United Nations Conference on the Law of the Sea

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24 February to 27 April 1958

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Annexes
Memorandum submitted by the Preliminary Conference of Land-locked States

Extract from the *Official Records of the United Nations Conference on the Law of The Sea, Volume VII (Fifth Committee (Question of Free Access to the Sea of Land-locked Countries))*

ANNEXES

Note : For the contents of these annexes, see entries in bold type in the Index to documents of the Fifth Committee, p. v of the present volume.

DOCUMENT A/CONF.13/C.5/L.1

Memorandum submitted by the Preliminary Conference of Land-locked States

[*Original text: English and French*]
[*28 February 1958*]

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[1] Annexes 2 and 3 are not reproduced in the present report.

MEMORANDUM

1. A preliminary conference of States without direct territorial access to the sea was held at Geneva from 10 to 14 February 1958 on the invitation of the Swiss Federal Government. This conference was the sequel to a series of meetings held in New York between representatives of land-locked States, Members of the United Nations, many of which had taken an active part in the discussions in the eleventh session of the General Assembly on the draft articles on the Law of the Sea presented by the International Law Commission, meetings which the observer of Switzerland to the United Nations had been invited to attend.

2. These meetings were based mainly on paragraph 3 of resolution 1105 (XI) adopted by the General Assembly on 21 February 1957 as the result of a joint proposal by Afghanistan, Austria, Bolivia, Czechoslovakia, Nepal and Paraguay, reading:

> "[The Assembly] recommends that the conference of plenipotentiaries study the problem of free access to the sea of land-locked countries as established by international practice or bilateral treaties."

They were also guided by the consideration that the draft articles presented by the International Law Commission contained no provisions dealing directly with the position of land-locked States and, further, that in proposing the establishment in the Conference on the Law of the Sea of a special committee to give effect to the above-mentioned recommendations the competent United Nations organs had expressed the desire that information should be assembled and proposals formulated with a view to that committee's work.

3. The Czechoslovak Government had proposed first of all a meeting of representatives of land-locked States in Prague. Later, the possibility was mooted of holding a meeting in Vienna. Finally, for technical reasons, it appeared more convenient to the delegates at New York of the States concerned to suggest that this preliminary conference should be held at the actual seat of the United Nations Conference on the Law of the Sea at Geneva, and, on practical grounds, shortly before the main conference. The Swiss Federal Government fell in with this suggestion. In his opening speech to the Preliminary Conference on 10 February 1958, the Head of the Swiss delegation, Mr. Paul RUEGGER, explained the circumstances in which the Federal Government had issued invitations to the Preliminary Conference, which that Government regarded as an informal meeting and as having for its main purpose an exchange of views and the collection of documentary material for the general conference.

4. The States invited to the Preliminary Conference were all the land-locked States mentioned in the general list drawn up by the United Nations for the invitation to the Conference on the Law of the Sea: States Members of the United Nations and States members of specialized agencies. Invitations were therefore sent to the following States: Afghanistan, Austria, Bolivia, Byelorussian Soviet Socialist Republic, Czechoslovakia, Holy See, Hungary, Laos, Luxembourg, Nepal, Paraguay, San Marino, and Switzerland. All these countries accepted the Swiss Federal Government's invitation. The delegate of Paraguay, however, was unable to attend the meetings. The list of members of delegations to the Preliminary Conference is annexed.[2]

5. The Head of the Swiss delegation was elected President of the conference. Mr. Weingart, of the Federal Political Department, Berne, was appointed Secretary.

6. At the opening of the conference certain delegations expressed the opinion that it would be desirable to have the participation of the People's Republic of Mongolia in the discussions. In this connexion the Swiss delegation pointed out that, in reality if not formally, the present preliminary meeting fell within the framework of the United Nations. For that reason the host State had followed strictly the decisions taken by the United Nations and had invited all the land-locked States which appeared on the list drawn up by the United Nations for the purposes of the general conference The host government took the view that the question as to what States should be invited was outside its competence.

7. At the beginning of the session, members of the conference were able to study with the keenest interest the valuable memorandum (A/CONF.13/29) on the question of free access to the sea of land-locked countries, prepared by the United Nations Secretariat, which sets out in detail the current aspects of this problem and the history of earlier attempts to solve it. The Preliminary Conference

[2] See annex 1 hereto.

expressed its unanimous appreciation of this excellent piece of work. It also took note with particular interest of the oral information on the same subject given by Mr. Sandberg, representing the Secretariat.

8. The summary records of the meetings of the Preliminary Conference have been reproduced separately as document A/CONF.13/C.5/L.1/Add.1.[3] It was agreed, at the suggestion of one of the delegates to the Preliminary Conference, that none of the statements made in the course of the session should be considered as committing any State to a given position.

9. The Preliminary Conference devoted the greater part of its meetings to hearing statements by the delegates of the different States represented on the situation of their particular countries, on the conventional status the majority of them enjoyed under bilateral or multilateral agreements, on their needs and on their experiences. The substance of these statements will be found in the summary records of the meetings and is placed at the disposal of the United Nations as a supplement to the documentation for the Conference on the Law of the Sea. There is every reason to suppose that both the Conference and the Fifth Committee, set up to study the situation of land-locked States, will find in these statements additional material of considerable value. All twelve states attending the preliminary Conference made general statements in the course of the meetings.

10. The Preliminary Conference had before it a number of papers submitted by delegations of land-locked countries. They are summarized below in their order of presentation, and in view of their importance they are reproduced as annexes to the present memorandum.

(*a*) Note dated 26 August 1957 by the Permanent Mission of Afghanistan to the United Nations distributed in New York to the representatives of the States concerned.[4] This document proposes first of all the elaboration of a "Universal Declaration" stating the right of free access to the sea of all countries; the reiteration of and, if necessary, the elaboration in greater detail of the Barcelona Declaration concerning the right to a flag for land-locked countries; the elaboration of a "Universal Declaration" recognizing a universal right to transit by air, railroad, road and waterways through the territory of States.

(*b*) A memorandum dated 31 January 1958 by the Swiss Government[5] communicated to the Secretary-General of the United Nations in response to a request from the Secretariat addressed to all States taking part in the Geneva Conference with a view to obtaining observations of governments for the Conference on the Law of the Sea. This document consists firstly of a historical section setting forth the steps taken by the Swiss Confederation over close on a hundred years and still more forcefully at the end of the First World War with a view to obtaining express recognition of its right to a flag, and secondly, a statement of a few general principles, such as that of the need for a "genuine link" between the ship and the country whose flag it flies.

(*c*) Lastly, and above all, a detailed draft submitted by the Czechoslovak delegation formulating in twelve articles, with comments in support, texts proposed to the Preliminary Conference as a basis of discussion for a joint proposal by the land-locked States to the Conference on the Law of the Sea.[6]

11. The Preliminary Conference had a long discussion on the question whether and how far, after finishing the part of its proceedings set aside for the hearing of the statements by the representatives of States and taking note of the papers presented by various delegations, it could at once take a further step forward by formulating forthwith texts to be submitted to the Conference on the Law of the Sea in the name of the States taking part in the Preliminary Conference, or whether the presentation of any such texts should not be held over until a later stage. A number of delegations were in favour of the immediate formulation of texts and urged that the Czechoslovak delegation's draft should be taken as a basis of discussion for a joint draft to be worked out on the spot. Other delegations contended that that procedure was premature so far as they were concerned. Some had accepted the Swiss Government's invitation being encouraged by the assurance that the essential object of the meetings at the present stage was to exchange information and to have a general exchange of views on principles of common interest. Others did not feel authorized in virtue of their instructions to form an opinion on the details of articles or drafts communicated at the meeting itself; such texts should, in their opinion, be reserved for previous examination by the governments of their countries, which were traditionally closely concerned with the methods of application of the principles affecting their access to the sea. Another idea put forward was that before proceeding to draft articles for which it was hoped to obtain general acceptance, it would be appropriate to hear the beginning of the discussion in the Fifth Committee of the Conference on the Law of the Sea. Faced with this situation, the participants in the Preliminary Conference nevertheless agreed unanimously in recognizing and underlining the importance of the present moment and of the possibilities which it offers for a reiteration, on the occasion of the proposed codification of the Law of the Sea, of the rights granted by *jus gentium* to land-locked countries. They considered that, nothwithstanding the difference in the positions of the various land-locked States, there was a broad and important common denominator — namely, the recognition by all of a certain number of principles relating to the rights and duties of those States. With a view to making an additional contribution to the general conference, they felt that an attempt could and should be made to express these principles which flow from international law in new and up-to-date formulae.

12. The Preliminary Conference accordingly set up among its members a working group with instructions to try to formulate these principles afresh. In this matter it was, moreover, guided by the finding, which was also the conclusion reached by the Sixth Committee of the United Nations General Assembly at the eleventh session, that, in the work of codification to be considered by the Conference of the Law of the Sea on this point, it would largely be a question of confirming the rights of the land-locked States. The working group set up by the Preliminary Conference consisted of the delegates of Austria, Bolivia, Czechoslovakia, Nepal and Switzerland. At the request of the delegate of one of the participating countries, it was expressly stated that the views put forward at the working group, as well as in the Preliminary Conference, must not be taken as committing the governments represented by the delegates, but that, on the contrary, their countries would always retain complete latitude, after further examination of the texts, to state their respective positions at the Conference on the Law of the Sea. Mr. Zourek, Czechoslovak delegate, was appointed Chairman of the Working Group.

13. After an exhaustive exchange of views, the group submitted its proposals for the formulation of "principles" at the final meeting of the Preliminary Conference, held on 14 February.

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[3] Mimeographed only.

[4] See annex 4 hereto.

[5] See annex 5 hereto.

[6] See annex 6 hereto.

14. After considering and discussing the texts submitted by the working group and expressing its warm thanks to the Chairman and to all members of the group for their work, the Preliminary Conference approved the statement of seven principles which, in the view of the participants, give expression to international law on the subject under discussion. With regard to one of the principles, one of the delegations made a reservation, which, however, refers to one aspect only of the principle formulated. The formulation is of course in no way complete. It was intended merely to state precisely a certain number of principles dealing with the status of land-locked countries. The text of these "principles", which forms the final and principal document of the Preliminary Conference, is contained in annex 7, to which special attention is drawn. This document is headed "Principles enunciated by the Preliminary Conference of land-locked States".

15. At the conclusion of its proceedings the Preliminary Conference expressed the hope that the various items of information assembled and the statement of principles, whose validity would, it believed, receive universal recognition, might be regarded as a useful contribution to the work of the Conference on the Law of the Sea. The delegates to the Preliminary Conference are certainly aware both of the paramount importance and of the difficulty of the task which the general Conference is about to approach in attempting to codify wide-ranging sections of the Law of the Sea. In the special, but essential, field which has formed the subject of its discussions, it could not be the Preliminary Conference's ambition to present preparatory work comparable with that which in other fields had engaged the attention of the International Law Commission over many years. The delegates who met from 10 to 14 February hope, none the less, that their efforts may assist the general conference in its deliberations.

Annex 1

Delegations

Afghanistan
Mr. Abdul Hakim Tabibi (*Chairman of the Delegation*)

Austria
Mr. J. G. Willfort (*Chairman of the Delegation*)
Mr. H. Fröhlich
Mr. O. Bazant
Mr. R. Thomas
Mr. G. Zuk

Bolivia
Mr. W. Guevara Arze (*Chairman of the Delegation*)
Mr. C. Salamanca
Mr. J. Escobari Cusicanqui

Byelorussian Soviet Socialist Republic
Mr. I. Geronin (*Chairman of the Delegation*)
Mr. A. Sheldov

Czechoslovakia
Mr. J. Zourek (*Chairman of the Delegation*)
Mr. V. Pechota

Holy See
Rev. Father Henri de Riedmatten

Hungary
Mr. Endre Ustor (*Chairman of the Delegation*)
Mr. Endre Zador

Laos
Mr. Sisouk Na Champassak (*Chairman of the Delegation*)

Luxembourg
Mr. I. Bessling (*Chairman of the Delegation*)

Nepal
Mr. R. Shaha (*Chairman of the Delegation*)

San Marino
Mr. E. Noel (*Chairman of the Delegation*)

Switzerland
Mr. P. Ruegger (*Chairman of the Delegation*)
Mr. A. Schaller
Mr. W. Müller
Mr. R. Probst
Mr. H. Duttwyler

Secretariat

Mr. G. Sandberg (representing the Secretariat of the United Nations)
Mr. C. Weingart (secretary of the Preliminary Conference)

Annex 2

Summary records of the meetings of the Preliminary Conference

[*Mimeographed only. For the text of the summary records of the meetings, see document A/CONF.13/C.5/L.1/Add.1.*]

Annex 3

List of statements by the delegates attending the Preliminary conference

[*Mimeographed only.*]

Annex 4

Note dated 26 August 1957 by the Permanent Mission of Afghanistan to the United Nations

The Permanent Mission of Afghanistan wishes to state that in order that the representatives of the land-locked countries may concentrate on the question of a common and unified approach to the Conference, it will be to their advantage to consider some problems in connection with the right to free access to the sea.

These problems, in the opinion of the Afghanistan Mission, are as follows:

1. *Documents of a universal nature*

A. Elaboration of a "Universal Declaration" stating the right of free access to the sea of all countries whether land-locked or not.

B. Reiteration of, and if necessary, elaboration in greater detail, of the Barcelona Declaration concerning the right to a flag for land-locked countries.

C. Elaboration of a "Universal Declaration" of all States recognizing a universal right to transit by air, railroad, road and waterways through their respective territories. This might be joined with the Declaration mentioned above, sub A.

2. *General conventions to be adopted as a consequence of the "Universal Declaration" as outlined above*

A. Elaboration of a "Universal Convention" stating the essential principles governing the right of transit and of free access to the sea, these principles being, *inter alia*:

(*a*) The principle of non-discrimination in the use of the available means of transportation through the territory of any given State;

(*b*) The principle of equality for all users of such means of communication;

(*c*) The principle of a just and fair contribution by all users to the cost of construction and maintenance of such means of communication;

(*d*) The rights of States to restrict freedom of communication within reasonable limits in times of emergency;

(*e*) The principle of the settlement of differences concerning the application and interpretation of all conventions

relating to the right of transit and access to the sea by peaceful means:

(i) Through arbitration by a special organ created to this effect by the convention and/or

(ii) By judgement of the International Court of Justice;

B. Elaboration of a "Universal Convention" relating to the use of railroads, roads and airways for the purpose of transit through the territory of States;

C. Elaboration of a "Universal Convention" concerning the right of using the ports, airports and other facilities for persons and goods in transit through a foreign territory;

D. Elaboration of a "Universal Convention" concerning the use of international waterways for purposes of transit;

E. Elaboration of a "Universal Convention" concerning the creation of free zones for the purposes of transit in seaports, river ports and airports.

Because of the importance of this question, the Mission of Afghanistan suggests frequent consultations and discussions between the representatives of all land-locked countries from the present time until April 1958, when the Conference will take place. The Afghanistan Mission will appreciate a response to this and its previous note on this question.

Annex 5

MEMORANDUM DATED 31 JANUARY 1958 BY THE SWISS GOVERNMENT

I. *Historical*

Switzerland had always maintained that the right to fly the national maritime flag is one of the fundamental rights of every independent State, whether such State has a sea-board or not. The flag is a symbol of sovereignty which requires no special recognition. Switzerland's efforts in this connection have been directed towards obtaining the formal and unrestricted recognition of this principle by all States and more especially those which are, by tradition, maritime States.

At the same time, Switzerland has endeavoured to secure the practical recognition of the principle of free access to the sea of countries without a sea-board. She has consistently and vigorously asserted that the right of such States to provision themselves and carry on their export trade and, what is more, to maintain and develop their relations with the whole world ought not to be liable to be restricted by any measures taken by neighbouring countries in ports or any other approach to their territory.

This attitude on the part of Switzerland was given tangible expression in the attached documents [7] — namely:

(*a*) "Memorandum of the Claim of Switzerland to a Maritime Flag", which was submitted to the President of the Paris Peace Conference in 1919;

(*b*) Note of the Swiss Delegation to the Commission on the International Regulation of Ports, Navigable Waterways and Railways of the Conference of the Powers in Paris, dated 13th May 1919, which defined in general terms the principle of the freedom of international transit traffic.

In 1864 the Federal Council, with a view to obtaining recognition of Switzerland's right to fly her own maritime flag, consulted 14 maritime powers. None of these States expressly contested this right, though some of them expressed doubts. France and Prussia pointed out that a State that had no ports could scarcely in practice engage in maritime navigation, as it did not possess the necessary facilities for the policing of such navigation. This objection was, however, ill-founded, because, as has since been proved in numerous cases, a land-locked State can in fact control its shipping just as easily as a State with a sea-board. Switzerland was incidentally admitted to the first conference on maritime law in 1856 (Declaration of Paris).

As for liberty of transit, Article 23 of the Covenant of the League of Nations expressly required the League to issue the necessary provisions for guaranteeing and maintaining liberty of communications and transit traffic. When in August 1919 an international study commission was set up to prepare for the tasks entrusted to the League of Nations by Art. 23 and other provisions of the Peace Treaties, Switzerland was invited to send a representative to that commission.

The work of the commission led to several draft conventions: one on navigation on international rivers, one on freedom of transit, a third on railway traffic and a fourth on the right of States without access to the sea to fly a maritime flag. In addition, a resolution on rights in international ports was adopted.

The Council of the League of Nations took cognizance of these drafts on 19th May 1920. On the same day, the members of the League were asked to state their views with regard to them at a general technical conference.

Later, the general conference on freedom of communications and transit which opened on 10th March 1921 in Barcelona accepted the following agreements, statements and recommendations:

(*a*) Convention and statutes on freedom of transit;

(*b*) Convention and statutes on the regulation of navigable waterways of international interest;

(*c*) Declaration concerning the recognition of the right to a maritime flag of States without a sea-board;

(*d*) Recommendation concerning international regulations governing railways;

(*e*) Recommendation concerning ports governed by international regulations.

The Swiss Federal Council associated itself with all the documents produced by the conference with the exception of the Convention on waterways and the Federal Assembly of the Swiss Confederation subsequently approved the Convention on Freedom of Transit. It also took official cognizance of the declaration recognizing the right of States without a sea-board to fly a maritime flag.

The attitude adopted by Switzerland with regard to all these questions was not dictated exclusively by economic considerations; but was largely determined by the tasks and obligations which she proposed to assume in the field of international co-operation. Thus, during the last world war, the fleet of the International Committee of the Red Cross (created for transport work) in many cases flew the Swiss flag.

It will thus be seen that Switzerland not only has special experience in connection with the right of States without a sea-board to fly a maritime flag and with freedom of transit, but, by virtue of her international functions, occupies a special position.

II. *Declaration of Barcelona concerning the recognition of the right of States without a sea-board to fly a maritime flag and Proposal concerning Maritime Law of the Commission on International Law or the United Nations Organization*

In view of the peculiar position of the States without a sea-board, Switzerland is of opinion that appropriate measures should be taken to guarantee the existence of a "genuine link" between ships flying the flag of a State and the State itself.[8] A country that has no ports of its own, and thus no corresponding services, does in fact have some difficulty in effectively controlling the movements of its vessels; consequently special care should be taken, in its interests and those of international legal security generally, to maintain order.

In practice, this can be done only by creating as close a link as possible between the vessels and the countries whose flags they are flying.

The question whether the primary object of a country's fleet is to ensure its provisioning in war time in goods from oversea countries may be of a certain importance, but the essential thing will always be that the maritime legislation of that country establish the necessary link. Thus Swiss maritime law provides that the whole of the capital invested in Swiss vessels must be of Swiss origin and the actual management of the concerns in question exercised in Switzerland; furthermore it regulates in detail the legal relations between the ship-

[7] See appendices I and II.

[8] See *Official Records of the General Assembly, Eleventh Session, Supplement No. 9* (A/3159), p. 24, art. 29.

owner and the crew and provides that, in this respect as in all matters connected with maritime activities, Swiss law shall in principle be applied.

III. *Freedom of transit*

Freedom of traffic between States is one of the foundations on which the comity of nations and international collaboration rest. There has even been talk of a fundamental traffic law. With a view to the application of Article 23, e, of the Covenant of the League of Nations and the regulation of the right of free transit, regarded as one of the most effective means of developing international collaboration, the Convention on Liberty of Transit was concluded on 20th April 1921 in Barcelona. According to article 2 of the attached Statutes, the measures taken by the Contracting Parties to regulate transport through their territories, must ensure freedom of transit without discrimination on communications suitable for international transit traffic. This convention was ratified by a large number of States.

In the present state of affairs, which calls for a greater measure of economic collaboration on an international level than ever, it is necessary not only to confirm the principles laid down in this convention, but to strengthen and amplify them.

IV. *Freedom of navigation*

As complete liberty of navigation as possible is vital for Switzerland. It is thus essential that Swiss vessels should have access to ports and obtain the right of transit for innocent purposes through territorial waters and internal navigable waterways.

APPENDIX I

MEMORANDUM ON THE CLAIM OF SWITZERLAND TO A MARITIME FLAG COMMUNICATED TO THE PRESIDENT OF THE PARIS PEACE CONFERENCE IN 1919

The realization of the principle of free access to the sea, which means the fulfilment of a wish that has long been cherished by Switzerland, adds to the importance of the claim which is indissolubly connected with the question of a national navigation, viz. the claim to a general recognition of the Swiss flag in the Ocean-traffic.

Although the right of flying the national flag as an emblem of sovereignty must be considered as a part of the fundamental rights of every independent State, the Swiss Confederation would attach great value to a formal recognition of this right by the Powers, all the more so since Switzerland, in spite of her land-locked situation in the heart of the continent, has a considerable share in the world's commerce. At the present time, when the Powers are about to place all international relations on the basis of Right, the Swiss Government feels particularly justified in expressing this wish for an international confirmation of their country's claim to navigation, which is founded as well on the plainness of their unquestionable rights, as on the economic exigencies of the day.

Ever since modern international law has been established, there has been an undisputed axiom, that every State has the right of unrestricted navigation upon the open sea. Owing to the fact that the flag of a ship presents the only outward mark of nationality, it has been recognized both by theory and practice of international law, that seafaring countries may sail their ships under a special national flag. Moreover, on the high sea, the flag is the symbol of a State's sovereignty over the ship. From the fact that the right of a country of flying a flag must be considered an attribute of sovereignty, may be drawn the conclusion, that this right, to become effective, must simply be notified to the other Powers, and is in no way dependent on their recognition. A recognition, however, of the national emblems by water and by land is certainly considered an international duty, resulting from the fundamental right of respect to which every State may lay claim.

Accordingly, the right of inland countries to navigating remained, on principle, undisputed and whenever objections were raised, it was generally not a question of right but of practical difficulties which opposed themselves to the exercise of this right on the part of States, that are deprived of any access to the sea. Therefore the authors on international law, as far as they take at all this question into consideration, pronounce for the greatest part in favour of the right of land-locked countries, and above all of Switzerland. If a difference were to be made in the treatment of inland countries and of littoral States, inasmuch as to exclude the former from the benefit of a right which, according to the rules of the law of nations, is the due of every State, the principle of equality of States, on which all international relations shall be founded, would be entirely disregarded.

Moreover, a refusal to recognize any country's flag on the high seas would be inconsistent with equity and with the notion of international right. The inevitable consequence would be that the navigation of this country would be legally and practically absorbed by the commerce of the surrounding States. The menace of such an event must necessarily be felt by an industrious people loving its independence. The Swiss Government therefore joyfully welcomed the programmatic message read by the President of the United States on January 22nd 1917, by which he declared that all States, especially countries with no access to the sea, should be provided with the means of communicating freely with the sea-shore towards which they appear to have a natural outlet. From this principle the Swiss people gladly draws the inference, that Switzerland will be enabled to regulate her navigation at her own discretion within the limits of the international rules, which for all States are equally binding, and that her right to carry her national flag on the open sea will be fully recognized.

The unalterable character of the Swiss claim is fully confirmed by a series of important precedents: on the boundary lakes of Switzerland the Swiss flag is as unreservedly recognized as the flags of the neighbouring States. An essential difference between the maritime flag and the flag carried on inland waters does not exist: it is simply a question of technical practicability, whether vessels, coming from the sea can reach the Rhine port of Bale on the international highway of the Rhine; and there is no reason why a sea-faring vessel forming a part of a Swiss Rhine-fleet, should not postulate the recognition of her nationality and therefore of her flag on the open sea.

In observance of the principle of equality of States Switzerland has actually been admitted to the first Convention on international maritime right, which was open to all States, viz. the Paris declaration of 1856. And, in conformity with this precedent, Switzerland signed, both on the first and second Hague Conferences, the conventions that are only applicable with regard to maritime States (viz. the conventions VI, VII, VIII, IX, X, XIII of October 18, 1907), without raising opposition on the part of any of the Powers.

Taking the claim of Switzerland to a maritime flag tacitly for granted, the ship that conveyed the first Swiss legation to Japan, in 1864, hoisted the Swiss colours, which were accordingly given a salute by the European and American ships lying at anchor in the Japanese waters.

Even though the right of Switzerland to a maritime flag seems not to have been disputed in itself, it appears nevertheless, as has already been observed, that the practicability of this claim has under former circumstances been repeatedly questioned. One argument adduced against the recognition of Swiss navigation, was based on the fact that Switzerland possessed no harbours of her own for sheltering the ships flying her colours. Although in a moment when the principle of free access to the seas, which comprises the claim of inland countries to the free use of certain ports, is about to be confirmed in international law, the aforesaid argument cannot carry much weight in the special case of Switzerland, which is virtually connected with the sea by the international Rhine, this reservation is entirely unfounded. Also the fact, that Switzerland will have no navy at her disposal exercising an effective control over her merchant vessels, may not be considered as a sufficient reason for refusing the recognition of its flag. States, with an undoubtedly seafaring character can either utterly lack the possession of men-of-war, as is the case of Belgium, or else be only provided, as for instance Norway, with a navy that must be regarded as entirely insufficient for the purpose of exercising a control over the country's trading vessels.

In laying down these reasons the Swiss Government hope to have sufficiently proved their claim to be firmly established. They wish, however, to point out the fact that the development of the economic life of Switzerland fully justifies the establishment of a Swiss national navigation and even makes it appear a necessity of the present time.

The desire of Switzerland to create a commercial fleet of her own, enjoying the same rights and being subject to the same duties as the fleets of other countries, is not dictated by reasons of international policy, as might be the case with a larger country, nor by the aspiration of making her navigation subservient to the purpose of economic conquest or colonial expansion. Undoubtedly Switzerland feels the inconvenience of being entirely dependent on foreign maritime trade for the transmission of her correspondence and for her intercourse with her representatives abroad. Nevertheless, when she sustains her claim to an ocean-traffic under her own flag, she is mainly prompted by the needs of her economic life. These needs are the result of the special character of the Swiss industry, which by reason of the smallness of the inland market and of the scarcity of the raw materials is entirely dependent on importation and exportation; moreover, the existence of a comparatively dense population, which entails the necessity of revictualling the country from beyond the sea. The remarkable share in the world's commerce, which Switzerland owes above all to her expansive industry and to the high standard of labour in the country, makes it necessary for the Swiss Government to find means by which the interchange of Swiss goods might be effected by a national maritime trade. The necessity of adopting this point of view is confirmed by the following statistical data which it may be useful to record: in normal times the exportation of agricultural products of the country amounts to one-seventh of the whole production, a remarkably high figure for a country which has a chiefly industrial character. On the other hand, two-fifths of the country's total food supply is being imported and the entire grain production of Switzerland before the war would barely have covered the wants of the country during a period of sixty days. Of the goods manufactured in Switzerland, on the average, two-thirds were exported, whereas in some branches of industry the proportion of exported goods even rises to 95 per cent, a figure which again exceeds by far the record numbers reached in any other country.

The Swiss Government would be highly gratified if in stating these facts they had succeeded in convincing the Powers of the legitimacy of their claim as well as of the necessity for Switzerland to possess a recognized maritime navigation. They feel bound to express their deeply felt hope that their national flag, which is connected with so many glorious memories and which gave its name, its colours and its emblem to the universally cherished institution of the Red Cross, be soon granted a general and illimited recognition by the Powers.

APPENDIX II

Note dated 13 May 1919, addressed by the Swiss Delegation to the Commission on the International Regulation of Ports, Navigable Waterways and Railways of the Conference of the Powers in Paris

The nations of Europe have every confidence in the work now being prepared in Paris. Now, after a most terrible war, they are looking to the Conference of the Great Powers to reassert the essential principles of international law without which there can be no lasting peace.

After a struggle in which they were pitted against one another and from which they one and all, victors and vanquished, belligerents and neutrals, emerged scarred and war-weary, these nations of Europe feel the need to find as far as possible an expression of their ideal of solidarity.

This solidarity will remain an empty catchword, if the nations do not succeed in establishing mutual relations. It is scarcely necessary to appeal to history and recall the fact that the decline of the Roman Empire and the barbarity of the Dark Ages were the consequence of the gradual disappearance of communications in conjunction with depopulation. The present situation in part of Europe offers only too many examples in support of this contention.

Europe expects of the Great Powers a solemn declaration defining and developing the guarantee of international free transit, the imperative need for which was recognized by article 5 of the Treaty of Paris of 30th May 1814 in similar circumstances. This article reads: " the future Congress will examine and decide (as well as for the Rhine) in how far, with a view to facilitating communications between the peoples and rendering them gradually less strange to one another, the above provision can be extended to all the other rivers the navigable reaches of which separate or traverse different States."

In those far-off days, the international rivers and in particular the Rhine, were the cheapest and most rapid method of international transit traffic.

Now, as in 1814, it is necessary, in order to ensure lasting peace, to seek to render the nations gradually less strange to one another and ever more interdependent within the League of Nations, by endowing the principle of international free transit, already recognized in several international agreements, with the enhanced prestige of a permanent general principle of universal *jus gentium*.

The universal postal and telegraphic conventions and the so-called Berne Convention on the transport of goods by rail, to mention but two examples, have already given tangible expression to the principle of free international transit.

If the Great Powers assembled in Paris were to proclaim their intention of permanently guaranteeing " free international intercourse ", for which they fought the last war at the cost of heavy sacrifice, this would be in keeping with their best traditions.

As for the European States whose territories are completely surrounded by that of other powers, such as Switzerland and the Czechoslovak Republic, the guarantee of free international transit is indispensable for their economic and political independence.

Free access to the sea will be but an empty phrase unless *jus gentium* gives these countries the assurance that their communications by rail, waterway, telegraph and telephone etc. will not depend on temporary agreements which can be revoked by other States at will.

It is imperative that this guarantee be furnished in a more definite and at the same time more general form, that can be adapted to the future development of lines of communication.

REQUESTS

Consequently the Swiss Confederation has the honour to propose to the Great Powers the recognition of the following principles of *jus gentium*.

I

General Principle

Liberty, equality of rights and continuity

All civilized nations now admit that international transit between two States through the territory of one or more other States should be free and the definition of this liberty now presents no difficulty.

It can be drafted as follows:

Transit between two States through the territories of one or more other States is and shall be perpetually free.

It may not be subjected to any hindrance or restriction whatsoever, and in particular to any transit or customs duty or any other charge whatsoever over and above the cost of transport properly speaking. These costs may not be higher than those of internal transport.

The States whose territories are crossed shall treat on a footing of complete equality between one another and with their nationals, all persons, goods, boats, wagons, coaches, mail or other property or means of communication or transit traffic on their territories, irrespective of nationality, origin or destination.

II

Freedom of Transit as applied to Inland Navigation

It is hardly necessary to remind the Great Powers that the legal status of the great international waterways, as incorpo-

rated in the *jus gentium* of 1814/1815, is nothing more nor less than an application of the principle of free international transit traffic.

In this connexion, the legal work accomplished in the 19th century contains gaps which it is very necessary to fill in today.

To take only one instance, the treaties of 1839 and 1868, whereby some States sought to guarantee liberty of international transit traffic by water between the Rhine and Belgium, contain the double defect of being *res inter alias acta* as far as Switzerland and other States are concerned, being imperfectly drafted and especially of not constituting a permanent rule of European *jus gentium*.

Other international waterways in Europe, and very important ones, are not even the subject of a plurilateral agreement ensuring free navigation between the international navigable waterway and the nearest great sea port, when such port is not situated on the river itself.

Jus gentium does not contain a single principle furnishing inland navigation with a minimum of guarantees either (1) within such sea ports not situated on the river itself (such as Antwerp, for instance), (2) in the matter of transit through these ports of ships navigating or persons and goods conveyed by river, proceeding to or from oversea countries or (3) as regards the extent of the right to fly a flag on international waterways.

We crave permission to say a few words concerning these serious gaps in the present *jus gentium*.

The modern States desirous of developing their ports have every reason for wishing to grant more favourable treatment than that accorded to their internal traffic to international transit traffic in these ports and in their territorial waters, as also to that on the great navigable canals linking their sea ports with neighbouring international waterways. In point of fact, these favours have the effect of increasing the demand for freight, distributing general harbour dues over a more considerable tonnage etc. To ensure to river craft and their passengers, crews and cargoes equality of treatment in these ports and on entering and leaving these ports and to allow them to proceed in transit freely on a footing of perfect equality with the nationals of the country is in reality to accord them a minimum: indeed, it is really tantamount to conferring a legal character on a universally acknowledged custom, so that one almost wonders whether it is necessary to accord express recognition to this obligation of *jus gentium*.

In order still further to restrict and define the scope of this legal guarantee, the following could, if necessary, be specified:

(*1*) The waterway systems to which it is granted;

(*2*) The sea port or sea ports to benefit by this guarantee in the case of each of these systems.

Thus it could be definitely stated that this guarantee only applied to the great European rivers such as the Rhine, the Danube, the Elbe, the Po, etc., and mention made, in the case of the Rhine, for instance, of Antwerp, it being in the obvious interests of the Netherlands themselves to offer to include other ports not situated on the Rhine but, for instance, on the Waal or the Leck.

(*3*) The countries to benefit by this régime in each of the waterway systems.

To sum up, Switzerland asks that the right of free navigation on international waterways shall, by means of a general convention, be expressly stated to include:

A

(*1*) The right of free navigation between the international river and the great sea port or ports nearest to the navigable estuary, even when the communication between these ports and this river is by canal or by the territorial seas of one or more States;

(*2*) The right to national treatment for shipping in such sea port or ports used for transhipment;

Switzerland would agree, if necessary, to restrict this guarantee to the shipping, boats or cargoes of the countries whose territories are completely surrounded by those of other States, such countries being specified, for each waterway " system ", by the General Convention, this right implying the utilization on the same footing as nationals of installations for the unloading, loading and transhipment etc. of goods in the sea port or ports or on rivers that have to be used for transit.

B

The right to national treatment in the sea port or ports to be determined for each international river in Europe for the transit of vessels and goods proceeding to or from oversea countries.

Here again, Switzerland woud agree to restrict this guarantee to transit traffic to or from States whose territories are completely surrounded by those of other States, on condition that it was accorded to the flags of all States adhering to the General Convention.

C

Precise guarantees concerning the right to fly a flag

In connexion with the application of transit rights, the Swiss Government desires to submit to the Great Powers, for their favourable consideration, some questions which have not up to the present received any definite or satisfactory solution in practice (through agreements) or even in theory.

Article 109 of the final Act of the Congress of Vienna of 9 June 1815 does not, as we know, mention the existence of a " right to fly a flag " on international rivers and the divergences of interpretation to which the principle of freedom of navigation " for the trade of all nations " has given rise are also a matter of common knowledge. As regards the Rhine for instance, the regulations in execution of the Act, which were to be " conceived in a uniform manner for all " were in fact drafted and applied for the benefit of some of the riparian States to the disadvantage of other countries concerned — Switzerland and the non-riparian States.

The Rhine Convention of 1868 opens with an article guaranteeing freedom of navigation " to all nations ", but Art. 2 limits this right to vessels " belonging to Rhine shipping " which are defined as those " having the right to fly the flag of one of the riparian States and in a position to substantiate this claim by means of a document issued by the competent authority."

The 1868 régime must now be abolished and, in the interests of Europe and peace, replaced by a more liberal and precise régime which will effectively guarantee free navigation for all the Rhenish countries, and free transit not only for their goods but also for their vessels, irrespective of whether they belong to regular Rhine shipping or no.

The first question is:

As the 1868 right to fly a flag on the Rhine (which is tantamount to the application of a uniform régime for all the riparian States) is to be changed, by what system should it be replaced?

Obviously maritime law could not be applied as it stands on the Rhine. On the other hand it should be taken into consideration as far as possible with a view to facilitating river navigation of sea-going vessels and vice versa.

If it were left to the States represented on the Rhine Commission to provide a special system for the Rhine only, it is to be feared that, in spite of the creation of the League of Nations, the riparian States would be tempted to secure advantages for themselves at the expense of other States.

On the other hand, it seems scarcely possible immediately to provide, within a universal convention, one uniform system applicable to the right to fly a flag on all rivers or even on all European rivers.

This being so, the second question would seem to be:

Would it not be well, as a first step, to determine for the Rhine, by means of a general convention to which the great maritime powers, the small European maritime powers and the States through whose territories the Rhine flows would adhere,

the general legal guarantees to be accorded with immediate effect to the ships of all nations on the Rhine,

or, in other words, to draw up regulations governing the right to fly a flag on the Rhine and

the legal status of shipping and international transit traffic on the Rhine?

We venture to bring to the attention of the Great Powers the questions of public international law and international law calculated to give rise to legal disputes between riparian and non-riparian States, or rather between the principle of territorial sovereignty and the right to fly the national flag (see appendix I).

It would then be for a restricted conference of the States more especially concerned or for the new Central Rhine Commission to draw up the technical and executory provisions.

In order to produce satisfactory work in the general interest, account should be taken, when considering these general principles, of the legal conflicts that might arise in connexion with free transit traffic on the Rhine with the ports of Antwerp, London etc., not only in time of peace but also in war time, between the States adhering to these general principles and special regulations.

III

International Rail Transit Traffic

When transit is effected by rail, it would not be possible, by analogy with river shipping, to give the countries of origin or destination the right to carry out, direct or supervise transport in the transit countries, without inadmissible and unnecessary interference with the sovereignty of these countries in the matter of the structure and operation of their railways.

It would be sufficient to require the transit countries, in addition to the obligation not to hinder the free passage of persons, goods and mail by any fiscal or other measures, to see to it that their railway authorities accept for transport such persons, goods, letters etc. in transit and convey them to the railways of the next State. The acceptance of this obligation would be all the easier as it would be absolutely reciprocal for all countries.

This obligation should however be exactly defined. It would not constitute an effective guarantee, if the railway and postal authorities etc. of the transit countries were in a position to slow down transport at will, overcharge for it or fail to take the necessary precautions to safeguard goods, mail etc.

Provision should be made for a minimum of guarantees in respect of the duration of transport, the amount of the charges, the distances on the basis of which delays and charges can be calculated and finally the question of responsibility. In expressing the wish that transit traffic be not treated, in any of the ways we have mentioned, less favourably than inland traffic, we believe that we are proposing a solution acceptable to all the States concerned.

This object can, it seems to us, be achieved by adopting the following wording, for instance, for goods traffic :

Each State shall see to it that those in charge of the railway lines on its territory used for transit are under the obligation to accept, for transport, goods in transit through its territory and do not treat such goods, in the matter of conveyance or charges, less favourably than inland transport.

This minimum guarantee would no doubt, in the majority of cases, be replaced by arrangements more favourable to transit, as this would naturally be in the interests of the transit countries.

In any case, the peace congress will, by incorporating the principle of freedom of transit in *jus gentium,* be accomplishing a splendid piece of work in the interests of peace, which will come to be regarded as one of its outstanding achievements.

IV

Mixed Transit Traffic

The Swiss Delegation does not feel justified in suggesting the internationalization of railways, which would, it seems to them, meet with serious practical difficulties, even when the railways were merely an extension of an international waterway.

On the other hand, the guarantee of free transit by rail is indispensable in mixed international traffic by river and rail combined ; this applies in particular to States surrounded by the territory of other States.

In this connexion, it would be desirable to guarantee the following right :

National treatment for the conveyance in transit of persons and goods from or to countries surrounded by the territory of other countries :

(*1*) on railways linking these countries with an international river or linking the international river with the sea ;

(*2*) in river ports used for transhipment from railway to navigable waterway.

V

Freedom of Postal, Telegraph and Telephone Communications, etc.

Any guarantees of free transit would be illusory if traders were for instance prevented from using the telegraph, telephone or other means of communication in the transit States.

It is particularly important that this legal safeguard should be incorporated in the *jus gentium* of the twentieth century.

In other words, we request, especially for States surrounded by other States, the right to use, in the same way as nationals, the postal, telegraph and telephone services and all other methods of communication present and future of the States which separate them from other States, in so far as this may be necessary to enable them to exercise the right of transit.

VI

Freedom of Innocent Transit in Wartime

Frequently, in time of war, a minimum of legal guarantees in favour of innocent transit for the non-belligerent States and *a fortiori* for reciprocal transit for friendly and allied countries has been found absolutely necessary.

It would be in the interests of the belligerents themselves that the extent of this right of transit through their territories should be more clearly defined. It has not infrequently been found that, for lack of clear regulations, minor officials who are over-zealous or carried away by the sense of their responsibilities, on their own initiative hinder transit traffic from or to other States to the detriment not only of these States but also of their own.

Today, when the League of Nations is founded on the principle of solidarity between the nations, would it not be eminently judicious and politic to apply this principle of solidarity to cases in which the members of that League might be called upon to assist one another at the sacrifice of all they hold most precious — that is to say, during a League of Nations war against an external enemy ?

Would it be admissible that one of the associated States should be permanently deprived by its own allies of the right to cross the territory of its co-associates, on the usual pretext of military interest?

This question is particularly important for States surrounded by others and especially for a neutral State like Switzerland, in the matter of its access to the sea.

It will be in the interests of the League of Nations to link together the States belonging to it, so as in future to ensure the minimum transit indispensable between friendly States, on the hypothesis of another war. *A fortiori,* it would be well to grant to the States belonging to the League of Nations a similar guarantee in respect of transit through the territory of States not belonging to the League.

The highest military interest could not justify a claim to the right permanently to deprive a friendly country of all access to the sea.

A distinction must be made between the zone of hostilities properly speaking and the remaining territory of the belligerent countries.

The exigencies of war might conceivably have to take precedence of any other consideration, even where friendly countries were concerned, but these exigencies are always local and temporary.

On the other hand, experience in time of war goes to show

that, even within this limited zone, it is often possible for military chiefs to allow trains or special convoys to pass for innocent purposes, on condition that every precaution is taken to ensure, for instance, the secrecy of military operations etc.

Another objection to international transit, even outside the zone of hostilities, is the shortage of means of transport in the belligerent country, whose territory is crossed.

This objection is particularly ill-founded when the State requesting admission for its goods for the purpose of transit is surrounded by the territory of another State and offers to have its goods conveyed in its own wagons or barges. The fact that the State surrounded by the territory of another usually hesitates to make an offer of this kind is that it is afraid of the risk of its wagons or barges being requisitioned.

We believe that we are acting in the general interest in proposing the following wording :

The right to free international transit of a friendly State surrounded by the territory of another may not be permanently restricted save on the communications of the territory crossed which are situated in the zone of hostilities.

It may only be suspended in the zone of hostilities if the State whose territory is surrounded by those of others and is a friendly State refuses to submit to the military security measures demanded by the belligerent State or States whose territories it desires to cross or if it does not offer to have the goods conveyed in its own wagons or barges.

Traffic of the friendly State using the territory of another State for purposes of transit shall be exempt from all requisitioning.

Vessels of this friendly State which are mainly or exclusively used for the river traffic of that State are not subject to the regulations peculiar to maritime warfare (seizure etc.) when they are obliged to cross the territorial waters of belligerents in transit, in order to reach one of the sea ports nearest to the international river from which they have come, or vice versa to proceed from one of those sea ports to the international river of destination.

Annex 6

ACCESS TO THE SEA OF LAND-LOCKED COUNTRIES :
DRAFT ARTICLES SUBMITTED BY THE CZECHOSLOVAK DELEGATION

Part I. MAIN PRINCIPLES

Article 1

RIGHT TO THE FREE ACCESS TO THE SEA

The principle of the freedom of the high seas which guarantees to all States equal use of the high seas, universally recognized by international law, embraces also the right of States without a seacoast [land-locked states] to free access to the sea.

Commentary

The noble principle of the freedom of the high seas signifies, as provided under article 27 of the Draft of the United Nations International Law Commission, that the high seas are open to all States. All states are therefore entitled to enjoy the advantages accruing from the freedom of the high seas. The principle of the freedom of the high seas, universally recognized at the present time, indubitably also includes the right of states without a seacoast [land-locked States] to free access to the sea and that by highway, by rail, by waterway and by air. The said principle also includes the right to fly a flag and the right to the use of maritime ports. Without these fundamental rights land-locked states could not exercise any of the powers incorporated in the principle of the freedom of the high seas.

This article does not apply to enclaves on the territory of a foreign State nor to the access of coastal States to seas other than those along their coast.

Article 2

RIGHT TO FLY A FLAG

1. Land-locked States have the right to sail ships, registered in a specific place within their territory ; this place is the port of registry for these ships.

2. Ships sailing under the flag of a land-locked State shall receive guarantees of equal treatment with ships of coastal states on the high seas, during passage through territorial waters and in entering internal waters.

Commentary

The right of land-locked States to fly a flag on the sea was first codified in the Peace Treaties [article 273 of the Versailles Treaty, article 153 of the Neuilly Treaty — in which this right is accorded to all land-locked States belonging to the Allied and Associated Powers, further in article 209 of the Trianon Treaty and article 225 of the Treaty of Saint-Germain, which accorded this right to all land-locked States which are contracting parties to the said Treaties].

" The Declaration recognizing the right of States without a seacost to fly a flag on the sea " unanimously adopted at the Barcelona Conference on the freedom of navigation and transit in 1921 " has for all times embodied the right of all States not having a seacoast to fly a flag on the sea ", to cite the President of the Barcelona Conference, Mr. G. Hanotaux.

The right of land-locked states to fly a flag at sea has thus become a lasting principle of international law, recognized and applied by all States.

Article 3

THE RIGHT TO USE MARITIME PORTS

1. Land-locked States have the right that ships sailing under their flags may use maritime ports.

2. The coastal State is obliged to ensure to the ships of a land-locked State most favoured treatment, and in no event shall such treatment be worse than that enjoyed by its own vessels in maritime ports under its sovereignty or authority, in particular as regards the freedom of access to the port, its use and full enjoyment of the facilities it provides with respect to navigation and commercial operation to ships and vessels, their cargoes and passengers and with respect to payments and charges of all kinds.

Commentary

In respect of land-locked countries, unlike coastal States, the exercise of the right to use the high seas is subject to their right to use maritime ports. The term " maritime port " should for the purposes of the present article be understood to signify ports receiving naval vessels and serving international economic relations or the transit of a land-locked State.

The right to use maritime ports applies to all vessels sailing under the flag of a land-locked State, irrespective of its owner, or operator, whether a State, a private person or a public agency. It applies equally to vessels exersising the power of control over the vessels of a land-locked State. The same right appertains to land-locked States also in respect of fishing vessels.

The granting of the best possible conditions to the land-locked State and in all cases at least treatment equal to that enjoyed by, and according to, the vessels of the coastal State is fully justified, if it is at least partially to compensate for the very considerable disadvantages arising from the unfavourable situation of the land-locked State. It has, moreover, already been accorded under certain treaties. Comp. article 11 of the Convention between Italy and Czechoslovakia on the granting of concessions and facilities in favour of Czechoslovak

transport in the port of Trieste of 23 March 1921. [*L.o.N., Recueil des traités,* vol. XXXII, p. 256.] Article 2 of the Statute of the International Régime of Ports of 9 December 1923 likewise rests on the same principle. [*L.o.N., Recueil des traités,* vol. LVIII, p. 300.]

Paragraph 2 of article 3 regulates the legal status of vessels in maritime ports alone, and in no way affects the rights of the coastal State, as for instance the exclusive right of the coastal State to operate cabotage.

Article 4

FREE ZONES IN PORTS

1. For the purpose of free and duty-free movement of goods between a land-locked state and the seacoast, the coastal state may establish by agreement with a land-locked state and for the use there a free zone in certain of its ports.

2. A free zone is a zone exempted from the customs territory of the state where it has been established, which however remains subject to the jurisdiction of that state especially with regard to safety of operation, working conditions and public health.

Commentary

As the experiences of the past years have shown, the needs of the land-locked countries may require the establishment of a free zone in one of the maritime ports. The Versailles Peace Treaty in its articles 363 and 364 regulated the right of Czechoslovakia to establish free zones in the ports of the North Sea as " les besoins tout particuliers de la République tchécoslovaque, conséquence de sa situation géographique " [Report of the Transport Commission to the Conference of 7 April 1919]. Land-locked states have concluded international agreements with a view to the establishment of free zones in ports. As an example it is possible to cite the Treaty between Czechoslovakia and Italy of 23 March 1921 on concessions and facilities en favour of Czechoslovak transports in the Port of Trieste [Convention entre l'Italie et la Tchécoslovaquie accordant des concessions et des facilités en faveur des transports tchécoslovaques dans le port de Trieste : *L.o.N. Recueil des traités,* vol. XXXII, p. 250 *et seq.*] ; the Convention of 2 August 1929 between Italy and Ethiopia, envisaging the establishment of a free zone in the port of Assab [Martens, *Nouveau recueil général de traités,* 3e série, vol. XXX, p. 335].

The free zones were also established to provide transit facilities to land-locked states in foreign ports. Compare the Greek-Serbian convention of 10 May 1914 on transit traffic through Salonika whose text served as a model for the wording of article 363 of the Peace Treaty of Versailles ; the convention between Greece and Yugoslavia of 10 May 1923 concerning the regulation of transit through Salonika, supplemented by the Protocols of 17 March 1929 ; convention between Great Britain and Belgium with a view to facilitating Belgian Traffic through the territories of East Africa, signed at London, 15 March 1921.

This article only lays down the obligation to give the land-locked State the possibility of establishing a free zone. As a rule, the land-locked State will not feel the need to establish a free zone in maritime ports where a free port exists. However, it need not necessarily be so in all cases. Thus, for instance, the Yugoslav free zone in the port of Salonika established by the Convention of 10 May 1923 does not form a part of the Salonika free port.

From the practices of States it is possible to deduce some general principles of the régime of free zones. A free zone within the terms of article 4 and within the meaning of this principle remains under the sovereignty of the State in the territory of which it has been established. The purpose of a free zone is first and foremost to facilitate transit. Therefore this zone is only excluded from the customs territory of the State and with regard to customs is considered, even in relation to the state in the territory of which it has been established, as foreign territory. The turnover of goods between the free zone and other countries with the exception of the territorial State, is subjected neither to the customs duties nor to any other import or export charges.

The law of the State in the territory of which the free zone is established extends in principle to the free zone as well. This law governs in particular the safety of operations, working conditions and questions of public health. The State in transit has, however, the right to perform the customs formalities in the free zone through its own organs.

Apart from facilitating transit, the free zone at the same time serves certain commercial needs. In the free zone it is permitted to store goods in customs and other depots, to inspect them, to select, pack and re-wrap them, to treat them with a view to perfecting them and to perform other operations in connexion with the transhipment of goods, without the presence or assistance of the customs authorities of the country in the territory of which the free zone is established.

The interests of the coastal States are sufficiently protected by the provision of article 7, under which the establishment of the free zone shall be carried into effect by agreement between the land-locked State and the coastal State.

Article 5

OBLIGATIONS OF THE COUNTRIES OF TRANSIT

Countries situated between the land-locked State and the seacoast [countries of transit] shall allow the transit of persons and goods proceeding from land-locked States to the sea and vice versa by highway, rail, waterway and air.

Commentary

The obligation of the countries of transit to permit the transit of persons and goods proceeding from land-locked States to the sea and vice versa ensues from the right of the land-locked states to free acces to the sea. This right would be ineffective if the corresponding obligation would not be imposed upon the countries of transit. The obligation of the countries of transit shall apply to all means of transport, since it is the only way how to give the land-locked States compensation for their unfavourable geographical situation. Each of the said means of transportation, be it transport on highways, railways, waterways and airways, have their specific features with regard to expense, expediency and adaptability. Should any of these ways of transit be denied to the land-locked State, that State would be discriminated in comparison with the coastal States.

In this connexion the necessity arises to define the country of transit. For the purposes of the present articles the term " country of transit " is understood to denote any country situated between the land-locked State and a maritime port, which according to natural conditions enters into consideration for transit between the land-locked State and the seacoast.

The right of land-locked countries to the use of transit routes is reflected in General Assembly resolution 1028 (XI) of 20 February 1957, concerning land-locked countries and the expansion of international trade. The resolution reads as follows :

" *The General Assembly,*

" *Recognizing* the need of land-locked countries for adequate transit facilities in promoting international trade,

" *Invites* the Governments of Member States to give full recognition to the needs of land-locked Member States in the matter of transit trade and, therefore, to accord them adequate facilities in terms of international law and practice in this regard, bearing in mind the future requirements resulting from the economic development of the land-locked countries."

In considering the provisions of article 5 it is necessary to stress the mutual advantage of transit trade. Transit from a land-locked country to the sea is economically beneficial to the countries of transit, particularly to the coastal countries. By imposing certain obligations to the country of transit, article 5 ensures to it at the same time indirectly also the enjoyment of the advantages ensuing from its position as a country of transit.

Article 6

PROHIBITION TO LEVY CUSTOMS DUTIES IN TRANSIT

The country of transit is not authorized to levy customs duties or other charges on goods shipped in transit from the sea to the land-locked State or from that State to the sea.

Commentary

The principle that the goods shipped in transit are exempt in the country of transit from customs duties and other charges is universally recognized and accepted. Article 6 merely applies this principle to the goods shipped in transit from the sea to the land-locked State and vice versa.

Article 7

MODALITIES OF THE EXERCISE OF THE RIGHT OF ACCESS TO THE SEA

The modalities under which the land-locked State shall exercise the rights mentioned under articles 4 and 5 shall, if they are not determined by existing international treaties or other rules of international law, be laid down by agreement between the land-locked State and the countries of transit.

Commentary

The purpose of article 7 is to safeguard the sovereign rights of the State of transit, which imply its contractual freedom to determine the conditions under which the land-locked State shall be granted certain powers for the exercise of its rights to free access to the sea. This freedom is of course subject to the limitations of existing international treaties or other universally recognized rules of international law to the effect that the conditions agreed upon shall not be less favourable than those which are laid down by those treaties and rules.

Article 8

EXCLUSION OF THE APPLICATION OF THE MOST-FAVOURED-NATION CLAUSE

These articles, as well as agreements on the conditions of transit between land-locked States and countries of transit are excluded from the application of the most-favoured-nation clause.

Commentary

The purpose of article 8 is not to place any obligation upon the State of transit which respects the present Convention and with a view to free access to the sea accords the land-locked State special facilities in the Agreement governing the conditions of transit, also to grant these same facilities to a third State in virtue of the most-favoured-nation clause.

The fundamental right of a land-locked State to free access to the sea, derived from the principle of the freedom of the high seas, constitutes a special right of such a State, based on its natural geographical position. It is natural that this fundamental right belonging only to a land-locked State cannot be claimed, in view of its nature, by any third State by virtue of the most-favoured-nation clause. The exclusion from the effects of the most-favoured-nation clause of agreements concluded between land-locked States and countries of transit on the conditions of transit is fully warranted by the fact that such agreements are derived precisely from the said fundamental right.

Article 9

RIGHTS OF THE COUNTRY OF TRANSIT TO PROTECTION

1. The country of transit may take measures which are indispensable in order to prevent the exercise of the right of free access to the sea from infringing upon its security, customs, fiscal and health interests.

2. In exceptional cases, in particular at a time of international crisis, the State of transit may, temporarily and for a period as short as possible, limit and it may even, if it deems it indispensable for reasons of public safety or for military reasons, temporarily suspend, in a part of its territory, the exercise of the right of transit. However, such measures must apply with equal force to the transit of all States and must be notified in time to the land-locked State.

Commentary

The purpose of paragraph 1 of this article is to determine the exact limit of the exercise of the right of the land-locked State to access to the sea and to achieve a certain balance between the rights and obligations of both land-locked States and States of transit. In principle the exercise of the right of the land-locked State may in no way entail a threat to the sovereignty or to any other important interest of the State of transit. On the other hand it is only natural that the measures taken to protect the sovereignty of the State of transit may not depass the limit of what is essential and may not entail discrimination in the transit of persons or goods transported from the land-locked State to the sea and vice versa.

Paragraph 2 provides for special instances of the restriction of the exercise of the right of transit. The reason for additional restrictions, of course for a period as short as possible, can be an exceptional situation under which the State of transit cannot, if it is not to act to the detriment of its own vital interests, permit the full exercise of the right of transit through its territory. The State of transit may resort to such measures as would affect the transit of the land-locked State the most seriously, and which might even lead to its suspension, only for urgent reasons of public security or for military reasons, while at the same time such suspension may only be a temporary one and may be localized only to a certain part of the state territory of the country of transit. In no event may these measures be used as a means of discrimination or pressure against a land-locked State. The previous notification of such measures to the land-locked State is an essential condition.

Similar provisions have, for instance, been incorporated in article 7 of the Statute of the Freedom of Transit drawn up at Barcelona on 20 April 1921.

Article 10

RELATION OF THE NEW REGULATION TO PREVIOUS AGREEMENTS

1. Articles 1 to 9 neither abrogate agreements which exist between the contracting parties on questions regulated under the said articles, nor preclude the conclusion of similar agreements in the future, provided that those will not be in conflict with the present regulation.

2. However, the contracting parties undertake that, in case such existing agreements deviate from the provisions set out under articles 1-9, they shall at the earliest occasion bring them in accord with the present regulation, unless such deviations would be justified by specific geographical, economic or technical conditions.

Commentary

The regulation represents the codification of the essential principles governing the right of land-locked countries to access to the sea. In evaluating its place among the other norms of international law it is necessary to proceed from its general nature. The regulation does not exclude, but to the contrary, ensues from the assumption of a detailed contractual regulation of the modalities and individual aspects. The conditions for the application of the principles of this regulation will differ from region to region of the world and from country to country. Existing treaties, in so far as they are not directly in contradiction with the present regulation, will constitute an important part of the regulation of relations between the land-locked countries and countries of transit. In those cases where the existing regulation deviates in principle from the present regulation and where such deviation is not justified by particular geographical, economic or technical conditions, it is desirable that the existing treaties be brought in to accord as early as possible and in an appropriate manner [revision, etc.] with the present regulation. This procedure was chosen for instance in the case of article 10 of the Statute of the Freedom of Transit concluded in Barcelona on 20 April 1921. It is natural that any future treaties should take into account the principles of the present regulation.

Article 11

SETTLEMENT OF INTERNATIONAL DISPUTES

1. Disputes that may arise in connexion with the interpretation or application of the above articles 1 to 10 and that could not be settled by negotiation or by any other means of peaceful settlement under an agreement between the parties, shall be brought before a mixed commission.

2. The mixed commission shall be composed of six members. Each party to the dispute shall nominate three members, out of whom only two may be nationals of the State on that side, while the third must be a national of a State not party to the dispute, and must not have his permanent residence within the territories of either of the States parties to the dispute; nor must he be in any way engaged in their services. The mixed commission shall decide by simple majority and its decisions shall be final and binding on the parties concerned.

3. Failing the constitution of the mixed commission within three months from the date of the original request by one of the parties or if, within a period of six months from the constitution of the Commission, or within a prolonged period agreed upon by the parties, there shall be a failure to bring the proceedings before the Commission to a settlement of the dispute, each of the parties concerned has the right to submit the case for decision to the Permanent Court of Arbitration at The Hague, in accordance with the provisions of the Convention on the Pacific Settlement of International Disputes of October 18, 1907.

Commentary

In principle it is left to the agreement of the parties concerned to determine what means of peaceful settlement they wish to resort to in the event of any dispute arising from the interpretation or application of the regulation. In so far as the dispute is not capable of a solution by any of these means (i.e., the means cited in Article 33, paragraph 1 of the Charter of the United Nations), the dispute shall be brought before a Mixed Commission, the composition, competence and manner of decision of which are governed by the provisions of paragraph 2, article 11, of the present regulation. The Mixed Commission in this instance represents an appropriately adapted modification of an Arbitral Tribunal, and in view of the nature of the disputes that may eventually arise from the interpretation or application of the present regulation appears to offer the most appropriate means for their peaceful settlement. It permits of a speedy, operative and competent consideration of the situations in dispute, where, in the majority of cases, technical moments will be predominant.

Failing the constitution of the mixed commission or in the event of its failure to bring about a settlement of the dispute within the period of time established therefor, each of the parties concerned shall have the right to submit the case for decision to the Permanent Court of Arbitration at The Hague in accordance with the provisions of the Convention on the Pacific Settlement of International Disputes of 18 October 1907. The procedure envisaged by The Hague Convention of 1907 offers the respective guarantees for the parties to assert their will and to ensure their influence with respect to the appointment of the Arbitral Tribunal. Besides this, the use of this procedure preserves the aspect of the expert competence of the Arbitral Tribunal, since the list of arbitrators of the Permanent Court of Arbitration and the manner of their selection offer wide possibilities for the appointment of an Arbitral Tribunal, the composition of which can, in each case, be adapted to the nature of the dispute in question.

Article 12

EFFECTS OF AN ARMED CONFLICT

The provisions of this part (articles 1 to 11) do not affect the rights and duties of belligerents and neutrals in time of armed conflict; they shall, however, continue in force even in time of armed conflict in so far as such rights and duties permit.

Commentary

This provision seems necessary in view of the purposes of the new regulation. For these reasons the regulation should in no event belong to that category of treaties which are suspended from the moment an armed conflict breaks out. The extent to which the provisions of the regulation will apply at the time of an armed conflict will naturally be governed by the status of the contracting parties in such a conflict. A similar provision was embodied in article 8 of the Statute on the Freedom of Transit which is a part of the Barcelona Convention on the Freedom of Transit of 20 April 1921.

Part. II. FORM OF THE NEW REGULATION

The articles contained in part I could either constitute a separate declaration which would be open, as the other contractual instruments agreed upon at the conference, to signature and ratification, or for accession by states, or could be included in some broader agreement, preferably in the Convention on the Régime of the High Seas, if it is negotiated at the conference. There are serious considerations speaking in favour of the second alternative. For this is the only way of ensuring that the said articles receive the broadest possible recognition by States. Final decision as to the form in which the provisions concerning the free access to the sea of land-locked states should be presented can be made at the conference according to the situation.

The principles concerning the modalities of transit should be incorporated in a special resolution so as to provide a basis for discussion between land-locked States and States of transit and furnish directives for eventual later elaboration of model treaties in the Transport and Communication Commission of the Economic and Social Council.

Annex 7

PRINCIPLES ENUNCIATED BY THE PRELIMINARY CONFERENCE OF LAND-LOCKED STATES

The delegates of the States which have no direct territorial access to the sea, gathered in Geneva from 10 to 14 February 1958, for a preliminary consultation, desirous to obtain the reaffirmation during the Conference of the Law of the Sea convened by the United Nations, or their rights of free access to the sea, taking into consideration the fact that other States which are not placed in the same geographic situation should not be requested to apply the most-favoured-nation clause, hold that access to the sea of land-locked countries is governed specifically by the following general principles which are part of existing international law:

Principle I

RIGHT OF FREE ACCESS TO THE SEA

The right of each land-locked State of free access to the sea derives from the fundamental principle of freedom of the high seas.

Principle II

RIGHT TO FLY A MARITIME FLAG

Each land-locked State enjoys, while on a footing of complete equal treatment with the maritime State, the right to fly its flag on its vessels which are duly registered in a specific place on their territory.

Principle III

RIGHT OF NAVIGATION

The vessels flying the flag of a land-locked State enjoy, on the high seas, a régime which is identical to the one that is enjoyed by vessels of maritime countries; in territorial and on internal waters, they enjoy a régime which is identical to the one that is enjoyed by the vessels flying the flag of maritime States, other than the territorial State.

Principle IV

RÉGIME TO BE APPLIED IN PORTS

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

Principle V

RIGHT OF FREE TRANSIT

The transit of persons and goods from a land-locked country towards the sea and vice versa by all means of transportation and communication must be freely accorded, subject to existing special agreements and conventions.

The transit shall not be subject to any customs duty or specific charges or taxes except for charges levied for specific services rendered.

Note. — The Austrian delegation presumes that principle V does not have a further scope than the obligations resulting from the statute of Barcelona of which Austria is a signatory.

Principle VI

RIGHTS OF STATES OF TRANSIT

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

Principle VII

EXISTING AND FUTURE AGREEMENTS

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

DOCUMENT A/CONF.13/C.5/L.6

Afghanistan, Albania, Austria, Bolivia, Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Ghana, Hungary, Iceland, Indonesia, Laos, Luxembourg, Nepal, Paraguay, Saudi Arabia, Switzerland, Tunisia and United Arab Republic: proposal

[*Original text: French*]
[*26 March 1958*]

I

Right of free access to the sea

Every State without a coast (land-locked State) has the right to free access to the sea. This rights derives from the fundamental principle of the freedom of the high seas.

II

Right to a flag

Every State without a coast possesses, on terms of complete equality of treatment with maritime States, the right to a flag in respect of such of its ships as are duly registered in a specific place in its territory; that place shall be the port of registry for such ships.

Commentary

Needless to say, equality of treatment implies equality of rights and obligations.

III

Right to sail in the territorial sea and in internal waters

Every State without a coast has the right to claim that ships flying its flag shall enjoy in the territorial sea and the internal waters of any maritime State a régime identical to that accorded to the ships of other maritime States.

IV

Régime applicable in ports of the coastal State

1. Every State without a coast shall be entitled to most favourable treatment, and in no event shall such treatment be less favourable than that accorded to ships of the coastal State, in maritime ports under the sovereignty or authority of the coastal State, as regards freedom of access to the ports, the use of the ports and the full enjoyment of the facilities of all kinds generally granted.

2. The expression "coastal State" means, for the purposes of this article, any State whose territory can, in the light of the geographical and economic circumstances, be reasonably regarded as constituting the means of access to the sea for a specific State without a seacoast.

3. For the purposes of this article, the expression "maritime ports" means ports normally used by merchant ships and open to international trade.

V

Right of free transit to the sea

1. Transit from a land-locked country towards the sea and vice versa by all means of transportation and communication shall be freely accorded, subject to existing special agreements and conventions.

2. The transit shall not be subject to any customs duty or special charges or taxes levied by the coastal State or by the State of transit, except for charges levied for specific services rendered.

Note. — The Austrian delegation is of the opinion that the principle expressed in article V has no wider implications than the obligation deriving from the Statute of Barcelona, of which Austria is a signatory.

VI

Form of the exercise of the right of access to the sea

The form in which the land-locked State is to exercise the rights mentioned in articles IV and V shall, in so far as it is not determined by existing international treaties, be laid down by agreement between the land-locked State and the coastal States and States of transit.