LEGAL DEVELOPMENT ISSUES

COMMONWEALTH LAND-LOCKED STATES AND THE LAW OF THE SEA

Paper by the Commonwealth Secretariat

EXECUTIVE SUMMARY

BACKGROUND

1. In 2004 the Secretariat prepared a report to inform Senior Officials of the rights of Land-locked States under the provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Following the October 2004 meeting of Senior Officials, the Secretariat held a seminar for the Land-locked States of Africa in June 2005 with a view to sensitising these states as to the benefits to be derived from being fully on stream with UNCLOS. From discussions at the seminar certain issues emerged which the Secretariat wishes to bring to the attention of Law Ministers. These issues, outlined in greater depth in the Report that follows, are:

- the perception that benefits from UNCLOS through ratification are a distant hope; and
- the view that ratification will give rise to costs.

MEASURES THAT SHOULD BE TAKEN BY LAND-LOCKED STATES

2. The Report outlines three distinct measures which developing Land-locked States that wish to obtain full advantage of the benefits contemplated in UNCLOS will generally need to undertake.

I. Accession to the UNCLOS pursuant to Article 307.
II. Consideration of the need for enabling legislation to bring the provisions of the Convention into force in local law.
III. Consideration of the need to enter into bilateral or regional agreements with other countries to secure access to the sea and to foreign exclusive economic zones.

ACTION BY LAW MINISTERS

3. In light of the information outlined in the Report, Law Ministers are asked to:

(a) consider the position of Land-Locked States and the possibilities granted to them under UNCLOS to achieve access to the sea and living resources so as to foster and encourage sustainability;

(b) endorse the efforts of the Commonwealth Secretariat to sensitise member states to the immediate need to accede to UNCLOS for those states which have not done so;

(c) encourage Land-locked States to enact enabling legislation to implement, the provisions of Part V of UNCLOS;

(d) encourage both Land-locked States and their coastal neighbouring states to utilise the provisions of UNCLOS to foster relations and simultaneously recognise the benefits of entering into regional arrangements for access to the sea.

REPORT

COMMONWEALTH LAND-LOCKED STATES AND THE LAW OF THE SEA

INTRODUCTION

1. The Commonwealth Secretariat informed the meeting of Senior Officials of Law Ministries in London, last October, of the rights of land-locked states under the provisions of the **1982 United Nations Convention on the Law of the Sea (UNCLOS)**. Rights of land-locked states are generally, but not exclusively, derived from UNCLOS. Thus, as a starting point, any attempt by land-locked states to improve their access to the sea, and their access to the resources of the sea, should take the relevant provisions of UNCLOS fully into account. In some cases, too, rights for land-locked states may be derived from customary international law and, to a lesser extent, from the 1958 Geneva Conventions on the Law of the Sea. The treaties that were opened for signature and ratification in Geneva in 1958 were: the Convention on the Territorial Sea and Contiguous Zone, the Convention on the Continental Shelf, the Convention on the High Seas, and the Convention on Fishing and Conservation of Resources of the High Seas. The Convention on Fishing and Conservation of Resources of the High Seas has had comparatively little impact on the development of the law of the sea, and no impact in respect of land-locked states, so its provisions will not be given consideration in this Report.

2. Still as a general proposition, whether or not a particular land-locked country may derive rights directly from UNCLOS will, of course, depend on its ratification of or accession to the treaty. At the present time, the following African land-locked member states of the Commonwealth are parties to UNCLOS: Botswana (became a party on May 2, 1990); Uganda (became a party on November 9, 1990); and Zambia (became a party on March 7, 1983). The following African land-locked member states of the Commonwealth have not become parties to the Convention: Lesotho (signed, but not ratified); Malawi (signed, but not ratified); Swaziland (signed, but not ratified). Zimbabwe, which has been suspended from the Commonwealth, ratified UNCLOS on February 24, 1993.

3. Having regard to the fact that three of the six Commonwealth African land-locked states are not parties to UNCLOS, one of the first strategic recommendations is that the non-parties to the Convention should seriously consider ratifying it. As will be discussed below, developing land-locked countries could benefit from the Law of the Sea Convention: this possibility informs the present recommendation.

ACTIVITY BY THE COMMONWEALTH SECRETARIAT

4. Since the October 2004 meeting of Senior Officials, the Commonwealth Secretariat held a seminar for the land-locked states of Africa with a view to sensitising those states to the benefits to be derived from being fully on stream with UNCLOS.

5. That seminar was held in Swaziland from 13 to 15 June, 2005 and was attended by senior officials of the respective countries. From discussions at the seminar, certain issues emerged which the Secretariat wishes to bring to the attention of Law Ministers.

(a) **The perception that benefits from UNCLOS through ratification is a distant hope.** Because land-locked states have no coastline, and are generally remote from the sea, policy-makers may take the view that any benefits to be gained from ratifying a treaty on the law of the sea are too distant. This position may be understandable at first sight, for with respect to

some aspects of the sea, land-locked states have traditionally not had rights. This is so, for example, in matters concerning the continental shelf, a legal concept that has essentially been associated with coastal states. For this reason, in the North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)(ICJ Reports 1969, p. 4), the International Court of Justice noted that land-locked states would not have an interest in the 1958 Geneva Convention on the Continental Shelf. The perception that land-locked states have nothing to gain in law of the sea matters is also based on the fact that the typical land-locked state – and certainly the typical African land-locked state – has no important seafaring tradition and no offshore fishing industry.

Although it is true that land-locked states have no direct interests in some areas of the sea, the perception that nothing is to be gained from ratifying UNCLOS is built on the incorrect assumption that the treaty as a whole ignores the concerns of land-locked states. Some of the main ways in which UNCLOS takes into account the interests of land-locked states will be discussed below.

(b) **The view that ratification will give rise to costs.** When a state ratifies the Law of the Sea Convention, the state incurs an obligation to contribute to the operation of the International Seabed Authority, on a pro rata basis, having regard to the state's normal level of contribution to the United Nations. For the typical developing land-locked country, this level of contribution is not likely to be prohibitive, as it will be less than one per cent of the costs pertaining to the International Seabed Authority. The ratifying state will also incur the costs of diplomatic representation and participation in the work of the Authority. The expenses of a small delegation for these purposes are likely to be a relatively insignificant portion of the foreign affairs budget of the typical land-locked country. Generally, though, the question of costs must also be seen in light of the prospective benefits that may accrue to land-locked states through their participation in diplomatic initiatives concerning the law of the sea.

6. Naturally, in considering whether to ratify the Law of the Sea Convention, the typical land-locked state will bear in mind the costs of ratification. There are, however, a number of other background policy matters that point in favour of ratification. These include:

(c) **The state of customary international law.** For a country that has not ratified UNCLOS, customary international law provides the legal foundation concerning rights and duties. Alternatively, for countries that have ratified the Geneva Conventions, those treaties will set out the prevailing law. Customary international law does not completely disregard the aspirations of land-locked countries in law of the sea matters. At the same time, however, customary international law tends to be less precise than the terms of UNCLOS; also, as is set out further below, customary international law does not treat land-locked states as well as UNCLOS does.

(d) **UNCLOS as the high water mark.** UNCLOS was negotiated from 1973 to 1982 with substantial participation by land-locked states. The result in this treaty is probably the best that could have been obtained given the balance of political forces at the Third United Nations Conference on the Law of the Sea (UNCLOS III), where the terms of UNCLOS were agreed. This is so because, at UNCLOS III, land-locked states consistently worked as a unit, and in formulating their proposals, they often worked as a group along with countries described as "geographically disadvantaged". Altogether, the Group of Land-locked and Geographically Disadvantaged States included more than 50 states, enough to constitute an influential body of opinion at UNCLOS III. Indeed, at various times the Group of Land-locked and Geographically Disadvantaged States was able to form a "blocking third" at the

conference: their numerical strength was such that they could ensure that proposals sharply inimical to their interests would be excluded from the terms of the Law of the Sea Convention.

(e) **Insistence on rights.** At UNCLOS III, the land-locked states and their geographically disadvantaged counterparts insisted that various rights in the sea, and not just to the sea, were important to them. For the land-locked states, in particular, these rights were said to be economically important, and in some cases, it was argued that the non-recognition of some rights could even affect the survival of individual countries. This insistence that rights be granted to land-locked states, together with the numerical strength of the Group of Land-locked and Geographically Disadvantaged States, was the key point in whatever successes the land-locked states have been able to garner in UNCLOS. Against this background, it appears counter-intuitive for land-locked countries to now stay out of the Convention. To stay out of UNCLOS creates the impression today that the prior insistence on the need for rights at the UNCLOS III was an exaggeration. And, if this perception is allowed to remain, it could affect the way in which land-locked countries are viewed in future negotiations.

(f) **UNCLOS as a package.** One of the central features of UNCLOS is its comprehensive reach. Unlike previous treaties on the law of the sea, the Convention covers all the zones of the sea, and the different issues of navigation, resource-access and related questions that arise with respect to the sea. All states, in considering whether or not to ratify UNCLOS, should bear in mind that although in one area the prospective benefits may be limited, in others the benefits may be meaningful. The Convention was negotiated as a package, so that some trade-offs were made for other benefits. So, for example, land-locked states may not have obtained all they wished in respect of access to the resources of the exclusive economic zone, but this was implicitly taken into account in deliberations concerning preferential rights in the deep seabed. In practice, therefore, land-locked states would be advised to look at the overall effect that the Convention may have on their prospects, and not only at how specific parts of this treaty apply to their interests.

(g) **Rights as bargaining chips.** Some of the rights held by states pursuant to UNCLOS may not be immediately of interest to particular land-locked countries. But this is not necessarily a reason for those land-locked countries to ignore the Convention. For one thing, some rights may be used as bargaining chips. A land-locked state may not, presently, wish to explore and exploit the resources of the exclusive economic zone of a neighbouring coastal state, but the possession of this right could be used in bargaining for other rights in the context of negotiations – as, for example, in a trade-off between fishing rights and rights of access across coastal state territory on preferential terms.

(h) **The attitude of other Land-locked States.** In determining its political attitude to the Law of the Sea Convention, each land-locked state may also have regard to the stance taken by other land-locked counterparts. This will provide general information as to current perceptions of like-minded countries to the Convention. Of the 42 land-locked countries in the world today, 17 are party to UNCLOS. These are:

Armenia
Austria
Bolivia
Botswana
The Czech Republic
Hungary
Laos
Luxembourg
Mali
Mongolia
Nepal
Paraguay
Slovakia
Macedonia
Uganda
Zambia
Zimbabwe

It may also be noted that there are 15 land-locked states on the African continent, and that five have become party to UNCLOS to date. The ten that have remained outside the scheme are as follows:

Burkina Faso	Lesotho*
Burundi	Malawi*
Central African Republic	Niger
Chad	Rwanda
Ethiopia	Swaziland*

* Lesotho, Malawi and Swaziland have signed but not ratified/acceded to the Convention.

With reference to all land-locked countries, it may be difficult to identify a clear pattern concerning ratification and non-ratification, though some of the states that participated most actively at UNCLOS III (e.g., Austria, Bolivia, and Zambia) have been more willing to adhere to the Convention than other land-locked countries. It is, therefore, important to address the question whether UNCLOS is beneficial to land-locked countries, and especially the developing states among them.

DOES UNCLOS HELP LAND-LOCKED STATES?

7. The suggestion that UNCLOS does not cater to land-locked countries is difficult to sustain, for, as noted above, several provisions of the treaty seek to take into account the concerns of countries that have no coastlines. This point bears elaboration with full reference to the Convention. In respect of land-locked states, the Convention achieves two main objectives, namely:

(i) **the affirmation of existing rights; and**
(ii) **the creation of new rights.**

(i) Affirmation of Existing Rights

(a) **Affirmation that ships under the flag of Land-locked States have the right of innocent passage.** Article 17(1) of UNCLOS indicates that:

"Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea."

From the perspective of land-locked states, this right facilitates access by all states to the various zones of the sea. The form of words used in Article 17 of the Convention is similar to the language set out in Article 14(1) of the Geneva Convention on the Territorial Sea and Contiguous Zone. It may be reasonably assumed that the basic right to innocent passage set out in Article 17 of the 1982 Convention is also part of customary international law, so that this right exists for all land-locked states, and not just for land-locked states that have ratified UNCLOS.

(b) **Affirmation that all rights on the high seas are open to Land-locked States as they are to other States:** Article 87 of UNCLOS indicates that

"(t)he high seas are open to all States, whether coastal or land-locked."

The provision then sets out a non-exhaustive list of the high seas freedoms open to all states. These freedoms shall be available to both coastal and land-locked states, and they include, inter alia, freedom of navigation, freedom of overflight, freedom to lay submarine cables and

pipelines, freedom to construct artificial islands and other installations, freedom of fishing, and freedom of scientific research. This provision reflects, in large part, the terms of Article 2 of the High Seas Convention which, in addition to listing four freedoms of the high seas, indicates that the high seas are "open to all nations". The provisions of the High Seas Convention are widely regarded as having codified established rules of customary international law, so that, again, the rules in Article 87 of the 1982 Convention that pertain to land-locked states are part of customary international law. Article 87 of the 1982 Convention differs from Article 2 of the High Seas Convention in its listing of freedoms available to all countries, with the latter stating expressly that high seas freedoms comprise the freedoms of navigation, fishing, and overflight, as well as the freedom to lay submarine cables and pipelines, among other things.

(c) **Affirmation of the right of access of Land-locked States to and from the sea and freedom of transit:** Part X of UNCLOS (Articles 124 to 132) specifies a number of rules concerning the right of access of land-locked states to and from the sea, and the concomitant right to traverse transit states to and from the sea. The main provision in this regard is to be found in Article 125 of the 1982 Convention. It reads as follows:

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

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

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

Part X of the Convention, in setting out particular features of the right of access, indicates that provisions in favour of land-locked states shall not be subject to the most-favoured nation clause, and that traffic in transit shall not be subject to customs duties, taxes or other charges save for charges levied for specific services. Similarly, the means of transport in transit and other facilities provided for and used by land-locked states shall not be subject to taxes or charges higher than those levied for the use of means of transport of the transit state. Part X also allows transit states to establish, by agreement, free zones and other customs facilities in transit states. Transit states are required to take appropriate measures to avoid delays and technical problems for traffic in transit, and ships flying the flag of land-locked states shall enjoy treatment equal to that accorded to other foreign ships in maritime ports. Finally, UNCLOS as a whole does not derogate from any greater rights in respect of transit that land-locked states may have, by agreement, with particular transit states.

The provisions in Part X of the 1982 Convention represented a significant victory for the Group of Land-locked and Geographically Disadvantaged States at UNCLOS III. This is evident when the terms of Part X are compared with relevant rules on access to the high seas in the 1958 High Seas Convention. Specifically, it is to be noted that Part X describes access to the sea as a "right", and that the mandatory term "shall" is used to confirm that the right is to be enforceable against States Parties to the Law of the Sea Convention. The particular form of words used in Article 125(1) of the 1982 Convention (quoted above) also reflects a significant shift away from the terminology of the High Seas Convention, in favour of land-

locked states. Article 3 of the High Seas Convention indicates that states without coastlines "should" have free access to the sea, but it fails to specify in definite terms whether this means that States Parties to the High Seas Convention are legally bound to provide access for their land-locked counterparts, or whether they have only a moral obligation to do so. This point of uncertainty has been removed with respect to land-locked and transit states that are party to the 1982 Convention; it remains for states that are party only to the High Seas Convention. If a transit state is party to neither UNCLOS nor the High Seas Convention, then the rules of customary international law would apply: the better view is that the rules set out in the High Seas Convention reflect customary international law on the point of access to the sea for land-locked states.

Thus, UNCLOS sets out a legal rule in favour of transit rights for land-locked atates. On the other hand, it is not altogether clear that land-locked states have a legal right of access to the sea across the territory of transit states that have ratified only the High Seas Convention, or across the territory of transit states that have ratified neither UNCLOS nor the High Seas Convention. This is an issue that may require further study.

(ii) Creation of New Rights

In addition to reaffirming rights that existed prior to 1982, UNCLOS has also created a number of new rights for land-locked and geographically disadvantaged states. These rights are new in the sense that they did not exist under the Geneva Conventions or under customary international law, in the form in which they have been incorporated in the 1982 Convention. They include the following:

(a) **Rights in respect of the Exclusive Economic Zones (EEZs) of other States:** The concept of the EEZ, first given treaty recognition in Part V of UNCLOS, has meant that, subject to geographical limitations, each coastal state has the right to proclaim an area of up to 200 nautical miles mainly for resource purposes. More specifically, in its EEZ, each coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and its subsoil.

With respect to non-living resources, the rights of the coastal state correspond significantly with rights traditionally held by coastal states under the doctrine of the continental shelf. Under the rules applicable to both the EEZ and the continental shelf, the rights of the coastal states over non-living resources are exclusive to the coastal state. Thus, land-locked states have no legal basis to claim access to non-living resources that are found in a coastal state's waters out to the limit of 200 miles.

With respect, however, to living resources, UNCLOS creates the possibility that land-locked and geographically disadvantaged states may have access the EEZs of other States. In brief, Part V of the Convention requires each coastal state to share its surplus of living resources with land-locked and geographically disadvantaged states. Thus, Articles 61 and 62 of the Convention, taken together, specify that when a coastal state has a surplus, it shall allocate this surplus to various categories of states, including land-locked and geographically disadvantaged states. Articles 69 and 70 of the Convention elaborate on this right of access to living resources for land-locked and geographically disadvantaged states. By virtue of these two provisions, land-locked and geographically disadvantaged states:

> "shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the Exclusive Economic Zones of coastal States of the same sub-region or region, taking into account the relevant

economic and geographical circumstances of all the States concerned and in conformity with the provisions of this article and articles 61 and 62."

Articles 69 and 70 of the Convention also indicate that "the terms and modalities" under which land-locked and geographically disadvantaged states are to have access to living resources in foreign EEZs are to be established through bilateral, sub-regional or regional agreements. Articles 69 and 79 also contemplate that when a coastal state "approaches" the point at which it will have no surplus of living resources for allocation to land-locked and geographically disadvantaged states, the coastal state and other states concerned shall co-operate to allow for participation of land-locked and geographically disadvantaged states in the EEZ of the coastal state. This is to be undertaken "on terms satisfactory to all parties."

In practical terms, if a land-locked state ratifies UNCLOS, the state will have the right to negotiate with neighbouring coastal states (and states in the same region or sub-region) for rights to surplus living resources in the EEZs of the coastal states. Pursuant to the Convention, some rights of access must be granted. On the other hand, if a land-locked state does not ratify the Convention, it is very likely that this state will not have a place at the negotiating table. Coastal states will be able to ignore any interests land-locked countries have in living resources in foreign EEZs. This is so because although the concept of the EEZ has become a part of customary international law, there is no evidence that under customary law coastal states are required to share living resources of their EEZs with land-locked countries. In other words, the sharing requirement for the benefit of land-locked states does not exist in customary law.

Two additional points should be noted about the EEZ regime as it applies to land-locked states. The first concerns the determination of the surplus of EEZ resources to be shared with land-locked states. Under the Convention, the surplus is defined as the difference between the allowable catch in the coastal state's EEZ and the harvesting capacity of that state. In simplified form the allowable catch reflects the quantity of available living resources in the EEZ of the coastal state for a given year, having regard to the need to preserve living resources for needs in subsequent years; and, as its name suggests, the harvesting capacity represents the capacity of the coastal state to take the living resources in its EEZ. The point to note here, though, is that under the Convention it is the coastal state that is responsible for determining the two elements that go into the determination of the surplus. Thus, it is possible that a coastal state may underestimate its surplus by overstating its harvesting capacity or by understating its allowable catch. And, if the coastal state does this, the land-locked country may find itself negotiating for access to a smaller quantity of living resources than it is properly entitled to pursue. This possibility follows from the language in Articles 61 and 62 of the Convention, which provide guidance on the determination of the surplus in the terms summarised in this paragraph. It also follows, however, from the language of Article 297(3) of the Convention.

Specifically, Article 297 (3)(a) acknowledges that some coastal state rights may be subject to the dispute settlement mechanisms of the Convention, but it further stipulates that the coastal state shall not be obliged to accept the submission to dispute settlement issues:

> "relating to its sovereign rights with respect to living resources in the Exclusive Economic Zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations."

Similarly, Article 297(3)(b) acknowledges that in some circumstances disputes may be submitted to conciliation procedures, but these issues shall not include disputes about the actual determination of the allowable catch or the harvesting capacity by the coastal state. Rather, they include disputes concerning the coastal state's arbitrary failure to determine the allowable catch and its harvesting capacity, or its arbitrary refusal to allocate its surplus. Once the coastal state has determined its surplus, its decision shall not be subject to dispute settlement under the Convention. This situation opens land-locked states to the possibility of abuse, but if a land-locked state is party to the Convention it may be able to argue that coastal states have a duty to act in good faith in the determination of the surplus.

Secondly, it is to be noted that land-locked states are not the only countries entitled to access to the living resources of the EEZs of coastal states. Article 62(3) of UNCLOS indicates that in giving access to its surplus to other countries, the coastal state shall take into account a number of factors including, inter alia:

a. the significance of the living resources of the EEZ to the economy and other national interests of the coastal state;

b. the rights of land-locked and geographically disadvantaged countries of the region or sub-region;

c. the requirements of developing states of the region or sub-region;

d. the need to minimise economic dislocation in states whose nationals have habitually fished in the particular EEZ or which have made substantial efforts in research and identification of stocks.

The list in Article 62(3) is not exhaustive, so that it is open to coastal states to allocate access to the surplus with reference to other considerations, including a country's ability to pay fees for access to the resources. Thus, the coastal state may want to allocate access to the countries willing to pay the highest fees, a situation that could work to the disadvantage of land-locked developing countries. Similarly, the legal requirement that the coastal state should take into account the interests of habitual fishing states and states that have undertaken research, may also reduce the size of the surplus that will be made available to a land-locked country in a specific region or sub-region. These considerations, however, do not negate the right of land-locked states to access the surplus. Where a land-locked state has ratified the Law of the Sea Convention, its right of access to living resources in the EEZ is assured, by virtue of Article 69. The main issue here – namely, what will constitute equitable access in any given situation – is to be determined by negotiation. Land-locked states will therefore derive some benefits to living resources of the sea pursuant to Article 69 of the Convention.

(b) **Rights in respect of the Continental Shelf:** As noted above, UNCLOS does not grant rights to non-living resources of the EEZ or of the continental shelf. In one instance, however, the Convention does accord rights to land-locked states in relation to the continental shelf. Article 82 of the Convention is concerned specifically with that part of a coastal state's continental shelf that lies beyond a distance of 200 nautical miles from the coastline. Article 82 stipulates that if a coastal state exploits resources from this part of the continental shelf, the state must make payments or contributions in kind to the International Seabed Authority for distribution to various countries. These payments are to be made annually on a scale of contributions starting in the sixth year of production from a particular site. In the sixth year, the level of payment shall be 1 per cent of the value of production from the site, and this shall rise annually by 1 per cent up to the twelfth year of

production. Following the twelfth year of production, the level of payment shall be at 7 per cent per annum. Developing land-locked states have a direct interest in these provisions because Article 82(4) of the Convention specifies that payments and contributions made under this arrangement shall be distributed to states "on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and Land-locked among them."

(c) **Rights in respect of the Deep Seabed:** Part XI of UNCLOS (when read with the 1994 Implementation Agreement on the Deep Seabed) establishes an elaborate regime for the exploration and exploitation of the resources of the deep seabed area (the Area). By virtue of Article 136, the Area and its resources are accepted as the common heritage of mankind and various other articles in Part XI set out in detail how the common heritage principle is to be recognised in practice. These provisions take into account some of the interests of land-locked and geographically disadvantaged states. So, for example, Article 140 notes that activities in the deep seabed area shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of states, and whether those states are coastal or land-locked.

Similarly, Article 148, on participation, expressly acknowledges the situation of land-locked and geographically disadvantaged states in the following terms:

> "The effective participation of developing States in activities in the Area shall be promoted as specifically provided for in this Part, having due regard to their special interests and needs, and in particular to the special need of the Land-locked and geographically disadvantaged among them to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it."

This provision has been criticised for its imprecision. It does not indicate the point at which liability will arise for breach of its terms and it fails to specify the penalties that may be enforced for breach.

The regime in Part XI also sets out rules concerning membership of the Council of the International Seabed Authority. Specifically, Article 161 (d) of the Convention specifies that, in addition to certain other categories, there shall be six developing countries representing the special interests, including the following: states with large populations, land-locked or geographically disadvantaged states, major importers of the category of minerals derived from the Area, potential producers of those minerals and least developed states. As there are six allotments for five categories of states, the largest number of land-locked or geographically disadvantaged states that can be elected specifically under this heading is two. And, given that other developing countries, such as archipelagic states and island developing states also represent specific interests, the number of land-locked or geographically disadvantaged states for this category could be one. This is not the complete picture concerning membership in the Council, however, Article 161(2) further requires the Assembly to ensure that land-locked and geographically disadvantaged states are represented to a degree that is reasonably proportionate to their representation in the Assembly. One question that arises therefore is the extent to which land-locked and geographically disadvantaged states have actually enjoyed representational rights (as a special interest group) in the work of the Council of the International Seabed Authority. This is a question of some importance not least because Part XI of the Convention has left various points of elaboration on the deep seabed regime to subsequent formulation by the Authority. If land-locked and geographically disadvantaged states have been under-represented, this could have

had some bearing on the subsidiary rules developed since the Convention entered into force in 1994.

Other rules in Part XI expressly take into account the concerns of land-locked countries. So, for example, Article 160(2)(k) empowers the Assembly to consider problems of a general nature faced by developing countries in deep seabed matters, and to have regard to "problems for States in connection with activities in the Area that are due to their geographical location, particularly for Land-locked and geographically disadvantaged States." Also, for reasons of clarification, Article 152(2) indicates that the general principle of non-discrimination applicable to activities in the deep seabed area does not exclude the possibility of "special consideration for developing States, including particular consideration for the Land-locked and geographically disadvantaged among them", as provided for in Part XI of the Convention.

Overall, the regime in Part XI of the Convention seeks to give preferential treatment to developing countries in deep seabed matters. This is reflected in various provisions on the distribution of proceeds of seabed mining, protection for land-based producers, encouragement for developing states to participate in the regime in Part XI, and training of nationals of developing countries, among other things. Some provisions, originally incorporated into Part XI for the special benefit of developing countries (e.g. those pertaining to the transfer of technology), have been changed by the Implementation Agreement of 1994, but even so, Part XI as it now stands takes into account developing country concerns. With this in mind, it is fair to conclude that developing land-locked countries could derive real advantages in the future pursuant to the deep seabed mining provisions of the Convention.

GIVING EFFECT TO THE LAW OF THE SEA CONVENTION

8. The developing land-locked states that wish to obtain the full range of benefits contemplated in UNCLOS will generally need to undertake three distinct measures. These measures are as follows.

(a) **Accession to the Convention.** The land-locked state will need to become a party to the Law of the Sea Convention. The state may do this by acceding to the Convention pursuant to Article 307. The Convention does not allow for general reservations or exceptions other than those that are allowed by specific articles, but some states – in the course of ratification or accession – have made declarations as to their understanding of particular provisions.

(b) **Enabling Legislation.** The land-locked state will need to consider whether enabling legislation is necessary to bring into force specific provisions of the Convention into local law. Generally, the extent to which the land-locked state will need to pass enabling legislation will depend on its internal constitutional and legal arrangements. If those arrangements allow treaties to be automatically applied as law within the domestic sphere, then local legislation may not need to be passed. If treaties are not automatically incorporated into local law, then enabling legislation will need to be considered. For the typical developing land-locked state, the range of items that may need to be included in local legislation is likely to be limited. Generally, coastal states are obliged to pass legislation pertaining to each of the zones of the sea that they are claiming for legal purposes (including the territorial sea, the contiguous zone, the EEZ and the continental shelf). In contrast, land-locked states will not need to make such claims because, by definition, they do not have zones of the sea as extensions of their territory. Nevertheless, if a land-locked state wishes to enjoy all the benefits available under the Law of the Sea Convention, that state may consider passing legislation on matters such as ship registration, and jurisdiction on vessels

relying on the services of nationals or carrying the flag of the land-locked state. The land-locked state may also consider whether it is necessary to pass legislation to facilitate participation by its nationals in deep seabed matters.

(c) **Bilateral Agreements.** Two of the most significant areas of interest for land-locked states, namely, access to the sea across the territory of transit states and access to foreign EEZs, require land-locked states to enter into bilateral or regional agreements with other countries. These agreements are necessary for the implementation of the broad rights assured for land-locked states under the Convention. Thus, the land-locked state should be prepared to enter into negotiations with coastal states pursuant to the terms of Articles 125(2) and 69(2) of the Convention. The negotiating approach taken by the land-locked state in each case will vary according to the particular needs of the land-locked state, its geographical location, the relative strengths of the parties, the history of relations between the parties, and other considerations. It is to be emphasised here, however, that these negotiations are required by the Law of the Sea Convention, so the land-locked state is entitled to request that its coastal counterparts take part in the negotiating process.

CONCLUSION

9. UNCLOS represents a deliberate effort on the part of the international community to ensure that the resources of the sea are not subject to the control of a small group of powerful states. At the same time, the main provisions of the Convention reflect the desire to promote the interests of developing countries as a group, and to take into account the interests of the most disadvantaged of the developing countries, namely, the developing land-locked states.

10. Law Ministers are now asked to:

(a) consider the position of land-Locked states and the possibilities granted to them under UNCLOS to achieve access to the sea and living resources so as to foster and encourage sustainability;

(b) endorse the efforts of the Commonwealth Secretariat to sensitise member states to the immediate need to accede to UNCLOS for those states which have not done so;

(c) encourage land-locked states to enact enabling legislation to implement, the provisions of Part V of UNCLOS;

(d) encourage both land-locked states and their coastal neighbouring states to utilise the provisions of UNCLOS to foster relations and simultaneously recognise the benefits of entering into regional arrangements for access to the sea.