

NEPAL'S TRANSIT ROUTE NEGOTIATION WITH INDIA AND CHINA

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Abstract

The geographical disadvantage faced by landlocked countries hampers their overall development, prompting international law to grant certain rights to secure their access to coastal areas. Nepal, as a landlocked country, has encountered numerous challenges in negotiating transit routes with its immediate neighbors, China and India, in order to realize the rights guaranteed by international law to landlocked nations. The transit right serves as a lifeline for Nepal to access third countries, but recurrent blockades from its southern neighbor have created uncertainty regarding the southern route to seaports. While Nepal has signed the Transit Transport Agreement and its protocol with its northern neighbor, China, there has been limited progress in developing connectivity infrastructure. This paper argues that ensuring uninterrupted access through the southern route is vital for Nepal from an economic perspective. However, the development of an alternative route through the north is not only crucial for contingency situations but also for unlocking new opportunities.

Keywords: *International Law, Law of Sea, Land Locked Country, Transit rights*

Theoretical Debate on Law of Sea

The Mare Liberum and Mare Clausum debate is a historical and legal dispute concerning the ownership and control of the seas. The Latin terms “Mare Liberum” and “Mare Clausum” stand for “Open Sea” and “Closed Sea,” respectively. The debate originated in the 17th century when the Dutch jurist and philosopher Hugo Grotius argued for the concept of

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Mare Liberum in his influential book of the same name. Grotius asserted that the seas were a common resource and should be open for navigation and trade to all nations. According to this view, no single nation could claim exclusive sovereignty over the seas (Grotius, 2004). In contrast, the concept of Mare Clausum, promoted by John Selden in his book *Mare Clausum*, asserted that certain seas could be closed or controlled by individual states. This idea was based on the principle of territorial sovereignty, suggesting that states could claim exclusive rights over the seas adjacent to their territories. Shelden was supporting the claim of England that it was possible for the sea to be occupied and subject to full ownership. It is claimed that England occupied sea both in fact and in law. Permission of King of England is required to engage fishing, navigating and engaging an enemy (Van Ittersum, 2021).

The ideas put forth by Hugo Grotius are widely regarded as the cornerstone of modern international law. Grotius' concept of the law of the sea recognizes the high seas as the common heritage of humankind established as global norm. This principle establishes that regardless of whether a country is coastal or landlocked, every nation has the generally accepted right to access and navigate the seas. While Grotius' notion of sea freedom holds universal significance, it does not completely invalidate Shelden's perspective. In contemporary international law, there is acknowledgment of coastal state control over internal waters, territorial seas, contiguous zones, and exclusive economic zones. Modern international law has become more predictable with the codification of customary practices through treaties and conventions. However, the tendency to hinder other countries from benefiting from sea routes and resources remains a persistent challenge that has not been entirely overcome.

Transit Rights of Land Locked Country in International Law

The principle of equality before the law serves as the foundational element of the rule of law. Within the realm of international law, states are recognized as the primary actors, and ensuring equal protection for each state is of paramount importance. However, inherent inequalities among countries create asymmetry, hindering states from fully benefiting from the legal provisions of international law. Specifically, landlocked countries face geographical disadvantages as they lack direct access to the sea. Various treaties and conventions, which serve as fundamental sources of international law, aim to safeguard the rights of landlocked countries. Nonetheless, the implementation of these progressive provisions heavily

relies on the bilateral relations between the landlocked country and the transit country.

Landlocked countries are defined as those surrounded by other countries. The United Nations Convention on the Law of the Sea, in Article 124, characterizes landlocked states as those having no coastline. According to data retrieved from www.geographyrealm.com, there are currently 49 landlocked countries, with 5 of them being partially recognized. Among these, there are 44 recognized landlocked countries, including unique cases such as Liechtenstein and Uzbekistan, which are doubly landlocked, meaning they are surrounded solely by other landlocked countries. Geographically disadvantaged, landlocked countries face the challenge of being cut off from direct access to the sea. These nations must traverse at least one neighboring country to reach the coastline. Access to the sea holds great importance for international trade, the utilization of maritime resources, research, and other developmental activities. The absence of a coastline directly impacts a landlocked country's maritime trade and hinders its ability to exploit the maritime resources considered the "common heritage of humankind." In an effort to integrate landlocked countries into sea-borne trade and facilitate their access to maritime resources, certain international legal provisions have sought to secure their rights to free access to the sea.

a) The Barcelona Convention and Statute on Freedom of Transit, 1921

This convention is the first international instrument ensuring right of transit. It provisioned "freedom of transit" under its 15 articles. In its article 1, it described about transit as "Persons, baggage and goods, and also vessels, coaching and good stock, and other means of transport, shall be deemed to be in transit across territory under the sovereignty or authority of one of the Contracting States, when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey, beginning and terminating beyond the frontier of the State across whose territory the transit takes place" (Convention and Statute on Freedom of Transit, 1921). Technically this convention is still alive, applicability of the convention is limited as the convention is ratified by only 50 countries (Acharya, 2021).

b) Convention on Transit Trade of Land Locked States, 1965

This convention is specifically codified to recognize the special status of landlocked countries and provide them with adequate facilities in terms of international law and practice. This convention made provision of 'Arbitration Commission' as a dispute settlement mechanism (Convention on Transit Trade of Land-Locked States, 1965). The binding nature of the convention is limited as only 38 countries ratified the convention (ibid.). Even all landlocked countries have not ratified it.

c) United Nations Convention on the Law of the Sea (UNCLOS), 1982

The United Nations Convention on the Law of the Sea (UNCLOS) is a landmark multilateral treaty that straightforwardly secures the rights of states. Coming into force in 1994, it currently has 167 countries and the European Union as parties to the convention. Although some countries, including the United States, have not signed the convention, it is widely regarded as a universal treaty that should be respected by non-party countries as well. UNCLOS is the product of the Third UN Conference on the Law of the Sea, considered one of the most significant law-making events of the twentieth century. This conference introduced a revolutionary law-making technique based on consensus decision-making and universal participation. The convention includes various articles that specifically safeguard the rights of landlocked countries (Upadhyaya, 2013). Article 69(1) grants landlocked states the equitable right to participate in the exploitation of living resources in the exclusive economic zones of coastal states within the same subregion or region. Article 124 defines terms such as "landlocked state," "transit state," "traffic in transit," and "means of transport." Article 125 secures the landlocked country's right of access to and from the sea, as well as freedom of transit. Article 126 excludes the application of the most favored nation clause in providing rights and facilities to landlocked countries. Article 127 ensures that traffic in transit is exempt from customs duties, taxes, or other charges, while other service charges should not exceed those imposed by the transit state for the use of means of transport. Article 128 allows transit states to establish free zones and other customs facilities. Article 129 encourages cooperation in the construction and improvement of means of transport in transit states to benefit landlocked countries. Article 130 instructs transit states to take measures to minimize technical delays or difficulties in transit traffic. Article 131 ensures equal treatment for landlocked countries in maritime ports. Article 132 guarantees that

the convention does not oblige transit states to provide greater transit facilities to landlocked states. In addition to these specific provisions, UNCLOS safeguards the rights of landlocked states regarding innocent passage in territorial seas, laying submarine cables and pipelines, and the lawful use of the sea, as well as equal rights to the high seas (United Nations Convention on the Law of the Sea, 1982).

d) World Trade Organization (WTO) agreements

The World Trade Organization (WTO) is an intergovernmental organization comprising 164 members, with an additional 25 governments holding observer status. Established in 1995 as the successor to the General Agreement on Tariffs and Trade (GATT), the WTO's primary objective is to promote rule-based trade among its members by reducing both tariff and non-tariff barriers. The core of the WTO's work lies in its agreements, which serve as legal frameworks for international commerce and bind governments to adhere to agreed-upon trade policies. For landlocked countries that face various trade obstacles imposed by transit countries, the removal of all trade barriers is crucial for promoting their trade. The WTO operates through three key agreements: the GATT, the General Agreement on Trade in Services (GATS), and the Trade-related Aspects of Intellectual Property Rights (TRIPS) agreement. The organization's overarching goal is the elimination of trade barriers, which ultimately strengthens the transit rights of landlocked countries. Within the GATT, Article V ensures freedom of transit through the territories of each contracting party (General Agreement on Tariffs and Trade, 1986). Among the 44 landlocked countries, 32 are classified as landlocked developing countries (LLDCs). The WTO has implemented preferential treatment for least developed countries and developing countries, recognizing their specific needs in trade (World Trade Organization, 2012).

e) UN Charter

The United Nations (UN) is a supranational organization that was established in 1945 after the devastating aftermath of World War II (WWII). The UN charter is primarily focused on safeguarding human rights and ensuring global peace and security. One of the core principles outlined in the UN charter is the concept of "nonintervention," which prohibits transit countries from interfering in the internal affairs of their neighboring landlocked countries. Chapter 7 of the UN charter grants the Security Council the authority to impose embargoes or blockades on

any country solely as a countermeasure in response to threats to peace or acts of aggression. Imposing such measures outside the criteria specified in the UN charter would be considered a violation of international law (Charter of the United Nations and Statute of the International Court of Justice, 1945).

f) Regional agreements

From Nepal's standpoint, the country is an active member of regional organizations such as the South Asian Association for Regional Cooperation (SAARC), the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), and a dialogue partner of the Shanghai Cooperation Organization. Within the SAARC framework, Nepal benefits from the South Asian Free Trade Area (SAFTA) arrangement, while BIMSTEC provides a Free Trade Agreement. These regional arrangements play a crucial role in promoting trade facilitation and ensuring transit facilities for landlocked countries like Nepal.

Nepal's transit route negotiation with Southern neighbor India

Nepal is surrounded by India in its east, west, and south. Nepal has age-old relation with India marked by a common religion, tradition, festivals, customs, social values, and people-to-people relations. According to Hindu methodology, Nepali princess Sita married Indian prince Ram. Nepali civilization and Indian civilization were both enlightened by Vedic philosophy. The open border between Nepal and India is the symbol of the closeness of these two countries. "Having been the neighboring countries with many similarities, the two countries have huge potentials of expanding the relations in a number of areas of mutual interest" (Hamal, 2014, p. 73).

Though Nepal is also connected with China on the northern side, the nearest Chinese seaport from Nepal is the Lianyungang Seaport which is about 4000 KM far from Nepal. The nearest sea from Nepal is the Bay of Bengal which is only 1127 KM far. In this context, Nepal's primary choice is to access the sea via southern neighbor India. Nepal had diplomatic relations with independent India in 1947 AD. However, Nepal already had diplomatic relations with the United Kingdom from 1816 and with its East-India Company which ruled India till 1947 AD.

Sugauli Treaty between Nepal and East-India company is humiliating one for Nepal which undermines the independence of Nepal. But later on, the Rana regime maintained a close relationship with the British

and achieved some sort of recognition as a sovereign country from the British. “Nepal signed the first Trade Treaty in 1792 with the East India Company, under which it agreed to pay equal tariffs on exports and imports through Indian territory. The tariff arrangement was removed after the signing of a Treaty of Friendship between Nepal and British India in 1923” (Nayak, 2016, p.104). Treaty of Trade and Commerce, 1950 between Nepal and independent India nullified previous treaties, agreements and engagements concluded between Nepal and the British Government on behalf of India (*Nepal-Bharat Ra Chin Sandhi* [Treaties Among Nepal, India and China], 2066).

Treaty of Trade and Commerce, 1950 in its Article 1 assured ‘full and unrestricted right of commercial transit of all goods and manufactures through the territory and ports of India’ however that unrestricted right was limited and dependent on other Articles of the treaty. Nepal and India signed the Treaty of Trade and Transit in 1960 which ensure Nepal’s right to trade with a third country. However, Nepal from its very beginning demanded to have a separate treaty for transit only because trade could be a bilateral matter between Nepal and India but transit is Nepal’s inherent right as a landlocked country provided by international law.

In 1969 AD, Nepal asked India to remove Indian military checkpoints from its northern border. India was dissatisfied with Nepal for this cause and denied renewing the Treaty of Trade and Transit. This is the first time Nepal faced Indian blockade. “The political situation normalized with the change of governments in Delhi and Kathmandu in the late 1970s. Nepal’s transit demand was agreed in a separate treaty in March 1978” (Nayak, 2016, p.106). Nepal hoped that having a separate trade treaty and transit treaty ensure Nepal’s access to India and third countries by using facilities of any of these two treaties. However, the intention remains the key factor. In 1989 AD, Nepal purchased arms from northern neighbor China. Dissatisfied India informed Nepal that both Trade Treaty and Transit Treaty would expire at the same time and India will not renew them. Ultimately with the expiry of these two treaties, Nepal faced a second blockade which only ended with political change in Nepal in 1990 AD.

As India and Nepal engage in negotiations for the renewal of the Treaty, Nepal has insisted on including an auto-renewal provision in the Transit Treaty. The original treaty, signed in 1999 AD, included this provision, ensuring automatic renewal every 7 years. During the recent visit of

Nepal's Prime Minister Puspa Kamal Dahal 'Prachanda', to India from May 31 to June 3, 2023, the two nations signed revised Treaty of Transit. This renewed provision encompasses the access of new railways and inland waterways for Nepal. In the joint press conference, the Indian Prime Minister announced that, in addition to the introduction of new rail routes for the people of Nepal, provisions have been made to facilitate the use of India's inland waterways (Modi, 2023).

At beginning Nepal thought separate trade treaty and transit treaty will ensure the uninterrupted access the to and from the sea. As the separate treaty became insufficient and faced second blocked, Nepal thought auto renewal of treaty will be the remedy. However, the focus has shifted from the treaty's provisions to the intentions of the involved parties. In 2015 AD, Nepal introduced a new constitution without obtaining India's consent. Consequently, India imposed a blockade on Nepal for the third time. Despite the auto-renewal feature of the Treaty of Transit, India pointed out border obstructions within Nepal caused by Madheshi parties, leading to transportation disruptions.

The relationship between Nepal and India regarding Nepal's transit rights through Indian territory has been characterized by ups and downs. India, being a signatory to the UN Convention on the Law of the Sea and a member of the WTO, is obligated to provide transit facilities to Nepal. Additionally, both Nepal and India are members of SAARC and BIMSTEC, which have agreements on the establishment of a Free Trade Area. Despite India's legal obligations under international law, it has repeatedly imposed blockades on Nepal, often citing technical and irrelevant issues.

Nepal's transit route negotiation with northern neighbor China

Nepal is geographically surrounded by Tibet, the autonomous region of China, in its northern part. Nepal shares a close relationship with its northern neighbor as well. According to legends, there was once a large lake in the Kathmandu Valley. Manjushree, believed to be from China, arrived in Kathmandu, chopped the Chovar hill, drained the lake, and transformed the valley into a habitable area. The Malla kings of Kathmandu Valley and Tibet maintained strong trade relations dating back to ancient times. During that period, Nepal had the right to mint silver coins for Tibet (Acharya, 2019; KC, 2004).

The geographical proximity between Nepal and China has played

a significant role in strengthening the ties between the two countries. People living near the border have close connections in terms of religion, culture, family ties, and economic and commercial interactions (Hamal, 2014). Following the establishment of the People's Republic of China in 1949 AD, Nepal and China established diplomatic relations in 1955 AD. Nepal has consistently supported the "One China" policy and considers Tibet as an integral part of China.

Although Nepal has always maintained a good relationship with China, using China as a transit country to access other countries has never been a priority for Nepal in the past. The relatively long distance to Chinese seaports and the challenging mountainous terrain have discouraged Nepal from utilizing the northern route. However, due to the unofficial blockade imposed by India in 2015 AD, Nepal was compelled to seek an alternative. In 2016 AD, Nepal and China signed the Transit Transport Agreement (TTA), followed by its protocol in 2018 AD. This agreement allows Nepal to use seven transit points, including four seaports (Tianjin, Shenzhen, Lianyungang, and Zhanjiang) and three land ports (Lanzhou, Lhasa, and Xigatse), for trading with third countries. The TTA effectively ended India's monopoly on providing transit facilities to Nepal. However, this facility limited only in paper.

The viability of using the northern route by Nepal to access third countries is always questionable. Even goods from Shanghai, China come to Nepal via Kolkata seaports of India. "Without robust land connectivity (railways and highways) and integrated check posts (ICPs), accessing Chinese seaports would prove expensive for Nepali traders" (Nayak, 2018). China is hesitant to encourage Nepal to utilize the northern route due to the sensitive nature of China's Tibet Autonomous Region. Following the 2015 AD earthquake in Nepal, the Tatopani border point remained closed for an extended period due to infrastructure damage caused by the quake. Furthermore, China closed the northern border citing concerns related to the Covid-19 pandemic. However, the closure of the Tatopani border point was not solely attributed to these reasons. China is also wary of potential anti-Chinese activities by Tibetan refugees using this route.

The signing of a transit agreement between Nepal and China was a breakthrough for diversifying Nepal's transit rights. However, after normalizing relations with India, Nepal does not display a sense of urgency in developing a functional northern transit route. The northern route is indeed more expensive than the southern route due to the long distance to seaports and challenging mountainous terrain. Nevertheless,

India has repeatedly used the provision of transit facilities as a bargaining tool to pursue its own interests, imposing blockades to exert pressure on Nepal. Regardless of the cost involved, Nepal needs to reduce its dependency on India by developing alternative transit routes in order to maintain international stability and national security. It is crucial for Nepal to lessen its reliance on a single transit route and open for diverse options.

Opening up northern connectivity provides more than just an alternative transit facility for Nepal. It also holds the potential to significantly boost Nepal's trade and tourism with China itself. By establishing efficient transportation links and trade routes with China, Nepal can tap into new markets, expand its export opportunities, and attract Chinese investments. Increased connectivity can facilitate the movement of goods, services, and people between the two countries, fostering economic growth and diversification.

Observation and conclusion

Indeed, the UN Convention on the Law of the Sea, GATT (General Agreement on Tariffs and Trade), the UN Charter, regional agreements, and various other treaties explicitly and implicitly uphold the unrestricted transit rights of landlocked countries. The effective implementation of these legal provisions of international law relies heavily on the mutual understanding among states. States are sovereign entities, and coercion is not the ideal approach to maintain the international legal system. Incentives to adhere to international law provide a better framework for promoting compliance.

Nepal, being a landlocked country surrounded by India on its east, west, and south, and by China on its north, faces the challenge of accessing the sea. Although India and China are both coastal states, the nearest sea to Nepal is the Bay of Bengal. To reach the nearest sea, Nepal must either utilize Indian seaports or rely on Bangladeshi seaports, both of which require transit through India. While Nepal and India have a Treaty of Transit with an auto-renewal provision, India imposed an unofficial blockade on Nepal in 2015 AD, citing border disruptions on the Nepali side.

Following the blockade, Nepal demonstrated enthusiasm to open a northern transit route by signing the Transit Transport Agreement with China in 2016 AD, with its protocol signed in 2018 AD. However, it

appears that after normalizing relations with its southern neighbor, Nepal has not displayed the same level of commitment to realizing the agreement with China. The closest Chinese seaport is located about 4,000 kilometers away from Nepal, encompassing challenging geographical terrain. On the other hand, the Bay of Bengal stands as the nearest sea to Nepal, positioned merely 1,127 kilometers away, and it is connected through a relatively dependable network of roads and railways. Under normal circumstances, Nepal's third-country trade is ideally conducted via the southern route. While the southern transit route proves to be more practical and cost-effective, Nepal should learn from the three blockades imposed by its southern neighbor. It is crucial for Nepal to prioritize the development of an alternative transit route from the northern side to ensure national security and cater to emergency situations. By doing so, Nepal can mitigate the risks associated with overreliance on a single transit route and ensure its long-term stability and preparedness.

In summary, while international legal provisions protect the transit rights of landlocked countries, relation of landlocked country with transit country will eventually determine the exercise of those rights. Nepal's geographical location necessitates reliance on transit through India or Bangladesh to access the nearest sea. There is no doubt, Nepal's primary focus should be achieving smooth access to the sea through southern side maintaining good relation with India. However, Nepal should actively pursue the development of alternative transit routes, including from the northern side, to ensure national security and emergency preparedness. Absolutely, opening up the northern route holds immense significance for Nepal beyond providing transit facilities. It has the potential to enhance trade and tourism with Nepal's northern neighbor, China. By developing efficient transportation links and trade routes with China, Nepal can expand its trade opportunities and tap into a vast market. Increased connectivity through the northern route enables smoother movement of goods, reducing logistical challenges and costs.

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