions of Article 130 as discussed below. Land locked States are often at the mercy of the bureaucracy, customs procedures and the quality of the services and infrastructure of their neighbouring transit countries. Landlocked countries incur transit charges paid to transit countries for using their facilities and services. These include port charges, road tolls, forwarding fees, customs duties and transit quota restrictions. For example, on certain transport routes in Africa there are an unjustifiably high number of road blocks and check points, causing delays and inflating transport costs. These barriers may also be a violation of existing international conventions as well as bilateral and regional cooperation agreements under Regional Economic Communities such as the Southern African Development Community (SADC), aimed at promoting the free flow of transit goods.[115]

Article 126 provides that the rights agreed upon for land locked States under the Convention by way of special agreements with transit States are not applicable to third States through the application of the most-favoured nation clause and this is ascribed to the disadvantaged geographical position of landlocked States. In effect third States are not entitled to invoke the

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[114] *Id.*, art. 129.

[115] *Benjamin R. Hutchinson,* Landlocked Countries and the Law of the Sea: Economic and Human Development Concerns, p14

application of the most-favoured nation as this is reserved only for land locked States who may secure rights of access already granted to other land locked States by a transit State as it is intended to serve the legitimate interests of the land locked States. The non-application of this clause stems from both the special agreements between the transit State and the land locked States as well as from the rights granted by the Convention.

4.6.2 Technical Aspects of Transit Administration and Facilitation

Article 127 of UNCLOS provides for customs duties, taxes and other charges and reads,

> *"1. Traffic in transit shall not be subject to any customs duties, taxes or other charges except charges levied for specific services rendered in connection with such traffic.*
>
> *2. Means of transport in transit and other facilities provided for and used by land-locked States shall not be subject to taxes or charges higher than those levied for the use of means of transport of the transit State."*

The purpose of Article 127 is to prevent the levying of discriminatory customs duties, taxes and other charges by transit States, to ensure the transit State does not derive economic benefit from transiting goods and applies to"...*traffic in transit*...", paragraph 1, and "...*means of transport in transit and other facilities*...", paragraph 2, of land locked States as they exercise their right to transit. The levels of charges to be levied for specific services rendered in the transit State, in order for the transit State to recoup the costs of the provision of those services and to ease an 'undue' burden to the transit State, is thus subject to be worked out by way of agreements as provided for in Article 125 paragraph 2 of the Convention.

Article 128 extends the provision for customs and provides for the creation of free zones and other customs facilities albeit limited by the requirement for an, "...*agreement between those States and the land-locked States*", to facilitate the same. The Article does not create an obligation for the transit States to create the free zones, but opens the way for the establishment of such zones to be covered by agreement between the States on the implementing arrangements to include such issues such as warehousing, insurance, breaking bulk and change in the mode of transport.

Article 129 provides for co-operation in the construction and improvement of means of transport in a situation where the land locked State has nonexistent or inadequate means of transport to exercise the right of transit. This provision to some extent empowers the land locked States as it gives them the allowance to facilitate their transit at their own expense in the territory of the transit State. However this would be subject to favourable conditions in the transit State in aspects such as security and in co-operative efforts, the level of commitment of the transit State in the infrastructure construction or modification efforts and the facilitating agreements would fall under Article 125 (2). To some extent this is a positive aspect as the transit State would derive benefit from the improved infrastructure.

Article 130 deals with measures to avoid or eliminate delays or other difficulties of a technical nature in traffic in transit and provides that transit States shall take "...*all appropriate measures*..." to avoid the same and that should such delays or difficulties occur the "...*competent authorities...shall cooperate towards their expeditious elimination*..." It can

easily be appreciated that delays and difficulties of a technical nature would mostly be of a localised origin, peculiar to the circumstances on the ground at the particular time of handling of goods in transit and that the expeditious elimination of the matter would lie within the authority of the local officials leaving the land locked States' traffic in transit at the whim of various factors such as corruption among others. The words "appropriate measures" as well as "competent authorities" also leave a lot to be desired as they may prove to be of subjective application as the standard of measure may vary from jurisdiction to jurisdiction.

Article 131 provides for equal treatment at maritime ports to ensure that ships carrying the flag of land locked States are accorded equal treatment as all other ships in all maritime ports since such ports play a vital role in the economic development of any country. This is subject however to bilateral arrangements agreed on with the coastal state as to the feasibility modalities in the spirit of Article 125 (2).Article 132 guarantees the continued grant of greater transit facilities which may have been extended to landlocked States by way of arrangements between the States under the cover of UNCLOS. The application of this provision is however limited to States parties to the Convention.

In a nutshell, Part X of UNCLOS lays the framework of how landlocked States can access their right to transit to the sea whilst the interests of the transit States are taken into consideration and incorporates the rights and freedoms which have progressively been created through various international instruments.

4.7 Trade Facilitation Instruments

Prior to the above discussed instruments and provisions, other attempts had been made to ease the operational aspect of transit and access to the sea. Transit provisions have been codified by a number of international conventions, the most important being the aforementioned General Agreement on Tariffs and Trade (GATT) agreements on transit, the World Customs Organization (WCO) Revised Kyoto Convention (revised in 1991 and came into force in 2006),[116] the Customs Convention on the International Transport of Goods under the Cover of Transport International Routier Carnets (TIR Convention) of 1975, as well as the1982 Geneva Convention on the Harmonization of Frontier Control of Goods. However they do not specifically deal with the special needs of land locked States.

Customs processes on transit goods are only one part of a wider transaction range that includes many other participants and procedures. Even if transit procedures are made effective and efficient, full trade facilitation is required to ensure that these issues are dealt with to assist land locked States to fully realize the right of transit as provided for in UNCLOS.

[116]The International Convention on the Simplification and Harmonisation of Customs Procedures (Kyoto Convention) 1974 was the original Convention

The International Convention on the Simplification and Harmonisation of Customs Procedures (Kyoto Convention) 1974 was drafted under the auspices of the World Customs Organization. Its 2006 Revised Kyoto Convention aims among others to simplify the procedures to move goods across borders to reduce administrative barriers thereby encourage small and medium-sized enterprises to become involved in international trade. The Convention proposes definitions of customs terms, standards, and recommended practice and it is drafted in very broad terms to include all processes of foreign trade not merely limited to a narrow application to customs formalities thus has a bearing on the interests of land locked States.

The Convention elaborates several key governing principles, among them, transparency and predictability of customs actions, standardization and simplification of the goods declaration and supporting documents, simplified procedures for authorized persons, maximum use of information technology, minimum necessary customs control to ensure compliance, use of risk management and audit-based controls and coordinated interventions with other border agencies.

The Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention) of 1975 is a multilateral treaty that was concluded at Geneva on 14 November 1975 to simplify and harmonise the administrative formalities of international road transport. TIR stands for "Transports Internationaux Routiers" or "International Road Transports". The 1975 convention replaced the TIR Convention of 1959, which itself replaced the 1949 TIR Agreement between a number of European countries. In common with other Customs transit procedures, the TIR procedure enables goods to move under Customs control across international borders without the payment of the duties and taxes that would normally be due at importation (or exportation). A condition of the TIR procedure is that the movement of the goods must include transport by road. The application of the TIR Convention will be discussed in greater detail in Part two of this part of the paper under the context of European setting where the Convention is most utilised as it is a best practice that sets the standard in this domain.

Conclusion

From the above outlined global instruments which culminated into the inclusion of Part X of UNCLOS, it can be discerned that the main obstacle to the full development of a guaranteed and unimpeded right of transit and access to the sea is the extent to which transit and coastal States aim to preserve their respective territorial integrity. The insistence on safeguarding their territorial integrity rests on the view of transit States that the freedom of transit can only be practically facilitated by way of bilateral or regional agreements which would factor in aspects which are peculiar to the pertaining circumstances and factors at play at the time or region of application and not by a singular international instrument.[117]It is their posture that,

[117]Pakistan's representative at the Caracas session of the Third UN Conference on the Law of the Sea stated that, "…transit by a landlocked State was in effect an encroachment on the sovereignty of the transit State…only the latter could determine the extent to which it was willing to accept such a limitation on its sovereignty." 2 UN GAOR, Conference on the Law of the Sea (33rd mtg.) 250, UN Doc. A/Conf.62/C.1/SR.1-17, A/Conf.62/C.2/SR.1-46 and A/Conf.62/C.3/SR.1-17 (1974)

as a matter of security, rights of transit can only be granted and enforced on a reciprocal basis which leaves the land locked States with an unequal negotiating base as this condition dilutes the special status which landlocked States hold due to their geographical disadvantages and requires that they be granted some level of affirmative action concessions to enable them to uplift themselves economically.

It has therefore to be appreciated that for landlocked States to fully realise their right of transit and access to the sea arrangements should be put in place which take into account the attitudes of the transit States to find solutions which benefit to all parties concerned. This complex quandary cannot be addressed by a mere analysis of the legal framework which facilitates the right to transit but an in depth examination of the global implementation efforts and the practicality of the process is necessary as will be tackled in the upcoming chapter of this paper.

PART TWO: IMPLEMENTATION ANALYSIS

Introduction

The implementation analysis to be undertaken in Part Two will look at the *lacunae* in both the global and regional legal regime governing the matters of transit for landlocked States.ie whether the obligations created in the legal instruments have been complied with by States as well as whether the global efforts through various bodies and activities fall short(or otherwise).

Chapter One, Section A will analyse the gaps identified in the implementation regime and address the underlying factors which create problems in the facilitation of the transit. Section B will look into the implementation practicality with regard to how transit affects all the countries in the chain.

Chapter Two will draw lessons from the European setting in Section A and will examine the transit regime and how transit is facilitated in a few European States. From the lessons learned Section B will make the concluding analysis as to the actual relationship between land locked states and the transit and coastal States as to whether it is dependence or cooperation.

CHAPTER ONE (PART TWO): IMPLEMENTATION OF THE GLOBAL LEGAL REGIME IN SOUTHERN AFRICA

SECTION A: Global Implementing Institutions and Relevant Actors

A number of institutions with various mandates emanated from the global legal framework, tasked to assist in the implementation of the different aspects of transit. Although the right to transit is provided for in Part X of UNCLOS, the implementation of the transit regime still faces challenges. Article 125(1) of the Convention specifically provides that, "...land locked States shall enjoy freedom of transit through the territory of the transit States by all means of transport" However Article 125 (2) goes on to state that,

> "*The terms and modalities for exercising freedom of transit shall be agreed between the land locked State and the transit States concerned through bilateral, sub regional and regional agreements*."

In effect, the implementation of the localised agreements is what has been problematic for land locked States due to factors at the practical level since those arrangements are dependent on the capacities of the States entering into the contracts. While transit agreements between various individual land-locked countries and the adjacent transit and coastal States may be similar to one another, there is no minimum standard for such agreements, although they are subject to "mutual accord."[118] Because the negotiating power of all States is dependent in part upon the degree of economic power exercisable by an effective government, some developing land-locked countries are at an even further disadvantage than that presented by mere geography.[119]And so in order to establish and strengthen the means by which land locked States can gain access to the sea a number of initiatives had to be undertaken to coordinate transit transport operations.

This section of this paper looks at the global initiatives which have been undertaken by several United Nations system organisations, institutional bodies and platforms which are creatures of UNCLOS and other instruments which have been given roles, tasks and mandates emanating from the principles of the United Nations Charter with the aim of affording equal opportunities for economic development to all States.

The question to be analysed in this section is how various institutions and bodies have assisted in the implementation and monitoring of the transit regime by understanding what the term 'transit' entails in actual practice.

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[118]Id. Article 125 (2) UNCLOS inference

[119]*See, e.g.,* United Nations Economic Commission for Africa, Assessing Regional Integration in Africa (IV), at 241, § 7.1, UNECA.ORG (2010), http://www.uneca.org/aria/aria4/index.htm, (stating that for many of the least developed landlocked countries, "research finds that, on average, transport costs . . . are as high as 77 per cent of the value of exports.").

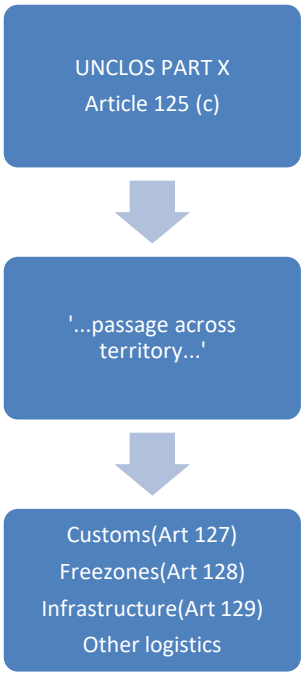

Figure 6: Illustration of transit flow

5.1 United Nations Conference on Trade and Development (UNCTAD) (1962)

General Background

The United Nations Conference on Trade and Development (UNCTAD) has a long history within the United Nations as the focal point for the integrated handling of trade and development, together with related issues in the areas of investment, finance, technology, enterprise development and sustainable development. In the post World War Two era, most matters concerning trade were dealt with in the General Agreement of Tariffs and Trade (GATT) and based on the principle of most favoured nation (MFN) treatment with the emphasis placed on reciprocity and non-discrimination. Beginning in the 1960s, developing countries recognized that they should uphold a common diplomatic stance to consolidate their development and economic concerns within one central organization. They therefore developed a coalition to press for changes in the functioning of the international economic regime by establishing a universal forum to deal with all development-related issues in a comprehensive fashion. The coalition had its roots in the process of decolonization, the growing disillusionment with the workings of the international economic regime and feeling marginalised in GATT negotiations to frame an adequate response to the problems of

economic development.[120] The developing countries sought an alternative international forum in which they could articulate and aggregate their interests. Therefore, a key component in the platform within and outside the United Nations among the developing countries was, first of all, a call for an international conference on trade and development. In 1962 the UN General Assembly decided to convene a conference on trade and development[121], and established a preparatory committee for it. The failure of the GATT to incorporate provisions dealing with commodity agreements, restrictive business practices, foreign investment and preferential trading systems for the developing countries and other major areas of interest resulted in the creation of UNCTAD by the adoption of UN General Assembly Resolution 1964 (XIX) [122]establishing UNCTAD as its subsidiary organ and was institutionalized to meet every four years, with intergovernmental bodies meeting between sessions and a permanent secretariat providing the necessary substantive and logistical support. Simultaneously the developing countries established the Group of 77[123] to voice their concerns.

5.1.1 UNCTAD – Institutional Mandate and Relation to the Transit Regime

Following the renewal of its mandate in Doha in 2012 UNCTAD has the mandate[124] to hold intergovernmental gatherings which address and pursue international economic issues encompassing trade, development, investment, technology, enterprise development and sustainable development. Responding to the specific problems of land locked States requires a multidimensional to approach landlockedness as a development challenge and requires the implementation of policies and measures aimed at economic restructuring and specialization in these countries that take into account their transport-related obstacles. The development of productive capacities is a key element of this process. In this context, UNCTAD supports landlocked States to tackle persisting and emerging challenges by providing advisory services and organizing high-level expert group meetings, among others to address key challenges facing these countries. The Doha Mandate states that UNCTAD shall,

> "(*18) Continue to address the special concerns and needs of Africa, including as articulated in the New Partnership for Africa's Development;*

[120] United Nations Conference On Trade And Development; A Brief Historical Overview Prepared by the UNCTAD Secretariat, UNCTAD/GDS/2006/1, page 2

[121] United Nations Conference on Trade and Development [1962] UNGAR sn 42;A/RES/1785(XVII) (8 December 1962)

[122] Establishment of the United Nations Conference on Trade and Development as an organ of the General Assembly [1964] UNGAR sn 2; A/RES/1995 (XIX) (30 December 1964)

[123] The Group of 77 (G-77) was established on 15 June 1964 by seventy-seven developing countries signatories of the "Joint Declaration of the Seventy-Seven Developing Countries" issued at the end of the first session of the United Nations Conference on Trade and Development (UNCTAD) in Geneva.

[124] As per the Doha Mandate of 2012, (Theme I, A, paragraph 9)

(i) Further address the special trade, investment and development needs of landlocked developing countries (LLDCs), including through continuing its support for effective implementation of the Almaty Ministerial Declaration and the Almaty Programme of Action: Addressing the Special Needs of Landlocked Developing Countries Within a New Global Framework for Transit Transport Cooperation for Landlocked and Transit Developing Countries, and its review in 2014, taking into account the challenges of the transit developing countries in this programme of action"[125]

Since its inception, UNCTAD has focused on the world's poorest and most vulnerable developing countries. Specifically, it aims to increase understanding and awareness of the development problems of least developed countries, as well as countries with specific geographical handicaps, most notably, land-locked developing countries and small-island developing states that are impacted by geography. UNCTAD provides targeted research and analysis of development challenges faced by these countries, designs innovative policy recommendations, delivers tailor-made technical assistance and supports intergovernmental processes which seek to address their specific problems.[126]

By General Assembly Resolution 48/169 its Secretary-General was requested to make an evaluation of the transit systems of the land locked and transit developing countries to serve as a basis for the review of the progress in the development of the transit systems. A symposium for land locked States was organized in 1995 to discuss the findings of the evaluation report and the land-locked and transit developing countries that participated in the Symposium[127] agreed on a range of proposals for the development of a global framework for transit transport cooperation covering the key areas in the transit transport sector, namely, rail and road transit traffic, port facilities and services, inland waterways, airfreight and communications. Proposals for donor support to the sector were also elaborated. The conclusions and recommendations for appropriate action in the above areas which were agreed upon by the Symposium were further discussed with the development partners in the intergovernmental meeting of experts, which finally adopted the Global Framework for Transit Cooperation between the Land-locked and Transit Developing Countries and the Donor Community. This Framework represented a major breakthrough towards the establishment of arrangements for efficient and self sustainable transit transport cooperation.

UNCTAD has undertaken various capacity building initiatives, in support of developing countries, which have been lauded for their merits. One such trade facilitation initiative is the integrated customs system, known as the Automated System for Customs Data (ASYCUDA) a computerized system designed between 1981 and 1984 to administer countries' customs, which has been installed in over 80 countries, and helped to speed up customs clearance procedures and helped governments to organize and modernize their custom procedures and management systems.[128] UNCTAD provides the technical assistance to guide national experts to install the system to be in line with the States' Customs code, implementing regulations and new procedural requirements.

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[125] The Doha Mandate, Theme I, Section B paragraph 18 (h) (i)

[126] Articles From UNCTAD, UNCTAD XIII, Data On Least Developed Countries

[127] United Nations General Assembly A/50/341 Fiftieth Session Agenda Item 95 (a) Report paragraph B.3

[128] UNCTAD Trust Fund for Trade Facilitation Negotiations Technical Note No. 21, January 2011

The objective of this Customs data system is to strengthen Customs operational efficiency for control by providing modern tools and techniques, implementing sound procedures and providing full audit trails and mechanisms for controlling Customs operations.[129] However the introduction of a Customs modernization and automation programme to be successful, should be backed by, high-level political support, an overall reform of Customs procedures possibly including related government agencies and private sector operators, and legislative and regulatory reform. Political support is crucial for the implementation of Customs reform and is a key factor in the success of the reforms. It can therefore be appreciated that the effective inception of the system may be challenging due to a variety of factors ranging from resistance to change by individual Customs officers, to high policy level decision makers who hold the key to push for the requisite changes to the current systems, the implementing legislation as well as the training of relevant staff at the operational level.

From the transit regime provided for in Part X of UNCLOS, the introduction of ASYCUDA, although not intended specifically for land locked States exercising their right to transit, it does give opportunity for the effectualisation of Article 127 of UNCLOS. The evaluation of transit systems by UNCTAD under GA Resolution 48/169,[130] also created room for the improvement of various aspects of transit, including the improvement of infrastructure, through the coordinated efforts of the concerned countries.

5.2 United Nations Office of the High Representative for the Least Developed Countries, Land locked Developing Countries and Small Island Developing States (OHRLLS)

5.2.1 General Background

The United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and the Small Island Developing States (UN-OHRLLS) was established by the United Nations General Assembly in 2001 through its resolution 56/227[131] with functions recommended by the Secretary-General in paragraph 17 of his report A/56/645[132]. The key functions of the Office of the High Representative in accordance with the Secretary-General's report A/56/645 are as follows:

- To assist the Secretary-General in ensuring the full mobilization and coordination of all parts of the United Nations system, with a view to facilitating the coordinated implementation of and coherence in the follow-up and monitoring of the Brussels Programme of Action for the Least Developed Countries for the decade 2001-2010[133], at the country, regional and global levels;

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[129] In Zimbabwe, the average amount spent clearing Customs was shortened from a little over two weeks to one day. UNCTAD: A Brief Historical Overview Prepared By The UNCTAD Secretariat, page 15

[130] United Nation A/RES/48/169 86th plenary meeting 21 December 1993,on Specific actions related to the particular needs and problems of land-locked developing countries

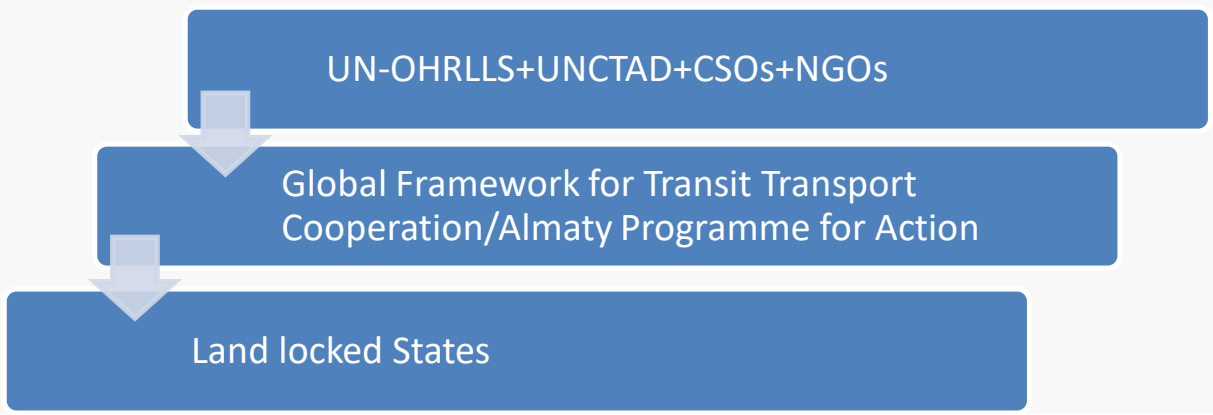
[131] 3rd UN Conference on the Least Developed Countries [2001] UNGAR sn 304;A/RES/56/227 (24 December 2001)

[132] United Nations General Assembly 56th Session Third United Nations Conference on the Least Developed Countries: implementation of the Programme of Action for the Least Developed Countries for the Decade 2001-2010, 23rd November 2001

[133] The Millennium Summit at the United Nations Headquarters in 2000 in New York undertook to address the special needs of the Least Developed Countries (LDCs), 50 world poorest nations which faced specific

- To provide coordinated support to the Economic and Social Council as well as the General Assembly in assessing progress and in conducting the annual review of the implementation of the Programme of Action;
- To support, as appropriate, the coordinated follow-up of the implementation of the Global Framework. This Global Framework has now been replaced by the Almaty Declaration and Programme of Action, 2003 for Transit Transport Cooperation between Landlocked and Transit Developing Countries and the Donor Community and the Programme of Action for the Sustainable Development of Small Island Developing States;
- To undertake appropriate advocacy work in favour of the least developed countries, landlocked developing countries and small island developing States in partnership with the relevant parts of the United Nations as well as with the civil society, media, academia and foundations;
- To assist in mobilizing international support and resources for the implementation of the Programme of Action for the Least Developed Countries and other programmes and initiatives for landlocked developing countries and small island developing States;
- To provide appropriate support to group consultations of Least Developed Countries, Landlocked Developing Countries and Small Island Developing States.

The UN-OHRLLS also partners with the United Nations, donor agencies, Civil Society Organisations and Non-Governmental Organisations in actively engaging in the economic and social development of Least Developed Countries, a category into which most land locked States fall into by United Nations criteria as discussed in the introductory background section of this paper.[134]



constrains and had special needs in their development. The Programme of Action of the Least Developed Countries for the Decade 2001-2010 adopted at the Third United Nations Conference of the Least Developed Countries in 2001 in Brussels and often
referred to as the Brussels Programme took those promises further by setting specific goals and targets and identifying policy actions by the LDCs and their development partners in support of those goals.

[134] See page 2 *supra*

Figure 7: Implementation Framework Matrix

5.2.2 UN-OHRLLS Activities and Initiatives

In fulfilment of its mandated functions in relation to the land locked States in Africa, the UN-OHRLLS has focused its advocacy work to support the New Partnership for Africa's Development (NEPAD)[135] and the aforementioned Brussels Programme for Action in their efforts to mobilise resources to achieve their objectives of the mainstreaming of the implementation of the Programme for Action at national development strategies. The Brussels Programme of Action was based on commitments aimed at significantly improving the human conditions of people in least developed countries, through providing a framework for a strong global partnership. However from its period of inception 2001 to 2011, despite the Programme of Action having had a positive impact on the development progress of least developed countries, the main challenge to its effective implementation was identified to be due to the treatment of least developed countries as a group on the basis of their low per capita income, human asset development and economic, vulnerability remains the fundamental premise for special measures in their favour.[136]

Full account should be taken of the specific geographical constraints and vulnerabilities of each least developed country, including small island and landlocked least developed countries, least developed countries with mountains and fragile ecology, low-lying coastal least developed countries, those with extreme dependency on primary commodity exports, low agricultural productivity and food insecurity, climate and environmental vulnerability, energy insecurity and least developed countries emerging from conflict. This specifically applies to the challenges faced by land locked States on an individual basis as each State has its own constraints peculiar to factors such as the level of economic development and internal political influences among others. This goes to validating the application of Article 125(2) of UNCLOS which provides for the exercise of the freedom of transit to be facilitated through bilateral, multilateral and regional agreements which take into account various aspects and factors pertaining to the unique circumstances of the countries involved in the transit chain.

To that end, the UN-OHRLLS has the responsibility to fulfil its functions to assist the Secretary-General for the effective follow-up and monitoring of the implementation of the Brussels Programme of Action and other like initiatives as well as the full mobilization and coordination of all parts of the United Nations system, with a view to facilitating the coordinated implementation of and coherence in the follow-up and monitoring of the

[135] NEPAD is an economic development program of the African Union. NEPAD was adopted at the 37th session of the Assembly of Heads of State and Government in July 2001 in Lusaka, Zambia. NEPAD aims to provide an overarching vision and policy framework for accelerating economic co-operation and integration among African countries. The focus of the UN-OHRLLS advocacy was on Africa since 34 out of the 50Least Developed Countries (LDCs), 15 of the 31 Landlocked Developing Countries (LLDCs) and six out of the 34 Small Island Developing States (SIDs) are in Africa. UN-OHRLLS Support to NEPAD Period Report, July 2006-June 2007

[136] Fourth United Nations Conference on the Least Developed Countries Report, Istanbul, 9-13 May 2011, A/CONF.219/3.

Programme of Action for the least developed countries at the country, regional and global levels, and to assist in mobilizing international support and resources for the implementation of the Programme of Action.[137] To achieve this, UN-OHRLLS should continue its awareness raising and advocacy works in favour of least developed countries in partnership with the relevant part of the United Nations, as well as with parliaments, civil society, media, academia and foundations, and to provide appropriate support to group consultations of least developed countries. With a view to ensuring the effective implementation of the functions of OHRLLS and strengthening its capabilities and effectiveness, as well as the effectiveness of the United Nations system support provided to least developed countries, the Secretary-General is requested to prepare a report in consultation with Member States as well as the relevant specialized agencies, funds, programmes and regional commissions, taking into account the work done by the United Nations system and submit it with recommendations to the General Assembly.[138]

5.2.3 Global Framework for Transit Transport Cooperation (1995) and the Almaty Programme of Action (2002-2013)

The 1995 Framework provided a strategy for addressing the transit problem by challenging land locked States to strengthen their transit cooperation by adopting and implementing policy measures and actions designed to improve their transit systems, and it urged the donor community to support such commitments. It was however overtaken by the Almaty Programme of Action of 2002(APoA) adopted by UN General Assembly Resolution A/58/Res/201, to establish a new global framework for developing efficient transit transport systems in landlocked and transit developing countries, taking into account the interests of both landlocked and transit developing countries. It recognizes the direct link between transport, international trade and economic growth, and aims at ensuring fuller and more effective integration of the landlocked developing countries into the global economy through implementation of specific actions to be undertaken by both landlocked and transit developing countries with the support of their development partners in five Priority Areas, namely:

- Fundamental transit policy issues;
- Infrastructure development and maintenance;
- International trade and trade facilitation;
- International support measures; and
- Implementation and review.

The OHRLLS being the UN System-wide focal point for issues related to land locked States was tasked by the General Assembly in its resolution 66/214 of 22 December 2011, to provide support and actively contribute to the review process of the implementation of the

[137] For example, OHRLLS has developed a project document to mobilise resources to supportthe process of the establishment an intergovernmental agreement for the Trans African Highway pursuant to the Declaration of the Second African Union Conference of the African Ministers in Charge of Transport, 21-25 November 2011, Addis Ababa, Ethiopia.

[138] United Nations General Assembly Resolution 64/214

APoA over a 10 year life span. Thus OHRLLS undertakes interagency coordination to ensure that within their respective mandates, relevant international and regional development and financial organizations, such as UNCTAD, UNDP and other relevant international and regional development and financial organizations do provide the necessary support for the review of the 10 year implementation period. A review of the APoA implementation was scheduled to be carried out in 2014, in accordance with paragraph 49 of the Action Plan.[139] The objective of the Program of Action is to,

- Secure access to and from the sea by all means of transport according to applicable rules of international law;
- Reduce costs and improve services so as to increase the competitiveness of their exports;
- Reduce the delivered costs of imports;
- Address problems of delays and uncertainties in trade routes;
- Develop adequate national networks;
- Reduce loss, damage and deterioration en route;
- Open the way for export expansion;
- Improve safety of road transport and security of people along the corridors.

The monitoring and review of the implementation of the APoA falls under its Priority Area 5 and it is stated there under that its successful implementation requires individual and concerted efforts by the landlocked and transit developing countries, their development partners, organizations and bodies of the United Nations system, relevant international organizations, such as the World Bank, regional development banks, the World Trade Organization and the World Customs Organization, the Common Fund for Commodities, regional economic integration organizations, and other relevant regional and sub regional organizations. The APoA represented a strong commitment by the international community to address the special needs and challenges of land locked States as called for by the United Nations Millennium Declaration.[140]

5.2.4 The Istanbul Declaration and Programme of Action (2011)

The OHRLLS also coordinates and mobilises resources for the implementation of the Istanbul Declaration and Programme of Action (IPoA) for the decade 2011-2020 adopted by the Fourth United Nations Conference on the Least Developed Countries in Istanbul in 2011. The IPoA was adopted following the assessment of the results of the 10 year Brussels Programme of Action to agree on new measures and strategies for the sustainable development of least developed countries for the next decade. From the review of the Brussels Programme of Action some lessons learned were apparent which are of direct application to the challenges peculiar to land locked States including the need for greater

[139] The General Assembly in its resolution 66/214 of 22 December 2011 and resolution 67/222 of 3 April 2013 decided to hold a comprehensive ten-year review Conference of the Almaty Programme of Action in 2014, in accordance with paragraph 49 of the Almaty Programme of Action and paragraph 32 of the Declaration on the midterm review. The review will be undertaken at the Second United Nations Conference on Landlocked Developing Countries (LLDCs) will be held from 3 to 5 November 2014 in Vienna, Austria. A/CON\F.225/PC/L.4

[140] United Nations Millennium Declaration, GA Res/A/55/L.2, 8th September 2000

ownership and leadership of least developed countries, including the integration of the Programme of Action in national development strategies, plans and programmes, and identification of authorities to oversee implementation, as well as multi-stakeholder engagement by parliamentarians, civil society organizations, the private sector, and executive branches.[141]

The overarching goal of the IPoA for the decade 2011-2020 is to overcome the structural challenges faced by the least developed countries in order to eradicate poverty, achieve internationally agreed development goals and enable graduation from the least developed country category. Under this goal, national policies of least developed countries and international support measures during the decade are to focus on a number of specific objectives with the aim of enabling half the number of least developed countries to meet the criteria for graduation[142] from the least developed country category by the year 2020.

The most relevantly applicable factor[143] to address the issues faced by land locked States is the requirement for the enhancement good governance at all levels, by strengthening democratic processes, institutions and the rule of law, increasing efficiency, coherence, transparency and participation, protecting and promoting human rights, reducing corruption, and strengthening least developed country Governments' capacity to play an effective role in their economic and social development, as this is the basis for the mobilization of resources from development partners and the donor community.

One of the tasks of the OHRLLS is the mobilization of resources to assist in the implementation of the Programmes of Action dealing with transit in areas such as infrastructure development and maintenance, human resource development and capacity building, policy and legislation review, reduction of central government debt and monitoring the effectiveness of programmes and initiatives undertaken at national, bilateral and regional basis. The APoA recognized that the cost implications of meeting the requirements of establishing and maintaining efficient transit transport systems are of such a magnitude that landlocked and transit developing countries cannot accomplish such a challenging task on their own.[144] Development partners therefore play an important role in supporting transit transport development programmes.

5.3 United Nations Development Programme (UNDP)

The UNDP (1966) functions among others, is to support countries to accelerate progress in human development by providing policy advice, technical support and advocacy. It is

[141]Report of the Fourth United Nations Conference on the Least Developed Countries Programme of Action for the Least Developed Countries for the Decade 2011-2020, Istanbul, Turkey, 9-13 May 2011, A/CONF.219/3.

[142] According to the OHRLLS, for a country to be eligible for graduation from the least developed country category, it should reach threshold levels of two of either the Low Income Criterion or the Human Assets Index or the Economic Vulnerability Index. The graduation criteria will be discussed in greater depth in a later section of this paper.

[143] See note 128

[144] Global Event Of Landlocked Developing Countries And Transit Countries On Trade And Trade Facilitation Report, Trade, Trade Facilitation And Transit Transport Issues For Landlocked Developing Countries, UNCTAD, UNDP, New York Publication

mandated to coordinate and enhance the efficiency of the United Nations system at the national level and is therefore well positioned to assess the challenges faced by countries at the local level and can best offer assistance in the designing of implementation programmes entrenched in the transit regime facilitation. While the land locked States share the common attribute of being geographically distant from the sea and ports, they vary considerably in a number of other important aspects. These differences must be taken into account for purposes of policy formulation. To some extent, the best ways to overcome their geography-based disadvantages vary from country to country, reflecting their differing individual competitive and comparative advantages and the need for customized policy responses. In coordination with the OHRLLS, the UNDP holds the capacity to pool expertise and harness resources to directly impact the transit chain from the unique posture of each land locked State and can propel policy direction towards the adoption of the most appropriate strategies to support the initiatives aimed at easing the transport burdens faced by such States.

According to the UNDP business model,[145] in addition to core partnerships with other United Nations organizations and governments, UNDP is mandated to pursue innovative strategic partnerships with civil society organizations and networks, as well as with the private sector. Such coordinating activities, assist the UNDP in the collection of data which can be utilized at the United Nations system level to harness support for development programmes being undertaken by specific countries from relevant development partners in the discharge of programmes of action on the implementation of the transit regime and the address of the constraints faced by land locked States at all stages of the transit cycle.

5.4 The Role of Development Assistance, the Donor Community and Other Stakeholders

Official Donor Assistance (ODA) is the main source of external finance for land locked States and it is crucial for the implementation of their development plans. Substantial resources are needed to be invested in infrastructure development if these geographically challenged countries are to overcome their economic and developmental problems and enhance their long-term growth prospects. International assistance for export diversification, institutional capacity-building and market access are thus essential.

However for donor support recipients to obtain the much needed aid in the form of budgetary support and technical and capacity building, a good governance record is crucial.[146] It was stated in the Monterrey Consensus of 2003[147] that good governance is essential for sustainable development. Sound economic policies, solid democratic institutions responsive to the needs of the people and improved infrastructure are the basis for sustained economic growth, poverty eradication and employment creation. Freedom, peace and security, domestic

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[145] UNDP Strategic Plan, 2008-2011, Executive Board of the United Nations Development Programme and of the United Nations Population Fund, DP/2007/43, Item 3 of Provisional Agenda

[146] "Good governance is a criterion which can be used to establish, break or change aid relationships." *'Good Governance': condition or goal? European Donors and the discussion on 'Good Governance'*, Paul Hoebink, Paper for the 10th EADI General Conference 'EU Enlargement in a Changing World Challenges for Development Co-operation in the 21st Century, Working Group 'Aid and Development' Ljubljana, 19-21 September 2002

[147] The Monterrey Consensus of the International Conference on Financing for Development, 2003, was a platform where agreements and strong commitments by developed countries to maintain their Official Development Assistance (ODA) targets to finance development by over 50 heads of State and Government and over 200 Ministers of Finance, Foreign Affairs, Development and Trade, as well as Heads of the United Nations, the World Bank, IMF and WTO, prominent business and civil society leaders were made.

stability, respect for human rights, including the right to development, and the rule of law, gender equality, market-oriented policies, and an overall commitment to just and democratic societies are also essential and mutually reinforcing. The position was further reiterated at the Fourth United Nations Conference on the Least Developed Countries[148] that focus on issues like good governance at national and international levels and the fight against corruption, respect for human rights, gender issues, building institutional capacity, social protection and social services and environmental concerns is important to a broad approach to poverty eradication. UN Secretary General also stated,

> "...as we all know, infrastructure is not just a matter of roads, schools and power grids. It is equally a question of strengthening democratic governance and the rule of law. Without accountability, not only of the government to its people but of the people to each other, there is no hope for a viable democratic State."[149]

In this regard, the role of international and local nongovernmental and the civil society organisations[150] comes into play as they offer monitoring and evaluation expertise and services on the progress of the implementation of the global legal framework which caters for the transit regime. In partnership with relevant government agencies and departments, they also play an advisory role to government on policy direction may translate into the review of relevant laws and regulations. The oversight role also extends to monitoring the governance trends to assist willing governments in fulfilling their international obligations and thus create a good governance record which facilitates the inflow of donor support. Direct donor support can be given to specialised NGOs to finance projects to collect, analyse and disseminate relevant information and to assess and monitor compliance with relevant agreements and treaty obligations at the national, multilateral and sub regional levels. NGOs and other civil society groups are not only stakeholders in governance, but also a driving force behind greater international cooperation through the active mobilization of public support for international agreements.

The role of the private sector both at the national and international podium in assisting in the facilitation of aspects of the transit regime should also be taken into consideration. This stakeholder bears the financial capacity to contribute to infrastructure development projects and may work in coordination with governments to fill development funding gaps.[151]

Conclusion

As has been outlined in this section, from the adoption of UNCLOS in 1982, despite the rather large time lapse to date, a number of initiatives have been undertaken at the global level by various institutions and organisations to give effect to the transit regime in its various

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[148] Programme of Action for the Least Developed Countries for the Decade 2011-2020, Istanbul, Turkey, 2011. A/CONF/219/3

[149] Secretary-General Ban Ki-moon, Remarks to the Security Council on Timor-Leste, 19 February 2009.

[150] "Historically, the UN cooperated with NGOs primarily as partners in the implementation of certain programs such as human rights monitoring due to their critical role in service delivery and implementation and civil society organizations have long been recognized as "partners" of the UN system", *The Role of NGOs and Civil Society in Global Environmental Governance*, Barbara Gemmill and Abimbola Bamidele-Izu, page 5

[151] An example is The Private Infrastructure Development Group (PIDG), a multi-donor organisation established in 2002 which has 9 members. Australia (joined in 2011), Austria, Germany, Ireland, the Netherlands, Sweden, Switzerland, the United Kingdom and the World Bank Group. The companies and facilities in the group mobilise private sector investment for infrastructure development in developing countries. Source: Australian Multilateral Assessment Report, March 2012, Private Infrastructure Investment Group (PIDG), Australian AID.

aspects. The APoA of 2002 is the main platform of action as it outlines and proposes a number of measures and strategies to achieve success in the implementation of the transit regime. However as will be analysed in the upcoming section of this paper, it is evident that the progress of development for the landlocked States remains sluggish with only a few countries of the category having graduated from the least developed country bracket.[152]The question then is whether the initiatives and implementation efforts at the global level adequately address the challenges faced by land locked States, or whether particular factors on the ground in the respective States and regions contribute to the slow progress.

CHAPTER ONE (PART TWO)

SECTION B: Regional Implementation Efforts: Southern African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA)

In addition to the global institutions discussed in the preceding section, the matter of transit for landlocked countries has also been given attention by various bodies, organisations and platforms in Africa and over the years various measures have been taken to facilitate transit. A historical overview of the relations between relevant African States will be made to better understand the intricacies of the transit regime facilitation initiatives.

6.1 Brief Historical Background

Almost all of sub-Saharan Africa became independent after 1956 and up until that era, bilateral agreements between countries were made between colonial powers seeking access to the sea for their colonies. For instance, a Treaty signed between Great Britain and Portugal on November14, 1890 guaranteed free navigation on the Zambezi River; Article 3 of this Agreement, the King of Portugal agreed to improve the means of communication between Portuguese ports and territories that were in the British zone of influence.[153] In 1950, Great Britain and the Republic of Portugal signed a Convention concerning the port of Beira, in Mozambique.[154] This agreement ensured access to the sea for the British colonies of Northern Rhodesia (Zambia), Bechuanaland (Botswana), Swaziland, and Basutoland (Lesotho). The contracting States also agreed to avoid any discrimination in applying railway tariffs within these territories.

The process of decolonization and preparing colonies for self-government commenced in the 1950s and consequently, the African land locked States began signing their own bilateral agreements with transit neighbors for overland public transport and to the transportation[155] of both goods and passengers. Besides bilateral agreements, a number of international organizations as discussed earlier, generally regional or sub regional, facilitate exchange

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[152] Botswana graduated from the LDC bracket in 2014. OHRLLS criteria. Page 5 *supra*

[153] The British colonies in issue were under the Federation of Rhodesia and Nyasaland now Malawi, Zambia and Zimbabwe; the Portuguese colony is now Mozambique. The River Zambezi has its source in Zambia and flows through Angola, along the borders of Namibia, Botswana, Zambia and Zimbabwe, to Mozambique, where it empties into the Indian Ocean.

[154] 537 U.N.T.S. 167

[155] Agreement of July 26, 1968 Between Mali and Upper Volta; Agreement of October 10, 1966 Between Niger and Upper Volta *See* Document UNO A/AC 138/37, June 11, 1971. *Note:* Upper Volta officially changed its name to Burkina Faso on August 4, 1984

between African States. Most of these were created as instruments of economic cooperation among States and within these institutions, organizations facilitating transit among member States were created. This section of the thesis will examine the status of implementation of the transit regime in Southern Africa through the various organisations, institutions and Regional Economic Communities.

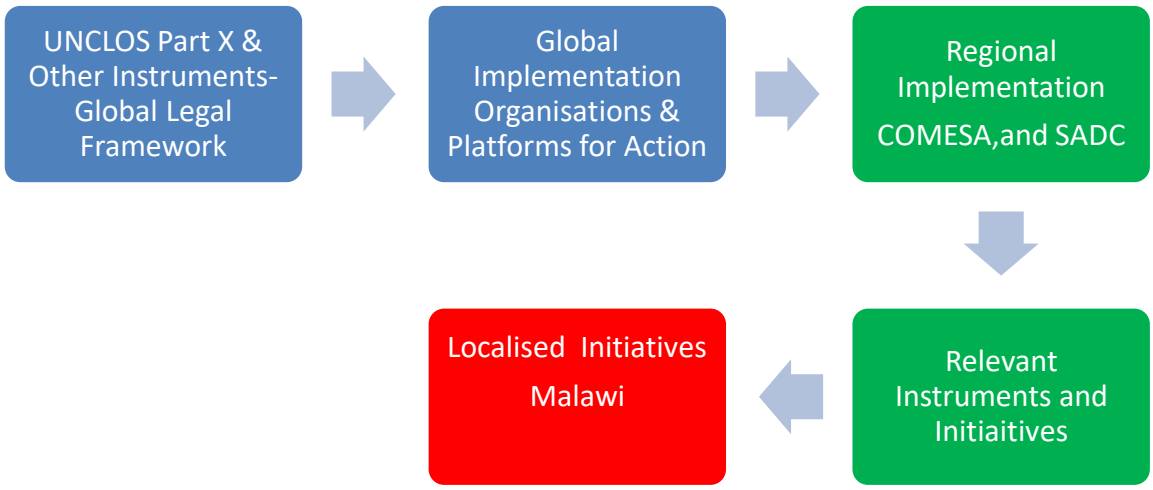

Figure 8: Implementation progress flow

6.2 Southern African Development Community (SADC) (1992)

One of the objectives of the African Union (AU) outlined in Article 3(l) of its Constitutive Act is to coordinate and harmonize the policies between the existing and future Regional Economic Communities (RECs) for the gradual attainment of the objectives of the Union. SADC is one of the seven[156] RECs on the African continent and it complements the role of the AU at the sub regional level, in its goal to further socio-economic cooperation and integration as well as political and security cooperation among its 15 member States.[157] The Southern African Development Coordinating Conference (SADCC), established on 1 April 1980 was the precursor of the Southern African Development Community (SADC). The SADCC was transformed into the SADC in 1992 in Namibia where the SADC Treaty was adopted, redefining the basis of cooperation among Member States from a loose association into a legally binding arrangement. Six of SADC member States namely Botswana, Lesotho, Malawi, Swaziland, Zambia and Zimbabwe are landlocked and so the matter of the effective implementation of transit rights and improvement of the transit regime is crucial for the economic uplifting of the regional grouping.

[156]The RECs are namely Community of Sahel-Saharan States (CEN-SAD), Economic Community of Central African States (ECCAS), Common Market for Eastern and Southern Africa (COMESA), Economic Community of West African States (ECOWAS), Intergovernmental Authority for Development (IGAD), Southern African Development Community (SADC), Union du Maghreb Arabe (UMA)

[157] SADC member States are Angola, Botswana, DR Congo, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

The SADC Treaty legally binds all the member States to its objectives which are to "*…achieve development and economic growth…through regional integration*"[158] and to "*promote self-sustaining development on the basis of collective self-reliance and the interdependence of Member State.*"[159] In order to achieve its goals, as per Article 5 (2) (h), SADC endeavours to promote the coordination and harmonization of the international relations of the member States. The Treaty makes no specific mention of landlocked States but makes provisions which make allowance for the setting into place of measures, policies and initiatives at both the national level as well as at the bi/multilateral level to give effect the right to transit. Article 6 (3) provides for non-discrimination against members of the Community and this sentiment extends to Article 21(1), which provides for Areas of Cooperation to be entered into on the basis of "*…balance, equity and mutual benefit*" and paragraph (3) binds the member States to agree to cooperate in various areas including, " *…infrastructure and service*s…"

The Treaty, in Article 22 also makes allowance for the conclusion of Protocols by the member States as may be necessary in identified areas of cooperation which in itself opens the field for the entry into facilitating instruments to cater for the modalities of transit in furtherance of Article 125(2) of UNCLOS. Article 33 is the enforcement provision which prescribes sanctions against member States which, "*…persistently fail and without good reason, to fulfill obligations assumed under the Treaty*"

Under the African Union the 2050 Africa's Integrated Maritime Strategy[160] was launched in Ethiopia, in April 2014 with the aim that it should be developed as a tool to address Africa's maritime challenges for sustainable development and competitiveness. In keeping with the principles of the AU, in paragraphs 21(x) and (xii) it is stated in the Strategy's guiding objectives that it would, "*Promote the ratification, domestication and implementation of international legal instrument*s" and "*Protect the right of access to sea and freedom of transit of goods for landly-connected States"*. The Strategy is to be interpreted and implemented in conjunction with all relevant AU, national and international regulatory frameworks and on-going maritime initiatives in Africa, including the New York Convention on Transit Trade of Landlocked States (1965), The African Maritime Transport Charter (AMTC), (2010), as well as the Almaty Programme for Action.[161]It also provides that the Strategy is to be reviewed every three years to ensure alignment of the strategic objectives with global geo-strategic contexts in Part XIX, paragraph 105 of the document.
Despite there being no specific reference to UNCLOS Part X as regards the challenges faced by the continent's landlocked States, the framework created by the aforementioned instruments established foundations for the coordinated and harmonised policies to facilitate aspects of transit. The encouragement for States to ratify and domesticate international legal instruments also goes to strengthen the position of land locked States as such concessions to the international legal framework creates obligations for the transit States to protect the right of transit and access to the sea.

[158] SADC Treaty 1992, Article 5 (1) (a)
[159] *ibid* Article 5 (1) (d)
[160] Pursuant to Decision [Assembly/AU/Dec.252(XIII)] adopted by the 13th Ordinary Session of the AU Assembly held in Sirte, Libya, on July 2009
[161] EXISTING REGULATORY FRAMEWORKS AND ON-GOING INITIATIVES, 2050 AIM Strategy, Part XI, paragraph 27 (ii), (v) and (ix)

6.2.1 Protocol on Transport, Communication and Meteorology (1996)

Under the SADC a number of Protocols were concluded including the 1996 Protocol on Transport, Communication and Meteorology. The Protocol in Article 2 (3) advises SADC Member States to promote an integrated, multimodal transport system throughout Southern Africa that remains efficient, reliable, economically viable, and environmentally responsible. This system is best realized through a harmonised regional policy on transport, with coherent frameworks for institutions and strategies for implementation. Therefore, Member States agree to cooperate on a transport network aimed at ensuring the free movement of people and goods through the region, particularly from landlocked Member States to seaports located in coastal Member States' territory and vice-versa. Article 3 (2) provides,

> "*Member States shall apply the following principles -*
>
> *a. the right of freedom of transit for persons and goods;*
>
> *b. the right of land-locked Member States to unimpeded access to and from the sea;*
>
> *c. the right of coastal Member States to unimpeded access to and from land-locked Member States*;"

Initially, cooperation will require funding by governments. The reciprocity element contained in this provision is positive since it levels the playing field for landlocked States in negotiating transit through the territories of the Member States and it echoes Article 15 of the 1967 New York Convention earlier discussed herein. It also positive as infrastructure development projects would be the responsibility of both the landlocked States and the transit and coastal States. This is in line with Article 25 of the SADC Treaty which provides that SADC shall be responsible for the mobilization of its own and other resources required for the implementation of programmes and projects; and, the Protocol notes that much of the transportation infrastructure should become financially self-sustaining through private sector investment and user-pays principles as provided in Article 2 (4) (i) which states that, "*Member States shall engage all stakeholders in giving effect to this Protocol by promoting [among others]the following strategic goals …co-operative policy development facilitated by strategic partnerships between government and a responsible and competent regional private sector."*

Consequently, Member States should endeavour to facilitate an environment conducive to participation of the private sector in transportation infrastructure since the private sector may have a broader resource base which can be injected into infrastructure development and maintenance to enable the smooth operation of the transit regime.

6.2.2 Protocol on Trade (1996)

In 1996, the Community also concluded the Protocol on Trade which intends to further liberalise intra-regional trade by creating mutually beneficial trade arrangements, thereby improving investment and productivity in the region. It advocates that Member States

eliminate barriers to trade, ease customs[162] procedures, harmonise trade policies based on international standards, and prohibit unfair business practices. In line with Article 127 of UNCLOS, Article 15 provides for the facilitation of Transit Trade and states:-

"Products imported into, or exported from, a Member State shall, as provided for in Annex IV of this Protocol, enjoy freedom of transit within the Community and shall only be subject to the payment of the normal rates for services rendered."

The Protocol also sets out institutional arrangements for implementation such as Preferential Trade Arrangements in Article 27 and the application of the Most Favoured Nation Treatment in Article 28, and contains annexes detailing policies on Rules of Origin, customs cooperation, harmonisation of trade documentation, transit facilities, and trade development.[163]

6.2.3 Regional Infrastructure Development Master Plan (2012)

In order to outline plans for infrastructure development that balance the needs of the region with its challenges, SADC released its Regional Infrastructure Development Master Plan in 2012.This document follows the 2010 Programme for Infrastructure Development in Africa (PIDA)[164] of the African Development Bank. The Master Plan was developed as a strategic framework guiding infrastructure development in Southern Africa from 2012 to 2030. Built on a foundation of harmonised policies and a joint pool of resources, it highlights key challenges for infrastructure in the region and establishes specific targets for bridging gaps and removing bottlenecks, in turn aiming to unlock the region's potential. The Master Plan in its analysis of the transport sector in the SADC region states that as regards surface transport there is widening gap in the provision of infrastructure in the subsector across the region. In this regard, the region adopted a Spatial Corridor Development Strategy developed in 2008, which yielded the flagship programme, the North-South Corridor Project[165]. The SADC corridor approach to regional development is based on both well maintained, operated infrastructure and the provision of seamless transport services. The PIDA, which forecasts indicators for the SADC region, projected that transit traffic for the landlocked countries Botswana, Malawi, Southern Democratic Republic of Congo, Zambia and Zimbabwe would increase from 13 million tonnes in 2009 to 50 million tonnes by 2030 thus placing more pressure on the current transit infrastructure.[166]

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[162] SADC Protocol on Trade, Article 4(1) provides , "*There shall be a phased reduction and eventual elimination of import duties , in accordance with Article 3 of this Protocol, on goods originating in Member States*"

[163] See Annex 2

[164] PIDA is a continent-wide program to develop a vision, policies, strategies and a programme for the development of priority regional and continental infrastructure in transport, energy, trans-boundary water and ICT.

[165] The Tripartite which includes the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC) are working towards deepening regional economic integration through a number of programmes, including the so-called "North-South Corridor Aid-for Trade Programme", which aims to improve the reliability of transport corridors through addressing infrastructure constraints and operational inefficiencies, improvements in policies and procedures, corridor institutional development and the promotion of coordinated approaches to planning, programming and financing

[166] Study on Programme for Infrastructure Development in Africa (PIDA) Phase I Study Summary, Africa Infrastructure Outlook 2040 Study on Programme for Infrastructure Development in Africa (PIDA), Andrew

6.3 Common Market for Eastern and Southern Africa (COMESA) (1994)

The Common Market for Eastern and Southern Africa traces its genesis to the mid 1960s. In 1965, the United Nations Economic Commission for Africa (ECA) convened a ministerial meeting of the then newly independent states of Eastern and Southern Africa to consider proposals for the establishment of a mechanism for the promotion of sub-regional economic integration. In 1982 the Lusaka Declaration of Intent and Commitment to the Establishment of a Preferential Trade Area for Eastern and Southern Africa (PTA) was adopted. The PTA Treaty envisaged its transformation into a Common Market and, in conformity with this, the Treaty establishing the Common Market for Eastern and Southern Africa, COMESA, was ratified in Malawi in1994.

COMESA is comprised of 19 member States 8[167] of which are landlocked. One of the priority areas for the Common Market is stated to be the development of transport and communications infrastructures and services with special emphasis on linking the rural areas with the rest of the economy in each country as well as linking the member States. In order to promote the achievement of the aims and objectives of the Common Market, in the field of transport and communications, Article 4 (2) (b) of the COMESA Treaty provides that Member States are obligated to make regulations for facilitating transit trade within the Common Market. Further to that, in the spirit of Article 127 of UNCLOS, to foster cooperation in trade liberalization and development, Article 45 of the COMESA Treaty provides for the establishment of a Customs Union among the Member States. The Article states,

> "*Within the Customs Union, customs duties and other charges of equivalent effect imposed on imports shall be eliminated. Non-tariff barriers including quantitative or like restrictions or prohibitions and administrative obstacles to trade among the Member States shall also be removed. Furthermore, a common external tariff in respect of all goods imported into the Member States from third countries shall be established and maintained."*

The Treaty also acknowledges the challenges faced by land locked States in Article 84 which provides for transport and communication policies by stating that in order *"…to evolve coordinated and complementary transport and communications policies, to improve and expand the existing links and establish new ones as a means of furthering the physical cohesion of the Member States, so as to facilitate movement of inter-State traffic and to promote greater movement of persons, goods and services within the Common Market"* Member States shall take all necessary steps to "…*grant special treatment to landlocked and island Member States in respect of the application of the provisions of this Chapter."*[Article 84 (d)].

Further allowance is made in Article 88 (d) which regulates the usage of maritime ports and it provides that Member States shall,

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Williams Jr TRN.tv, Goodwill Ambassador Andrew Williams Jr at Globcal International Cooperative on May 07, 2014

[167] The member States of COMESA are Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Seychelles, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. Highlighted are the landlocked States in the Common Market.

"…in the case of those that are coastal Member States, co-operate with those that are landlocked Member States in maritime transport so as to facilitate the trade of such landlocked Member States"

The Article in paragraph (e) also compels the Member States to "…*take measures to ratify or accede to International Conventions on maritime transport"*

The COMESA Treaty goes on to make more regulations on facilitation of trade in the Common Market and has very instructive chapters[168] addressing aspects of customs logistics and the harmonization and standardisation of the customs systems, coordinated intra- State infrastructure development and maintenance, all which give the land locked States in the region good prospects of implementing their right to transit. The Treaty is the umbrella under which the member States can enter into bilateral arrangements to facilitate transit on terms peculiar to themselves. Article 21 of the Treaty provides for the referral of cases of non conformity to obligations under the Treaty to the COMESA Court of Justice.

6.3.1 Protocol on Transit Trade and Transit Facilities (1996)

In line with sub-paragraph (b) of paragraph 2 of Article 4 of the COMESA Treaty, Member States of the Common Market concluded the Protocol on Transit Trade and Trade Facilities which further regulated the transit regime by further liberalizing intra-regional trade by creating mutually beneficial trade arrangements and advocates that Member States eliminate trade barriers, ease customs procedures and harmonise trade policies based on international standards, and prohibit unfair business practices. Article 2 (3) of the Protocol echoes Article 127 of UNCLOS with regard to the right of access to the sea and customs duties, taxes and other charges and provides, *" The Member States undertake not to levy any import or export duties on the transit traffic referred to in paragraph 1 of this Article. However, in accordance with paragraph 6 of Article 11 of this Protocol, a Member State may levy administrative or service charges".*

As with other previously discussed instruments which make provision for the interests of the transit States, the same are protected in paragraph 3 of Article (2) which states that, "*Notwithstanding the provisions of paragraph 1 of this Article, any Member State may, if it deems it necessary, prohibit, restrict or otherwise control the entry of certain persons, mail, merchandise or means of transport from any country for the protection of public morality, safety, health or hygiene, or animal or plant health, or in the public interest."* It should be noted that the Article makes no mention of the sovereignty of the transit States which displays a great degree of flexibility that can be available when transit is being facilitated. In the same spirit paragraph 1 of the same Article provides that, "*The Member States undertake any means of transport suitable for that purpose…"* and paragraph 4 provides that, "…*there shall be no discrimination in the treatment of persons, mail, merchandise and means of transport coming from or bound to the Member States, and that rates and tariffs, for the use*

[168] See Annex 3

of their facilities by other Member States shall not be less favourable than those accorded to their own traffic."[169]

The transit regime at the Southern African region level has received ample attention in the way of facilitating instruments which take into account the disadvantaged posture of the landlocked States as has been illustrated by the aforecited treaties, protocols and regional arrangements. The question however is whether the enabling legal framework does indeed benefit the relevant States in practice. It is however clear that the instruments in Africa focus majorly on trade (facilitation) as a whole and do not make specific provisions for the facilitation of the transit regime for the land locked States. The impression given from the analysis of the legal framework in Africa is that implementation of transit is largely governed under bilateral and multilateral agreements between the concerned States where the intricate details of the transactions are negotiated and covered accordingly.

6.4 Regional Level Implementation

As of October 2013, 166 States had ratified UNCLOS[170], 41 of which are African States including the transit and coastal States in Malawi's transit chain due to the recognition of the great importance of the regional dimension on the overall ability for trade. However, Malawi's membership to overlapping regional and bilateral arrangements under both SADC and COMESA with different geographical coverage, trade liberalization agendas and trading rules makes its trade regime more complex. Although membership to the RECs creates significant trade opportunities it also poses a number of challenges for trade policy design and transit facilitation due to the different national priorities and political commitment which translates into inadequate or weak national legislation, lack of domestication of international instruments which in turn results in the administrative aspects of transit implementation receiving insufficient attention; the undeniable consequence of this is poor status or availability of physical infrastructure and numerous complications in the soft infrastructure such as cumbersome transit procedures and inefficient logistics systems which transcend the borders in the region.

At the regional level the facilitation of transit is duly covered by the provisions made under both the COMESA and SADC Treaties and the related protocols. At national level, apart from the bilateral arrangements with her transit States, Malawi has undertaken commitments to improve access to the sea and ease the challenges faced in its transport sector. In conformity with the United Nations Millennium Development Goals 2000, Malawi undertook to implement the same, by the adoption of the medium term Malawi Growth and Development Strategy II[171] for the period 2011 to 2020 with the aim of reduction of poverty

[169] See Annex 4 for full Protocol

[170] Division for Oceans and the Law of the Sea, Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 29 October 2013. Malawi ratified in September 2010, Zambia in March 1983, Zimbabwe in February 1993, Republic of South Africa in December 1997, United People's Republic of Tanzania in September 1985 and Republic of Mozambique in March 1997.

[171] The Malawi Growth and Development Strategy I was successfully implemented between the years 2006 and 2011 and was superceded by the MGDS II as discussed above.

by focusing on nine priority areas the third of which is Transport Infrastructure and Nsanje World Inland Port in line with UN MGDs Goal 8- Develop a global partnership for development.
In recognition of the challenges faced due to the transit regime implementation, the Strategy outlines in Priority Area 3:-

> "3. Transport Infrastructure and Nsanje World Inland Port
> *Good transport infrastructure is a catalyst for development. Better domestic and regional connectivity demands improved road, water, rail and air transport. While continuing with the improvement of the road network, Government will focus on rail and water transport infrastructure including the Nsanje World Inland Port*."

The priority area falls under the thematic area of Infrastructure Development in the Strategy which makes recognition of the requirement for improved surface transport infrastructure as being central to domestic and international connectivity. However despite this recognition, the Strategy does not include in its implementation activities the aspect of entering into bilateral agreements with its transit countries to facilitate the implementation of the ultimate goal of reducing the costs associated with transit transport the goal being to open up the country to ports along the Indian Ocean and reduce costs of goods; with the medium term expected outcomes to include reduced transport costs, reduced lead times on exports, and decreased cost of shipping, low costs of cross-border and transit trade, and lower cost to reach domestic, regional and international markets.

6.5 Possible Alternatives

Distance to the sea is obviously the main challenge faced by landlocked States and poses major constraints to economic development aspirations for them. As such, alternatives to the transit problem should be addressed from other angles which may offer long term and sustainable channels for development to complement the current transit regime and offer relief to the system.

6.5.1 The Zambezi Waterway/Inland Port[172]

The usage of inland waterways for transit to the sea for landlocked States is a possible alternative to the geographical challenges faced by land locked States to access the sea. For Malawi, Zambia and Zimbabwe, recent proposals have been made and feasibility studies conducted into the usage of the Shire-Zambezi Rivers through the territory of Mozambique to access the Indian Ocean. As far as a hundred and fifty years ago, the Shire - Zambezi was already used by explorers and missionaries as an inland transportation waterway from the Mozambican coast in the Indian Ocean to the Malawian District of Nsanje, over a distance of 380 km. Recent use of the waterway for transportation dates back to the early 1970s, where barge services Malawi to the port of Chinde in Mozambique were privately operated. Due to the civil strife in Mozambique from 1977 to 1992, goods transportation on the waterway was disrupted and Malawi turned to alternative transport modes on corridors such as Durban and Dar-es-Salaam to continue its external trade.

The transportation of goods to and from the landlocked countries of Malawi and Zambia is predominantly carried out, at present, by road or rail through the major corridors which are now under rehabilitation and which connect the landlocked countries of Malawi, Zambia and

[172] Refer to map in Figure 2 page 4

Zimbabwe, through Mozambique, Tanzania or South Africa to the major Indian Ocean ports. These transportation costs on these modes currently account for a large percentage of the total costs of imported or exported goods. This cost constraint, further exacerbated by regularly increasing cost of fuel, is continuously driving the search for cheaper means of transportation, particularly by fluvial shipping on the Shire – Zambezi waterway.

A pre-feasibility study, funded by the European Union (EU), was conducted on the Shire - Zambezi Waterways in 2006 indicated that the rivers could be navigable if developed but further studies were required to determine the technical, economic, social and environmental viability and sustainability of the development and the operation of the waterway. COMESA, on behalf of the Governments of Malawi, Mozambique and Zambia, submitted a request to the African Development Bank in 2009 to support the detailed feasibility study for the re-opening of the Shire-Zambezi Waterways. The request for funding was endorsed by the SADC Secretariat in 2010. The Bank identified the African Water Facility (AWF) and the NEPAD Infrastructure Project Preparation Facility (IPPF) as possible sources of grant support for this project and the Facilities carried out a joint Appraisal Mission to the three cooperating countries in May 2010. The cooperation framework for implementing the Shire Zambezi Waterways Development project is provided by a Memorandum of Understanding signed in 2007 between the Governments of Malawi, Mozambique and Zambia.

The successful opening of this waterway would cut transportation costs for Malawi, Zambia and Zimbabwe as the distance to the Indian Ocean would be reduced to 380kilometers from 2855kilometers for Malawi, 1950kilometers for Zambia and 1680 for Zimbabwe. Evidently the transit costs ranging from fuel, fleet maintenance, administrative bureaucratic costs, and corruption, among others would be minimized. The small number of countries administering the operation of the waterway is advantageous and would minimize the challenges faced due to failure to coordinate and harmonise the direction of the project. Monitoring of the effectiveness of the waterway would also be uncomplicated due to the limited number of overseeing stakeholders.

6.5.2 Air Transportation

Air transport accounts for up to 40% of world trade in terms of the value of goods transported.[173] It plays a significant role in the economic development of many if not all countries around the world. In Africa, where poor roads, ports and railway infrastructure often constrain the rapid and efficient transportation of passengers and high value goods earmarked for export, air transport holds both a potential for growth and a role for the economic development of the continent by fostering trade and foreign investments.
In the early days of independence, air transportation came to be recognized as "both far-reaching and essential for the development of Inter- African trade and for the improvement of the economic, social and cultural conditions of the African peoples".[174] The underlying reasoning was that the road and highway network which existed prior to the accession of African countries to independence was broken down into sectors that were mostly distinct from each other. The road network was mainly designed to channel raw materials from the interior to seaports for export, rather than being part of a network between countries aimed at facilitating regional development.

[173] See Air Transport Action Group *The Economic and Social Benefits of Air Transport* (Geneva, Switzerland: Air Transport Action Group (ATAG)) at 2.
[174] See Organization of African Unity (OAU), *10th Summit Anniversary* (1973) at 39.

In 1964 the Economic Commission for Africa (ECA) had also recognized that a policy was needed to support the development of Africa's air transport sector.[175]ECA's inspiration came from several declarations and resolutions, which eventually resulted in the Lagos Plan of Action, all of which addressed the declining economic environment and the role of the air transport sector in Africa.[176] The Lagos Plan of Action aimed at promoting the integration of transport and communication infrastructure with a view of increasing intra- African trade and opening up land-locked countries and isolated regions.[177] The Lagos Plan of Action was the result of many discussions and consultations among African States, which primarily focused on how to eliminate the physical and non physical barriers which allegedly hindered the development of African air services. The initiative, which was led by the ECA, considered intra-continental air services as the prime instrument for Africa's integration and development. These discussions and consultations culminated in 1988, when Ministers in charge of Civil Aviation of forty African States met in Yamoussoukro, Ivory Coast, and declared a new African Air Transport Policy, which was subsequently named the "Yamoussoukro Declaration"

The Yamoussoukro Declaration's objective was the full integration of the African air transport market comprising at least 40 of 54 African States within eight years to liberalize the African air transport market. However, although at the operational level significant progress was been achieved in the liberalization of air services through the signing of numerous bilateral agreements, policy implementation remains incomplete or stagnant in many regions of the continent, thereby hindering the full deployment of the economic potential of Africa. The stagnation is driven mainly by the governments of a small number of African countries who aim at protecting their failing national carriers by refusing to liberalize their air transport markets irrespective of the obligations they have assumed under the Decision, has hindered full liberalization of the African air transport sector and effectively prevented African nations from taking full advantage of the positive economic impacts of air transportation.

Considering the multitude of challenges relating to transit to the sea faced by land locked States, the air option would be a viable intervention to lessen these problems if government level commitment and coordination could be achieved. At COMESA level the policy on air transport was already well established in the COMESA treaty. Article 84 of the treaty engages Member States to develop coordinated and complementary transport and communications policies. At SADC level, the SADC Protocol on Transport liberalization of air services is mentioned in Article 9(2), titled Civil Aviation Policy, which provides that Member States will develop a harmonized regional aviation policy, which includes the "*gradual liberalization of intra-regional air transport markets for the SADC airlines*".

As herein illustrated, the legal framework for the liberalization of air transport is in place but is yet to be implemented. It therefore must be impressed upon the political leaders of governments in Africa that it is important for Africa to create a single market and air space to be able to benefit from economies of scale as well as achieve cost-effective management of its airspace. The Yamoussoukro Declaration offers the best opportunity to the continent to

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[175] ECA recognized air transportation as one of the most important modes of transportation for the physical integration of Africa. See UNECA, *La Décision de Yamoussoukro*, at 31.

[176] United Nations Economic Commission for Africa (UNECA), *Declaration of Yamoussoukro on a New African Air Transport Policy*, (1988) preamble [*Yamoussoukro Declaration*].

[177] Organization of African Unity (OAU), *Lagos Plan of Action for the Economic Development of Africa, 1980-2000* (1980) at 58

consolidate its air transport industry and strengthen its operations, safety, security and protection of the environment; amendments can be made to the declaration to best suit the needs of the Member States to ensure its successful implementation. Development of air transport in Africa has to be closely linked with other socio-economic sectors and, especially, the infrastructure sectors in an integrated manner. Given the deep international character of air transport, cooperation with partners is essential in order to ensure mutually beneficial market relations and mobilisation of the necessary support of key partners such as the EU.

Conclusion

The countries in the SADC/ COMESA regional economic community enter into pure intra-country trade agreements which do not focus on the implementation on the transit regime and access to the sea. These agreements target the reduction or removal of tariffs and related charges[178] on specific goods and products originating in the Member States to stimulate exports within the REC. SADC has no regional legislative body and relies on national domestication process to enable implementation of regional agreements. As such it is not clear as to whether the facilitation of transit to the sea is dependent on bilateral agreements between the States on case by case basis or the transactions are deemed adequately catered for under the global legal framework. The apparent absence of clear and detailed documentation on how transit is facilitated at bilateral level is a cause for concern since it shows that there is lack of commitment to sustainably addressing the challenges being faced by the land locked States in the region from their own governments since such initiatives cannot emanate from transit States.
For Malawi, the implementation challenges emanating from the uncoordinated implementation of the obligations for States under the global and regional legal framework governing transit may well be resolved by shifting attention to possible alternatives such as the inland waterway as discussed above. It is an initiative which involves a fewer number of States and thus the mobilisation of resources for infrastructure development as well political level commitment is more feasible. It is a matter of weighing what route is more practical and which best addresses the problem of accessing the sea as a long term measure.

CHAPTER TWO (PART TWO): Improving Implementation in Southern Africa

SECTION A: The European Setting - Best Practices

In Europe, despite their geographical handicap, landlocked States are as prosperous as their coastal neighbours, which implies that it is also possible for landlocked countries to

[178] For example, Zimbabwe and Malawi entered into a Trade Agreement which was implemented in 1995; this is a reciprocal trade agreement, with 25 percent domestic value added requirements. Arrangements are characterized by implementation problems, in particular with regards to rules of origin of the goods subject to the value added requirements, and no dispute settlement mechanism. As of 2002 it was under re-negotiation.

overcome the disadvantage caused by their location and prosper. The question is therefore the examination of what strategies were adopted by Europe's land locked States, to overcome their geographical handicap and gain economic prosperity. As discussed in preceding chapters overland transport across national borders for the land locked States being discussed in this thesis, continues to present many challenges and difficulties associated with a host of adverse conditions, such as inadequate infrastructure, inefficient transport organization, trade imbalances, lack of policy commitment, poor utilization of assets, and a proliferation of government controls and other physical barriers among others. The global legal framework is of uniform application to all land locked States; however implementation modes are the very key to the success of the transit regime facilitation.

7.1 Historical Background

Land locked States on different continents have throughout concluded bilateral treaties dealing with the question of access to the sea and transit and in Europe before World War I, Switzerland, feeling the great disadvantage of not having ships under its own flag to safeguard supplies for its population, was the first land locked State to ask for the right to have a maritime flag.[179] Previously, also for the first time, through a treaty on March 16, 1816, it had tried to solve its transit problem with the kingdom of Sardinia, then its neighbor.[180] From World War I onward, the number of treaties in Europe grew significantly, mainly because so many States without maritime access emerged from the dismemberment of the Austro-Hungarian Empire.

In 1921, Germany, Poland, and the Free City of Danzig signed a Convention on transit freedom between Eastern Prussia and the rest of Germany.[181] The "corridor of Danzig," which allowed Poland and Danzig to freely approach the sea, separated East Prussia from the rest of Germany, making East Prussia a German enclave within a foreign territory. On its side, Germany granted to Poland and to Danzig the same transit freedom throughout its territory. Article 2 of the agreement exempted all goods in transit from all customs or similar duties. Trains containing goods traveled under seal (Article 9), and persons in transit, along with their baggage, were exempted from all customs duties.

In the same year a legal instrument granting facilities to a State without access to a port in a transit State was agreed on between Czechoslovakia and Italy that related to concessions and facilities granted by Italy in the port of Trieste[182] to facilitate transit between the two States. Czechoslovakia obtained the right to install its own customs office in the port of Trieste, and the Italian administration authorized the transit of Czech vehicles originating at the port through Italian territory. Czechoslovakia also obtained the right to use a hangar to facilitate loading and unloading of goods through the railways. Another Convention of 1923, between Czechoslovakia and Hungary, guaranteed similar facilities.[183]

These agreements demonstrated a relatively liberal attitude on the part of transit States. This evolution in the direction of further liberalization of transit continued on the European continent. In the period after World War II, the contribution of the Economic Commission for

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[179] Helmut Tuerk & Gerhard Hafner, *The Landlocked Countries and the United Nations Convention on the Law of the Sea,* in *Law of the Sea* page 58 (Hugo Caminos ed., Ashgate 2001).
[180] *See id.*
[181] Treaty Series, League of Nations, Vol. XII (1922), at 308.
[182] Treaty Series, League of Nations, Vol. XXXII (1925)
[183] 48 L.T.S. 257.

Europe (ECE) became determinative and its Committee of Internal Transport facilitated the adoption of two Conventions concerning overland and railway transit. The two Conventions signed in 1952, exempted from taxes and duties at the frontiers goods transported by railway and facilitated transit of passengers and baggage on railways at the frontiers. These conventions entered into force in 1953. The ECE also took into consideration overland transport and prepared a draft convention relating to international transport of goods covered under TIR (Transport International Routiers) Carnets. Commonly known as the TIR Convention, it was signed in Geneva, Switzerland in1959, and entered into force in1960[184]and was subsequently revised in 1975.

The TIR regime, which concerns the transport of goods in overland vehicles or containers loaded on such vehicles, is the simplest system for customs and police formalities. Transit States party to this Convention agreed to introduce simplification through their own legislation. In view of its innovative approaches, the TIR Convention played a considerable role in stimulating overland transport in European States, which led Marion to emphasize that "without TIR, life would be impossible in Europe."[185] The Convention facilitated and liberalized international transport among European States without creating any obstacle to the conclusion of agreements on, for instance, customs unions or economic zones. After the TIR Convention was adopted, many other international legal instruments each increasingly more liberal dealing with specific issues were signed in Europe.

7.2 The United Nations Economic Commission for Europe (ECE) and the Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention)

Work on the TIR transit system started soon after the Second World War under the auspices of the ECE. The first TIR Agreement was concluded in 1949.[186] The success of this limited scheme led to the negotiation of a TIR Convention which was adopted in 1959 by the ECE Inland Transport Committee and entered into force in 1960. This first TIR Convention was revised in 1975 to take account of practical experience in operating the system and to give effect to technical advances and changing Customs and transportation requirements.

The experience gained in the first 10 to 15 years of operating the system was thus used to make the TIR system more efficient, less complex and at the same time more Customs secure. Another reason why the original TIR system had to be modified was that in the early 1960's the maritime container emerged as a new transport technique. That was followed a little later by the inland container used by the European railways and by the swap-body introduced for improving the efficiency of road and rail transport.

The TIR is touted to be one of the most successful international transport conventions and is in fact so far the only universal Customs transit system in existence[187]. The idea behind the

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[184] 348 U.N.T.S.,14.

[185] Loïc Marion, *Liberté de transit en droit international* (unpublished Ph.D. thesis, U. Rennes, France, 1974) at 465. This Convention was revised in 1975 to take into account practical experience in operating the system and to give effect to technical advances and changing customs and transportation requirements. *See* generally, *The TIR Transit System,* ECE/Trans/TIR2 UN, 2 (United Nations 1991)

[186] The Convention has 68 Contracting Parties and the European Union to it.

[187] Border Management Modernisation, edited by Mclinden Gerald and Fanta Enrique, World Bank at page 286

TIR Convention and its transit regime has formed the basis for many regional transit systems and has thus, directly and indirectly, contributed to the facilitation of international transport, especially international road transport, not only in Europe and the Middle East, but also in other parts of the world, such as Africa and Latin America.[188]

With the aim of reducing the difficulties experienced by transport operators and, at the same time, to offer Customs administrations an international system of control replacing traditional national procedures, whilst effectively protecting the revenue of each State through which goods were carried, the TIR system was devised. Customs transit systems are intended to facilitate to the greatest possible extent the movement of goods under Customs seals in international trade and to provide the required Customs security and guarantees. For such a system to function satisfactorily, it is essential that any formalities involved are neither too burdensome for the Customs officials nor too complex for the transport operators and their agents. Therefore, a balance needs to be struck between the requirements of the Customs authorities on the one hand and those of the transport operators on the other.

Traditionally when goods crossed the territory of one or more States in the course of an international transport of goods by road, the Customs authorities in each State applied national controls and procedures. These varied from State to State, but frequently involved the inspection of the load at each national frontier and the imposition of national security requirements (guarantee, bond, deposit of duty, etc.) to cover the potential duties and taxes at risk while the goods were in transit through each territory. These measures, applied in each country of transit, led to considerable expenses, delays and interferences with international transport. The TIR therefore made provisions to address these aspects of transit.

The advantages of the TIR Convention to commerce and to transport interests are that goods may travel across national frontiers with a minimum of interference by Customs administrations. By easing traditional impediments to the international movement of goods, the TIR system encourages the development of international trade. By reducing delays in transit, it enables significant economies to be made in transport costs. The TIR Convention also provides, through its international guarantee chain, relatively simple access to the required guarantees which are a sine qua non for the transport and trade industry to benefit from the facilities of Customs transit systems. Finally, in reducing the impediments to international traffic by road caused by Customs controls, it enables exporters and importers to select more easily the form of transport most suitable for their needs

Administratively, the Convention established an international guaranteeing chain which is managed by the International Road Transport Union (IRU). The IRU also serves both as the international Customs document and proof of guarantee. The overall supervision of the TIR Convention and its application in all Contracting Parties falls under the responsibility of the TIR Administrative Committee, an inter-governmental body comprising all Contracting Parties and its TIR Executive Board (TIRExB), composed of nine elected members, each

[188] The TIR system is promoted under the auspices of the United Nations to make it as widely available as possible for all countries wishing to make use of it. In 1984, the Economic and Social Council of the United Nations (ECOSOC) adopted a Resolution (1984/79) which recommends that countries world-wide examine the possibility of acceding to the Convention and introducing the TIR system.

from a different Contracting Party. Since more than sixty years, the TIR Convention significantly contributes to the facilitation of international transport and trade throughout the UNECE region. In addition, more and more countries from beyond the UNECE region (North Africa, Middle East, and Asia) have joined the TIR Convention in recent years or are considering acceding to it.

7.3 TIR Convention – Best Practice Standards

The Transport International Routier (TIR) sets the standard in this domain and serves as a benchmark for future effective transit transport frameworks.[189] The main reason for the success of the TIR to date is that all parties involved from customs, other legal bodies, transport operators, and insurance companies recognize that the system not only saves time but also money, due to its efficiency and reliability. The TIR Convention is simple, flexible, and cost reducing, and ensures the payment of customs duties and taxes that are a result of the international transport of goods. Furthermore, it is constantly being updated according to the latest developments, mainly concerning fraud and smuggling.[190]

The TIR specifies five main pillars:
• *Secure vehicles.* The goods are to be transported in containers or compartments of road vehicles constructed so that there is no access to the interior when secured by a customs seal, so that no goods can be removed or added during the transit procedure, and so that any tampering will be clearly visible.
• *International guarantee valid throughout the journey.* In the situation in which the transport operator cannot pay for the customs duties and taxes due, this system ensures that the customs duties and taxes at risk are covered by the national guaranteeing system of the operator.
• *National associations of transport operators.* National associations control access to the TIR procedures by transport operators and issue the appropriate documents and manage the national guarantee system.
• *TIR carnets.* This is the standard international customs document accepted and recognized by all members of the TIR Convention.
• *International and mutual recognition of customs control measures.* The countries of transit and destination accept control measures taken in the country of departure.

All countries involved in the transit chain, from country of departure to country of destination, through the transit country should be active members of the TIR Convention for its effective implementation.

The benefits of TIR for the transit regime include the movement of goods across international borders with minimum customs interference, the reduction of delays and costs of transit, the simplification and standardisation of documents, the non requirement of customs guarantee deposits at transit borders. Customs authorities also enjoy benefits such as the guarantee of duties and taxes at risk during international transit movements, only bona fide transport

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[189] Jean François Arvis, Transit and the Special Case of Landlocked Countries, Customs Modernization Handbook, at 255.

[190] Phase I of the TIR revision process was concluded in 1997 and its amendments came into force in all Contracting States to the TIR Convention 1999. A second package of amendments to the TIR Convention (Phase II) came into force on 2002. In 2000 work started on Phase III of the TIR revision process. Source: ECONOMIC COMMISSION FOR EUROPE(UNECE) TIR HANDBOOK, ECE/TRANS/TIR/6/Rev.9

operators being permitted to use TIR carnets, thus increasing the reliability of the system, and disputes can be arbitrated through national associations in the country of transit.

7.4 Emulating the TIR Convention

Due to the enormous success of the TIR system, its concept has been the basis for attempts to establish bilateral and multilateral agreements between countries elsewhere, such as in Asia, Africa, and South America. However, none of these initiatives have been successful yet. The main reason for this has been the absence of a common regional guarantee system. The internationally agreed on and recognized guarantee system is one of the core elements of the TIR system, and in its absence TIR-like systems cannot be successful. On occasions, even when such a system is included within a transit agreement, the failure to implement it fully jeopardizes the efficiency of the regional transit regime. Practical implementation shortfalls are often at the root of the failure of regional or international transit agreements. Active cooperation between and among transit and landlocked countries can help ease trade barriers. Such regional and bilateral cooperation can promote an integrated approach to transit that goes beyond customs transit issues and can contribute to the successes or shortfalls in supporting transit.

Bilateral transit agreements are key building blocks of transit facilitation harmonization initiatives.[191] In the absence of TIR-like conventions, bilateral agreements are needed to make transit possible. In practice, bilateral agreements have strategic importance for developing landlocked States economies. The scope of bilateral agreements is usually practical and reflects a balance between the interests of the land locked and transit States, incorporating such aspects as preferred route and freight sharing agreements. On the African scene, as discussed earlier in this paper, there are a number of regional agreements which lay down broad goals and policy directions. Actual customs transit facilitation may be dependent on other existing agreements or procedures. A 2001 UNCTAD report[192] points out "…there has not been any shortage of measures and initiatives to improve facilitation of transit traffic. COMESA, EAC and SADC all have various measures that are in place to address transit facilitation. Unfortunately, the major problem has been poor implementation."

To achieve a significant impact on customs transit, regional agreements should address, directly or through related mechanisms, components such as common customs documentation and procedures such as the TIR carnets. Cooperation between authorities, or one-stop border posts would also be beneficial. The setting up of a regional customs guarantee system would assist in the facilitation of transit and reducing the transport challenges faced by land locked States.

7.5 The Program of Trade and Transport Facilitation in Southeast Europe (TTFSE)

Another initiative that has been successfully implemented in Europe in the facilitation of the transit regime is the TTFSE. The Trade and Transport Facilitation in Southeast Europe (TTFSE) regional program, supported by The World Bank, the European Union (EU), and bilateral partners, was set up in 1998 upon the request of the region's countries and the Southeast European Cooperative Initiative. It aimed at to creating a framework to help to reduce transport costs, fight corruption, and help customs administrations gradually align

[191] Article 125 UNCLOS
[192] InfraAfrica Ltd. 2001, p. 45

their procedures with EU standards. The countries included in this program are Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania, Serbia, and the landlocked Moldova and Federal Yugoslav Republic of Macedonia. Since most of the trade flows are bound to or are from the EU and the majority of the countries involved fall within the TIR system, it is already built on a strong transit base.
The design and implementation of the TTFSE was based on a participatory methodology to ensure a sense of ownership among the various stakeholders involved including national agencies, customs officials, and transport operators. The TTFSE program was built on this set of regional mechanisms:

- A high-level Regional Steering Committee convening all countries twice a year to facilitate cooperation and experience sharing
- A regional Web site presenting all requirements and procedures of border agencies
- Public–private working groups interacting quarterly
- Regional conventional and distance-learning programs to harmonize the quality of transport service providers
- Paired local project teams gathering all border agencies at pilot border crossing points with interactions across the border
- Indicators that monitor border crossing times.

This customs modernization initiative has been implemented at a number of selected border crossing points and inland clearance terminals with a considerable degree of success. The program's progress report for 2002 highlights the significant reduction in waiting time, the establishment of a transparent and public customs performance monitoring system[193], and the visibly improved dialogue among customs administrations within the region. The success of this program so far can be attributed to **reliable funding from the World Bank and various other donors, strong commitment by the national governments involved**[194], direct participation of all stakeholders, extensive use of information technology, the introduction of human resources programs, and the emphasis on close and meticulous monitoring to fine-tune and identify changing needs and priority areas.
Two key ingredients of the success of TTFSE as a transit facilitation initiative have been the development of joint border facilities and the monitoring of indicators. TTFSE has a harmonized set of indicators[195]. Joint processing allows all customs and non customs procedures to be carried out in a single stop in a common border processing zone.

Having analysed the impetus behind the successful implementation of the transit regime in Europe, it is also necessary to include a visual of other factors that contribute to the success in Europe and hampers progress in Africa.

Country	**Coastal States/Ports**	**Distances (KM)**
Austria	Antwerp/Belgium Hamburg/ Germany	1112 972

[193] TTFSE Indicators: Agreed to by all participating countries, the set of indicators has allowed both general performance and the real time impact of the different pilot site initiatives to be monitored. To improve the efficiency and relevance of this initiative, the program has tried to institutionalize the collection procedures at each of the pilot sites, relying on local computer applications or simple measurement techniques to obtain most of the key figures automatically. An important feature of transit-related indicators is that the design of the indicators and the data collection involve both public agencies and the private sector (trucking industry). Transit related indicators include, trucks cleared in less than 15 minutes, irregularities per number of examinations, truck examinations, average border exit time, average border entry time, surveyed occurrences of corruption. *Source:* TTFSE report 2002 at www.ttfse.org.
[194] Emphasis supplied.
[195] *See* note 191

	France Marseilles/France Rotterdam/Netherlands	1012 1169
Hungary	Antwerp/Belgium Hamburg/Germany Rotterdam/Netherlands	1361 1160 1417
Switzerland	Antwerp/Belgium Genoa/Italy Hamburg/Germany Le Havre/France Marseille/France Rotterdam/Netherlands	720 447 911 758 437 814
Malawi	Durban/Republic of South Africa Dar es Salaam/Tanzania *(Nacala/Mozambique) **(Beira/Mozambique)	2855 1519 (751) (530)
Zambia	Durban/Republic of South Africa Dar es Salaam/Tanzania *(Nacala/Mozambique) **(Beira/Mozambique)	1627 1950 (1341) (1019)
Zimbabwe	Beira/Mozambique Durban/Republic of South Africa	551 1680

Figure 9: An illustration of the distance between the landlocked States' capitals and the ports they utilise.
*Malawi and Zambia do not make use of the Nacala Port due the poor state of the infrastructure which was destroyed during the Mozambican civil war. As stated earlier the port is undergoing reconstruction.
** Exporter/importers in Zambia, Zimbabwe and Malawi face challenges with Mozambique customs authorities and thus utilise the port minimally.[196]
It is clear from the information in Figure 7 that the distance between the destination country and the port is a major factor which affects the economic development of land locked States. So too the availability of ports as evidenced by the number of ports available for use for Switzerland despite that its goods transit through numerous borders from the ports. This displays that the use of TIR facilitates easy transit for the countries in Europe. Cooperation, coordination and commitment by stakeholders in the transit chain are also contributing factors to the European success. The European infrastructure has also received support from various funding institutions which has resulted in the availability of good quality infrastructure and more ports at the disposal of the land locked States despite the distances from the capitals of the land locked States to the ports.

[196] SADC Non-Tariff Barriers ,Reporting, Monitoring and Eliminating Mechanism, Complaint Number NTB-000-587, http://www.tradebarriers.org/complaint/NTB-000-587

Concluding Analysis

While transit facilitation is a bottleneck to the development of land locked States, this is precisely where the reforms face the most daunting challenges. In many countries inadequate practices or procedures, are deeply entrenched. Customs transit is only one part of a wider range of policy issues that involves many other participants and procedures, including cross border vehicle regulations, visas for truck drivers, insurance, and police controls. The quality of infrastructure is also a major concern for many landlocked countries. Even if customs transit procedures are made effective and efficient, full trade facilitation will require that these other issues should be dealt with comprehensively. Some measures can be taken at the national level while others require some form of regional cooperation. Customs transit is, in a sense, straightforward as it is built on proven principles i.e. secure the cargo, provide a guarantee mechanism, and use a centralized flow of documentation. As noted earlier customs transit is vulnerable to poor institutional frameworks. Transit operations are extended in space and time and are, therefore, exposed to inefficient bureaucracy and to corrupt practices.

The guarantee system needs a minimum degree of sophistication of the local financial infrastructure, which is not always available in developing countries. The TIR and its network of national guaranteeing associations propose the best current reference system. So far there is no convincing example of a fully functioning guarantee system available to transporters in land locked States under discussion. In part, this is because financial institutions have not been in a position to propose products similar to the TIR insurance in the development context.

Transit facilitation institutions such as corridor agreements promote active cooperation between and among transit and landlocked countries, and are a pivotal element in helping reduce or remove physical, administrative, and institutional barriers to trade. The potential strength of transit corridors lies primarily in the possibilities they offer in confronting the concerns and interests of all relevant stakeholders, public and private, who can focus on policies and initiatives to cater to specific routes and border crossings. Transit corridors thus offer the possibility of tackling transit in a holistic manner institutional, administrative, and infrastructure, initiating and effecting changes that may otherwise be difficult to obtain at a wider national or regional level. In this sense, promoting specific transit documentation or introducing effective harmonized border crossing procedures for specific routes are more easily attainable objectives that, once in place, can be expanded to national levels. The quality of the governance structure of the corridor is of critical importance in achieving those objectives.

Transit agreements are important in forming and shaping such cooperation, either at the bilateral, sub regional or regional level. In practice, such agreements promote an integrated approach to transit that goes far beyond customs transit, and tackles issues such as infrastructure, visas, permits, and insurance.

Regular exchange of information between public agencies and stakeholders will help to identify where the shortfalls are entrenched in the transit regime procedures[197]. Public policies must foster the emergence of modern operators, and phase out transit activities by obsolete equipment and informal operators, with whom efficient transit provisions are virtually impossible.

[197] SADC has a Complaint, Reporting, Monitoring and Eliminating Mechanism which can be given greater powers of identifying the shortfalls in the transit chain systems. See note 194.

The next and final chapter of this thesis will draw conclusions from all the aspects which have been analysed herein with a purpose to discern whether the relationship between transit and land locked States is that of dependence or cooperation for the mutual benefit of the countries involved in the facilitation of the transit regime.

CHAPTER TWO (PART TWO)

Section B: Application of Best Practices to Southern Africa

UNCLOS and the earlier mentioned legal instruments have created a comprehensive framework under which land locked States can have access to the sea with 'minimal' challenges. The instruments create obligations to assist in the facilitation of the transit regime for all parties in the transit chain. However, despite this umbrella of enabling legal provisions, the land locked States under discussion in this paper still continue to lag behind in development due to the high transportation costs they face in transiting from the sea through the territories of the transit States. The question therefore is why there is a continued gap in the implementation of the guarantees of the right to access to the sea. It cannot be denied that the challenges faced by each land locked States are unique to it specifically, depending on various factors ranging from the internal environment within the country, (policy direction, economic development status, national legislation, availability and quality of infrastructure etc) as well as external influences which are beyond the control of the land locked States' governments and policy makers. The balance between the right of transit to the sea through the sovereign territories of the transit States and the sovereign rights of the transit and coastal States is the crucial determinant in the transit equation as the relationship should be of mutual benefit and not burdensome to the interests of all players in the chain.

Bilateral arrangements as provided for in Article 125 of UNCLOS hold the key to the successful implementation of transit since they incorporate and are reflective of the particular

and specific needs of the parties to the agreements. Consideration should however be made as to what arrangement is more practical; couching the terms and conditions in a single specific document or as part of a broader agreement which covers other aspects of the relationship between the negotiating countries.

8.1 The Facilitating Environment – Regional Integration and Cooperation

RECs present a platform on which various issues can be tabled and solutions devised at levels higher than the national standing and offer an enabling as well as accountability framework for member States to such groupings. As earlier discussed, Malawi is a member of both COMESA and SADC which both have as one of their principal objectives in transport, the improvement of transit transport systems and facilities as well their performance. The COMESA Vision and Strategy into the 21st Century states, "*Facilitation of both road and air transport is aimed at ensuring more efficient movement of goods and people, thus not only enhancing intra-COMESA trade, but also maximising the use of existing infrastructure. Transport facilitation programs also aim to create stable, competitive and cost-efficient transit systems*."[198] The SADC Protocol on Transport, Communications and Meteorology, states as one of its strategic goals, "*Integration of transport, communications and meteorology networks to be facilitated by the implementation of compatible policies, legislation, rules, standards and procedures; elimination or reduction of hindrances and impediments to the movement of persons, goods, equipment and services….the right of freedom of transit for persons and goods; the right of land-locked Member States to unimpeded access to and from the sea….the development of simplified and harmonized documentation which supports the movement of cargoes along the length of the logistical chain, including the use of a harmonized nomenclature*".[199]

The issue to be contemplated is how effective these RECs are as regards recognizing, proposing and formulating solutions to alleviate the challenges faced by the land locked States. An International Monetary Fund (IMF) Working Paper[200] from its Policy Development and Review Department examined the prospects and challenges faced by these two regional groupings and established that progress in COMESA has been limited by country-level implementation problems while SADC has been hampered by complicated and restrictive rules of origin. There is considerable overlap in the membership of the economic groupings.[201] The overlapping memberships have led to conflicting goals and limited progress in both organizations, and reveal a lack of political commitment. The overlap in membership has also translated into overlap in activities. This has not always augured well for effective implementation and in particular optimal utilisation of resources. Although attempts have been made in the past to get the organisations to work together, in practice this has proven been difficult to achieve.

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[198] COMESA Vision and Strategy into the 21st Century – COMESA Secretariat

[199] SADC Protocol on Transport, Communications and Meteorology – Southern African Development Community, See page 51 above.

[200] COMESA and SADC: Prospects and Challenges for Regional Trade Integration Prepared by Padamja Khandelwal, IMF Working Paper, page 4, WP/04/227

[201] Nine SADC countries are also members of COMESA: Angola, Democratic Republic of Congo, Malawi, Mauritius, Namibia, Seychelles, Swaziland, Zambia and Zimbabwe.

For COMESA, the finding was that, of its 19 Member States 8, have not joined its free trade area (FTA)[202] which was established in the year 2000 for purposes of tariff reductions and open regionalism, and due to a lack of political commitment in member countries, the COMESA FTA has been hampered by country level institutional changes, prevailing structural constraints, cumbersome bureaucratic procedures, as well as restrictive standards. For the land locked States this state of affairs perpetuates rather than ameliorates their situation as regards transit facilitation. SADC's approach of addressing structural impediments and other constraints through sectoral cooperation initiatives was found to be important. However despite the ambitious goals of the SADC sectoral initiatives, progress made is limited and it has been widely acknowledged that there is a lack of mechanisms for evaluating and monitoring projects or assessing their effectiveness especially regarding the operations and management of the overall performance of the transit corridors in the region. It was noted that the organization is still more of a political block than a true instrument for regional economic integration.[203]

As a result of the disconnect between the countries falling in the RECs, the implementation of the obligations under the legal framework and enabling provisions, bilateral agreements between the land locked States and their transit neighbours fail to ease the transit burdens, for example with regard to infrastructure development and maintenance as these are projects which require hefty financing and thus cannot fall within the budgetary responsibility of a single government. The mutual benefit aspect of investing in this crucial infrastructure is therefore neglected with each State focusing on its respective internal responsibilities and for the transit States consideration is extended to having to invest in new infrastructure, coping with environmental costs providing efficient logistics and customs operations among others. Transit is a costly venture for both the landlocked countries and the transit countries and should thus be facilitated in a manner which highlights and boosts mutual benefits for both parties. The fragmented rather than integrated operations results in a broken transit chain. In transit transport operations, it is not enough that part of a system works well in one country or some systems work well in some countries, or indeed, that some systems work some of the time. To be effective, all transit transport systems must work well in all countries all the time for concerned to achieve benefit.

In a report delivered at UNCTAD's Sixth Meeting of Governmental Experts from Landlocked and Transit Developing Countries and Representatives of Donor Countries and Financial and Development Institutions[204] it was noted that some specific areas were believed to have had an adverse effect on the full implementation of transit agreements and on full compliance by the signatory countries. It was reported that national legislation interferes with transit agreements and that signatory countries seem to be more loyal to their local regulations. In this regard it was observed that the governments' commitment is crucial for the successful implementation of transit agreements. Further to that, lack of sufficient knowledge of the relevant transit agreements and a low level of awareness in transit facilitation issues was reported to have been recorded among government officials responsible for the implementation of transit agreements. It was noted that transit agreements as well as international conventions give allowance to transit countries to take measures they

[202] Members of the FTA include Burundi, Djibouti, Egypt, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Zambia, and Zimbabwe. Note the absence of the transit States Mozambique, Republic of South Africa and Tanzania.

[203] *See* Note 199

[204] First Session of the Intergovernmental Preparatory Committee of the International Ministerial Conference on Transit Transports Cooperation June 2003, unctad/Ldc/2003/3.

deem necessary to protect their economies.[205] However, the extent to which transit countries apply various measures to transit traffic has been a source of disruption to the movement of transit cargo and has adversely affected implementation of transit agreements.
It was found that in most cases, the frameworks established for the implementation of transit agreements do not have enough capacity in terms of power, funds, expertise or material resources to enforce the implementation of the relevant agreement, to deal with uncooperative signatory parties or to assist those willing but lacking resources to fulfill their commitments.[206]

As the transit transport industry adjusts to the new global environment driven by globalisation and information technology, issues not fully covered in the existing agreements have been coming out. Such issues relate to areas like multimodal transport technology, information technology, environment, safety of human life and the security of transit cargo. New policy and management trends like liberalization, commercialization, restructuring and private sector participation are also not well covered by all the current agreements.

The report also indicated that co-ordination and mutual administrative assistance among countries using the same transit corridors are still weak partly due to lack of communication facilities. The implementation of transit agreements would be greatly facilitated if customs authorities, police authorities and stakeholders from transit and inland countries could be sharing information and exchanging views on a daily basis to cover the gap between identification of problems and instituting practical, sustainable solutions to address problems on the ground.

8.2 Cooperation and Commitment for Infrastructure Development, Rehabilitation and Maintenance

Political level commitment from the governments of land locked States is the main determinant behind the drive to achieve access to the sea for the economic development of these countries. As outlined earlier in this paper, the global legal framework guarantees the right to transit; the challenge as demonstrated is the effective implementation due to the various factors discussed herein. Political commitment is essential for national legislative reform as well as for the commitment of funds for transit infrastructure development and maintenance as well as being the negotiating base for bilateral arrangements with the transit States.
The most efficient physical infrastructure for implementing the transit regime is the use of transit corridors from port through the transit States to the land locked States' territories. However the successful operation and management of these corridors has proven to be a challenge[207] due to the failure to create monitoring mechanisms as to the status and condition of the infrastructure as well as to whether the soft infrastructure is in accordance with the obligations and requirements under the global legal regime pertaining to customs administration and other bureaucracies etc. Despite their regional character, transit transport systems have continued to operate as fragmented national systems rather than integrated

[205] For example Article 125(3) UNCLOS

[206] Eg A formal dispute settlement mechanism in the form of a COMESA Court of Justice is provided, but disputes in general have been handled through an informal process of diplomatic consultation and rendering the court inoperational.

[207] *See* pages 12 to 16 supra

regional systems. As a result, users must deal with the needs and requirements of each country rather than the needs of smooth transit across a regional corridor.[208]

The efficient operation of transit corridors can be a great opportunity for both the landlocked and the transit country as it contributes to the improvement of trade within a region or sub-region and the access for a whole region's goods to world markets, thus creating a spill over effect for the region. Transport corridors maximally enhance profitable interregional cooperation, for example the Transport Corridor Europe Caucasus Asia, TRACECA.[209] This EU initiated programme was launched in 1993 to develop a transport corridor on a west-east axis from Europe, across the Black Sea, through the Caucasus and the Caspian Sea to Central Asia. The approach taken in the development of the corridor was to attempt in the first phase to establish a common legislative base in the transport and transit sector due to the lack of a single legislative framework in the participating States' structures, which made a coordinated approach to the concept of international freight traffic difficult, if not impossible. It was agreed that laws should be systematically harmonized and amended to meet international principles.
In Southern Africa segments of transit corridors, operate well below their installed capacities. Most of them, such as the Angolan, Mozambique and the East African Corridor of Mombasa (Tanzania), reached their peak in the seventies. Since then, most of the corridors in East and Southern Africa operate below capacity. For example, the SADC regional ports were estimated by SATCC to operate at on average 70–80 per cent below capacity for dry cargo and 55 per cent for container traffic.

It is not unusual for countries to agree on viable policies and practices at regional level, only to have them reversed at national level in the name of national interest and sovereignty. For as long as countries put national interests before those of the region, there will always be the danger of lack of, or poor implementation of or even reversals of agreed policies and measures. Countries should recognise their interdependence and that overall benefit will accrue only if one country is not made better off at the expense of the other. Through the regional economic groupings such as COMESA and SADC, there is a gradual shift to recognising the importance of regional interests, but this has been slow in coming. Until broader regional benefits are seen and accepted as overriding narrow national interests, transit facilitation will remain problematic.

8.3 The Contribution of Cooperating Partners

As earlier discussed, the transit regime has been successfully implemented in Europe due to the commitment from all countries affected by the challenge of accessing the sea which resulted in the creation and signing of the TIR Convention. This was made feasible and

[208] As an example, a trucker moving a shipment from South Africa to Malawi must traverse Zimbabwe and Mozambique. The trucker must comply with the requirements of the four countries, including the originating country South Africa and the destination country Malawi. Thus, it does not make sense if the trucker is faced with differing weight limits, for example, in the four countries or in some of the countries. For efficient transit movement and facilitation, the load limits must be harmonized throughout. For this to occur there must be supporting policies and legislative frameworks, including enforcement capacity.

[209] TRACECA is an internationally recognized programme aimed at strengthening of economic relations, trade and transport communication in the regions of the Black Sea basin, South Caucasus and Central Asia owing to active work based on political will and common aspirations of all member-states he TRACECA route comprises the transport system of the 13 member-states of the "Basic Multilateral Agreement on International Transport for Development of the Europe-the Caucasus-Asia Corridor" (MLA TRACECA): Azerbaijan, Armenia, Georgia, Iran, Kazakhstan, Kyrgyzstan, Moldova, Romania, Tajikistan, Turkey, Ukraine and Uzbekistan.

facilitated by the harmony amongst the member States as well as the committed contributions from the cooperating partners and donors.[210]For the African setting compounded with the policy level challenges as well as discordant legislation at the national and regional level and the inadequate infrastructure the contributions of cooperating partners have contributed to the still lagging transit regime.
There has been poor donor coordination, not only in undertaking assessments and various analyses of transit transport corridors, but also in devising solutions. There has been a multiplicity of studies undertaken over the years but very little in terms of tangible implementation successes.[211] This is because efforts and resources are fragmented. Is it a question of international rhetoric? As a result, on top of the existing gaps in the transit regime, capacity constraints in terms of expertise and resources, regional organisations have often not been in a position to provide effective leadership and guidance to Governments to deal with identified issues. Despite the multiplicity of gatherings in terms of meetings, workshops and symposia, implementation remains weak owing largely to lack of effective implementation guidelines which could have been made available by the cooperating partners which facilitated the transit regime successfully in Europe. Governments in Africa also lack of an informed basis for decision making as regards their obligations under the global governance framework.[212] As such the concerns of Governments should be addressed by providing informed analysis of options and to convince them through documented proof that they stand to gain in the long run or to provide them with tangible alternatives.

8.4 Concluding Recommendations

This paper has illustrated that the international legal framework which creates the transit regime establishes obligations for the transit and coastal States to generate an environment which is conducive to the successful implementation of the right to access to the sea for landlocked States. The main challenges which have been identified herein are the modalities of implementation. It has been demonstrated that under the same umbrella of international instruments Europe has managed to successfully implement and facilitate transit for its landlocked States due to the commitment at the policy level as well as coordinated and harmonised regional legislation which couches the intricacies of the right to transit to the sea.

The contention which runs throughout this discussion is the balance or lack thereof, of the right to the preservation of territorial integrity of the transit States and the right to access to the sea through the territory of the transit States. To sacrifice aspects of their sovereignty, the transaction must be deemed to be of mutual benefit and not be regarded as a burden or strain on the resources of the transit States. As such in implementing Article 125 (2) of UNCLOS the entry into bilateral agreements which outline the modalities of transit, the landlocked States must bring to the table proposal, policies and strategies which will be accepted by the transit States.

To achieve this, the negotiations for bilateral agreements for transit must be entered into with adequate knowledge of the obligations and concessions that transit states must fulfill. It has been discussed in this paper that the position of African States is that they do not have sufficient knowledge on the international legal framework. With this information gap, it is evidently a challenge for the technocrats to advise the policy and top level decision makers on the essential areas to be prioritized and to effect legislative reform in order to create structures from the national level which will focus on the challenges faced in accessing the

[210] *See* note 193
[211] Refer to notes 199 and 203 for examples of studies carried out cooperating partners.
[212] *See* note 36

sea as well as at regional and sub-regional level, where infrastructure development and maintenance programmes can be initiated.

The analysis of the challenges in the transit regime identifies at SADC level for Malawi, Zambia and Zimbabwe, weak coordination and harmonisation, the overlap in governing legal instruments, as well as inadequate surface infrastructure as the main factors impeding the successful implementation of the transit regime in the region.

8.4.1 Government Policy Direction and Commitment vis-à-vis the Governing Legal Framework

The successful implementation of the governing legal framework can only be attained with support from committed governmental policies. As has been illustrated, the coordinated approach to the transit problem in Europe was a result of the harmonised and committed response to the challenges faced by the landlocked States on the continent by the policy makers; it was due to the recognition and appreciation of the economic dimensions pertaining to the intricate links between the prosperity of the region being tied to the economic development of all States in therein. This is an outcome that should be stressed to the policy makers in the SADC region as well as the relevant countries that policies on transit for land locked States is not and should not be viewed as an isolated problem to be dealt with at the affected State level solely. The drive should commence at national level with the domestication of relevant international instruments and the review of existing national transport related legislation and strategies to incorporate and emulate measures which have proven to be effective and efficient in other jurisdictions. The very absence of national legislation in Malawi providing for transit to the sea illustrates that despite the country facing passage challenges, policy direction has not been made to address the matter adequately. Further, the in availability of documented bilateral agreements between Malawi and her transit neighbours as well as coastal States seems to indicate that the facilitation of transit is under the umbrella of the regional protocols on *adhoc* basis which leaves the transit regime for the country vulnerable.

The global institutions with the mandate to assist with the implementation of programmes to facilitate the transit regime, such as the OHRLLS, should commit to engaging the relevant governments and providing them with documentation and data from various studies that have been undertaken to serve as best practice standards that can subsequently be utilised as basis for restructures and reforms. Obviously such initiatives require funding to be implemented and the burden rests on both the governments in the affected countries as well as the ‘overseeing’ institutions to coordinate resource mobilisation for these activities from donors and cooperating partners.

8.4.2 Infrastructure Development and Accessing Donor Funding

Efficient transit transport systems can be established through genuine partnerships between landlocked and transit developing countries and their development partners at the national, bilateral, sub regional, regional and global levels and through partnership between public and private sectors. Partnerships should be based on the mutual benefits deriving from the specific actions that major stakeholders have agreed to undertake in the present programme of action in order to establish efficient transit transport systems. The international community, including financial and development institutions and donor countries, should provide financial and technical support to help those countries to deal effectively with their transit transport problems and requirements. Aspects of the successful implementation of the transit regime should be borrowed by countries in Southern Africa and financed accordingly for

implementation upon the conduct of comprehensive feasibility studies since the environment in Europe differs significantly from the existing in Southern Africa.

Despite distance to the sea being the major factor affecting trade and economic development for landlocked States, cooperation and collaboration between the landlocked States and transit and coastal States should be strengthened with the support of the international community at the elimination of abstract vocalization of the problems and international rhetoric. In this regard, to successfully address the challenges in facilitating transit, there is critical need for a comprehensive and well researched action plan for sustainable and inclusive growth, structural transformation and economic diversification. Official Development Assistance strategies should also recognise the large infrastructure needs faced by landlocked States and the need for an increase in direct assistance to support large-scale investments in roads and railways. In this regard, the landlocked States themselves should present national transport and development strategies to be financed.

The bottom line is that, it should be recognised that sustainable development cannot be attained without taking into account the needs of vulnerable countries such as landlocked States in all regions and assistance should be rendered to them on an affirmative action basis with the ultimate goal of creating an uplifting platform for such countries as the question of access to the sea is for landlocked States is dependent on the cooperation of all stakeholders in the transit chain.

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ANNEXES

Annex 1

UNCLOS (1982)

PART X

RIGHT OF ACCESS OF LAND-LOCKED STATES TO AND FROM THE SEA

AND FREEDOM OF TRANSIT

Article124

Use of terms

1. For the purposes of this Convention:

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

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

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

(d) "means of transport" means:

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

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

2. Land-locked States and transit States may, by agreement between them, include as means of transport pipelines and gas lines and means of transport other than those included in paragraph 1.

Article125

Right of access to and from the sea and freedom of transit

1. Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.

2. The terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through bilateral, subregional or regional agreements.

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

Article126

Exclusion of application of the most-favoured-nation clause

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

Article127

Customs duties, taxes and other charges

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

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

Article128

Free zones and other customs facilities

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

Article129

Cooperation in the construction and improvement of means of transport

Where there are no means of transport in transit States to give effect to the freedom of transit or where the existing means, including the port installations and equipment, are inadequate in any respect, the transit States and land-locked States concerned may cooperate in constructing or improving them.

Article130

Measures to avoid or eliminate delays

or other difficulties of a technical nature in traffic in transit

1. Transit States shall take all appropriate measures to avoid delays or other difficulties of a technical nature in traffic in transit.

2. Should such delays or difficulties occur, the competent authorities of the transit States and land-locked States concerned shall cooperate towards their expeditious elimination.

Article131

Equal treatment in maritime ports

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

Article132

Grant of greater transit facilities

This Convention does not entail in any way the withdrawal of transit facilities which are greater than those provided for in this Convention and which are agreed between States Parties to this Convention or granted by a State Party. This Convention also does not preclude such grant of greater facilities in the future.

Annex 2

SADC Protocol on Trade (1996) Part 8

PART EIGHT

TRADE RELATIONS AMONG MEMBER STATES AND WITH THIRD COUNTRIES

Article 27

PREFERENTIAL TRADE ARRANGEMENTS

1. Member States may maintain preferential trade and other trade related arrangements existing at the time of entry into force of this Protocol;

2. Member States may enter into new preferential trade arrangements between themselves, provided that such arrangements are not inconsistent with the provisions of this Protocol.

3. Notwithstanding the provisions of paragraphs 1 and 2 of this Article, Member States party to any existing preferential trade arrangements and other trade related arrangements undertake to review the further application of such preferential trade arrangements, with a view to attaining the objectives of this Protocol.

Article 28

MOST FAVOURED NATION TREATMENT

1. Member States shall accord Most Favoured Nation Treatment to one another.

2. Nothing in this Protocol shall prevent a Member State from granting or maintaining preferential trade arrangements with third countries, provided such trade arrangements do not impede or frustrate the objectives of this Protocol and that any advantage, concession, privilege or power granted to a third country under such arrangements is extended to other Member States.

3. Notwithstanding the provisions of paragraph 2 of this Article, a Member State shall not be obliged to extend preferences of another trading bloc of which that Member State was a member at the time of entry into force of this Protocol.

Article 29

CO-ORDINATION OF TRADE POLICIES

Member States shall, to their best endeavour, co-ordinate their trade policies and negotiating positions in respect of relations with third countries or groups of third countries and international organisations as provided for in Article 24 of the Treaty, to facilitate and accelerate the achievement of the objectives of this Protocol.

Article 30

COOPERATION WITH THIRD COUNTRIES OR GROUPS OF THIRD COUNTRIES

Member States shall develop cooperation and conclude agreements with third countries or groups of third countries and international organisations as provided for in Article 24 of the Treaty, to facilitate and accelerate the achievement of the objectives of this Protocol.

Annex 3

COMESA Treaty (1994)

CHAPTER THREE
AIMS AND OBJECTIVES

ARTICLE 3
Aims and Objectives of the Common Market

The aims and objectives of the Common Market shall be:
(a) to attain sustainable growth and development of the Member States by promoting a more balanced and harmonious development of its production and marketing structures;
(b) to promote joint development in all fields of economic activity and the joint adoption of macro-economic policies and programmes to raise the standard of living of its peoples and to foster closer relations among its Member States;
(c) to co-operate in the creation of an enabling environment for foreign, cross border and domestic investment including the joint promotion of research and adaptation of science and technology for development;
(d) to co-operate in the promotion of peace, security and stability among the Member States in order to enhance economic development in the region;
(e) to co-operate in strengthening the relations between the Common Market and the rest of the world and the adoption of common positions in international fora; and
(f) to contribute towards the establishment, progress and the realisation of the objectives of the African Economic Community.

ARTICLE 4
Specific Undertakings

In order to promote the achievement of the aims and objectives of the Common Market as set out in Article 3 of this Treaty and in accordance with the relevant provisions of this Treaty, the Member States shall:
1. In the field of trade liberalisation and customs co-operation:
(a) establish a customs union, abolish all non-tariff barriers to trade among themselves; establish a common external tariff; co-operate in customs procedures and activities;
(b) adopt a common customs bond guarantee scheme;
(b) simplify and harmonize their trade documents and procedures;
(d) establish conditions regulating the re-export of goods from third countries within the Common Market;
(e) establish rules of origin with respect to products originating in the Member States; and
(f) recognise the unique situation of Lesotho, Namibia and Swaziland within the context of the Common Market and to grant temporary exemptions to Lesotho, Namibia and

Swaziland from the full application of specified provisions of this Treaty.
2. In the field of transport and communications:
(a) foster such co-operation among themselves as would facilitate the production of goods and facilitate trade in goods and services and the movement of persons;
(b) make regulations for facilitating transit trade within the Common Market; and
(c) adopt a Third Party Motor Vehicle Insurance Scheme.

Annex 4

COMESA Protocol on Transit Trade and Transit Facilities (1996)

See link: COMESA Protocol for Transit Trade and Transit Facilities
wits.worldbank.org/GPTAD/PDF/annexes/COMESA%20protocol.pdf