

Toward a BBNJ-Model Implementation Agreement for Submarine Communications Cables Governance and Protection

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Structured Abstract

Article Type: Viewpoint

Purpose—This paper provides a solution to enhance the governance and protection of submarine communications cables in maritime areas where only coastal States enjoy sovereign rights and no other rights.

Approach—The viewpoint in this paper is elaborated based on a reading and interpretation of the United Nations Convention on the Law of the Sea (UNCLOS), as well as scholarly articles on the subject and insights into the submarine communications cables industry.

Findings—While a reading of UNCLOS provisions could be interpreted to emphasize the freedom to lay submarine cables in the exclusive economic zone and the continental shelf of coastal States, the ambiguity of these provisions could also support an alternative interpretation that reflects the practice of coastal States.

Practical Implications—This paper shows that there is a possibility to strike the desired balance between the interests of coastal States, other States, and cable operators through the adoption of an implementation agreement in the image of the Convention on the Conservation and Sustainable Use of Marine Biological Diversity in Areas Beyond National Jurisdiction, known as the BBNJ Agreement.

Originality—This paper presents a novel perspective and a solution to a pressing problem.

Keywords: EEZ, continental shelf, submarine communications cables

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I. Introduction

Our oceans are the main host of the world's global internet traffic, with over 95% of our internet communications passing through fiber optics embedded inside submarine communications cables laid on the ocean floor.¹ The International Telecommunications Union, the leading United Nations specialized agency for digital technologies, and the International Cable Protection Committee, the leading organization advocating for the protection of submarine cables, launched the creation of an International Advisory Body for Submarine Cable Resilience in late 2024, following the large number of incidents damaging submarine cables, which occur regularly and annually, and in particular following the incident resulting in the severing of two submarine cables in the Baltic Sea in November 2024. On the occasion of the creation of this new body, the Deputy Secretary-General of the International Telecommunication Union stated that "anything we do today in the digital world depends on submarine cables, from our emails and text messages to financial transactions, critical government communications, cloud services, social media, our video streaming services and so on."²

With our increasing reliance on the internet, there is no doubt that submarine cables are a critical infrastructure³ that requires protection. Several scholarly articles critical of the current legal regime regarding the protection of submarine cables under the United Nations Convention on the Law of the Sea (UNCLOS, or the Convention)⁴ have highlighted that the protection of submarine cables is becoming increasingly crucial. While in the territorial sea, coastal States have complete sovereignty and can enact and enforce the laws and measures they deem necessary for the protection of submarine cables, the exclusive economic zone (EEZ) and the continental shelf have raised some challenges and difficulties with regards to the protection of submarine cables in these areas, where only coastal States enjoy sovereign rights and no other rights, balanced by the need to protect the freedom other States enjoy in these maritime areas as guaranteed by UNCLOS.

UNCLOS, known as the constitution of the ocean, has proven to be comprehensive, integral, and visionary. The latest advisory opinion by the International Tribunal for the Law of the Sea, in relation to the protection and preservation of the marine environment from climate change, is a testament. The way this Convention is drafted allows for interpretations that can adapt to developments in the ocean space, which result from multiple factors, including the evolving practice of States in the ocean and the ever-growing reliance on technology. The ambiguity in some provisions of UNCLOS allows for further clarifications and provides flexibility for States to agree on the content of the legal obligations subject of these provisions.

In this regard, implementation agreements to UNCLOS, which can be defined in general as a method "that enhances the effectiveness of a treaty,"⁵ have been an instrumental tool to further explain some of UNCLOS provisions and to help implement them in a manner that aims to enhance sustainable governance of the ocean and its resources. We now count three implementation agreements, with two agreements in force.⁶ The first one is the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (1994), which was adopted to address some concerns in relation to the implementation of Part XI of UNCLOS in relation to the Area, to ensure "as wide a participation as possible"⁷ to UNCLOS. The second is the Agreement

on the Conservation and Management of Straddling Fish Stocks, which was adopted to help implement the provisions of UNCLOS more effectively in relation to straddling fish stocks while addressing some of the problems left unaddressed by UNCLOS.⁸ The third implementation agreement was recently adopted by consensus at the United Nations in June 2023. This third and most recent implementation agreement is the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, commonly referred to as the BBNJ Agreement.⁹

While there are provisions in UNCLOS that govern the Area¹⁰ and the High Seas,¹¹ the BBNJ Agreement came to shed more light on some of these provisions and also to address “significant gaps [that] exist in the governance of BBNJ”¹² such as the use of marine genetic resources, the establishment of marine protected areas on the High Seas, capacity-building and transfer of marine technology in areas beyond national jurisdiction.¹³ As the Area and its resources are considered a common heritage of humankind,¹⁴ the BBNJ Agreement was built around this concept, with its provisions drafted in line with the provisions of UNCLOS. It provides more clarifications to UNCLOS to enhance the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction,¹⁵ i.e., the High Seas and the Area,¹⁶ while balancing the interests of developed and developing countries. The BBNJ Agreement establishes a legal regime that elaborates on the provisions of UNCLOS while also providing innovative solutions to existing problems in relation to the exploration and exploitation of BBNJ.

In the same spirit and following the same logic, a new implementation agreement addressing the legal regime governing submarine communications cables and their protection might seem to be the right solution to further elaborate on the provisions of UNCLOS and provide a legal basis for enhanced protection of submarine communications cables while balancing between the need for effective governance and protection of submarines cables, the aspirations of the submarine cables industry, and the national interests of States. While there are different types of submarine cables, this article focuses on submarine communications cables.¹⁷

This article begins with a brief overview of the submarine communications cables industry and cable operations. It then explains the current legal regime applicable to submarine cables and their protection, outlining why some of these provisions could be further interpreted to ensure enhanced governance and protection of submarine cables.

II. A Brief Overview of the Submarine Cables Industry and Cables Operations

The submarine communications cables industry involves multiple stakeholders. These stakeholders include cable owners (such as private or state-owned telecommunications companies, investment banks, and internet cable providers),¹⁸ as well as suppliers (which can encompass cable manufacturers, cable installers, and companies specializing in cable repair and maintenance).¹⁹ Due to the significant technical and financial investment required to construct, install, operate, and maintain submarine communications cables,²⁰ the stakeholders involved often form a consortium of companies.²¹

To lay submarine communications cables on the ocean floor, a cable route study is conducted covering the entire route of the submarine cable, from its landing station onshore.²² It is followed by the laying of the cable, which also includes maintenance operations.²³ After laying a submarine communication cable on the sea floor, the cable would still require attention throughout its life span. This is reflected in the maintenance and repair operations of submarine cables laid on the sea floor throughout their operational time.²⁴

Practice has shown that to lay submarine communications cables and ensure their operation, maintenance, and repair, cable operators (i.e., the submarine cables industry's stakeholders) would have to deal with coastal States for multiple reasons, including permitting requirements and other arrangements.²⁵ In this regard, it is opportune to highlight that the inception of a submarine communications cable is often the result of a demand for more capacity to an existing cable, or a political demand by States to connect multiple countries, or a connectivity demand,²⁶ and that States have every interest in facilitating a successful and speedy laying of submarine communications cables. However, practice again has proven contrary to these expectations, with several coastal States imposing regulations varying from the imposition of annual fees on cable operators laying submarine cables in their EEZ/continental shelf to the requirement of obtaining permits before laying submarine cables.²⁷

Understanding the legal regime governing submarine communications cables is therefore essential to be able to define the limits of the powers given to coastal States in their EEZ/continental shelf with their rights and duties on the one hand, and the rights and duties of other States and, as a consequence, the cable operators on the other hand.

III. The Current Legal Regime Governing Submarine Communications Cables and the Practice of Coastal States

The international law governing submarine communications cables dates back to 1884 with the adoption of the Convention for the Protection of Submarine Telegraph Cables.²⁸ The 1958 Convention on the Continental Shelf²⁹ and the 1958 Geneva Convention on the High Seas³⁰ followed. Then the 1982 United Nations Convention on the Law of the Sea, or UNCLOS, was adopted, with a quasi-universal participation to it by States.³¹ Non-States Parties usually also abide by the rules enshrined in UNCLOS, as some of its provisions are considered customary international law.³²

UNCLOS is considered the legal regime governing submarine cables, particularly because some of its provisions on submarine cables incorporate the provisions of the 1958 Geneva Conventions, which in turn incorporate some of the provisions of the 1884 Convention.³³ UNCLOS can thus be considered the final outcome, encompassing the relevant rules governing submarine communications cables, which borrow from and build upon preceding agreements.

Under UNCLOS, the sea is divided into various maritime zones, each with distinct prerogatives for the coastal State. While coastal States enjoy sovereignty in their territorial sea, which also translates into their sovereignty in regulating submarine communications cables laid in their territorial sea or passing through it,³⁴ they only enjoy sovereign rights in their EEZ and their continental shelf.

This paper focuses on the EEZ and the continental shelf, where the exclusive and inclusive interests of coastal States and third parties or other States in these maritime zones pose a significant challenge, in particular with regard to the need to strike a balance between the freedom that States should be enjoying in these areas and the interests of coastal States.

The EEZ and the continental shelf are maritime zones that extend to 200 nautical miles beyond the baselines from which the breadth of the territorial sea is measured.³⁵ The EEZ includes the seabed, its subsoil, and superjacent water,³⁶ and the continental shelf consists of the seabed and subsoil (within the 200nm or beyond it, i.e., the extended continental shelf).³⁷

While coastal States must claim their EEZ,³⁸ the rights coastal States exercise over the continental shelf are inherent.³⁹ In the words of the International Court of Justice (ICJ): “the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab intio*, by virtue of sovereign rights over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.”⁴⁰

In the EEZ, coastal States enjoy sovereign rights for the exploration and exploitation of natural resources.⁴¹ On the continental shelf, they enjoy sovereign rights for the purpose of exploring and exploiting the continental shelf and its natural resources.⁴² Pursuant to Article 56 paragraph 3 of UNCLOS, coastal States exercise their sovereign rights in relation to the seabed and its subsoil in the EEZ subject to the provisions governing the continental shelf,⁴³ which makes the regime governing the seabed and subsoil of both maritime zones the same as they overlap,⁴⁴ and points to the “integral nature of the overarching regime applicable to the 200-NM-zone.”⁴⁵ As stated by the ICJ in the Libya/Malta Continental Shelf Case: “although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the seabed of the zone are defined by reference to the regime laid down for the continental shelf. Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive zone without a corresponding continental shelf.”⁴⁶

Regarding submarine cables, UNCLOS provides for the freedom to lay submarine cables in the EEZ, the continental shelf, and the high seas. Article 58 of UNCLOS (on the rights and duties of other States in the EEZ) makes reference to Article 87 of UNCLOS (on the freedom of the high seas), which in turn refers to Part VI of UNCLOS, i.e., the continental shelf, for the provisions governing the freedom to lay submarine cables.

Under Part VI of UNCLOS, paragraph 1 of Article 79 stipulates that “all States are entitled to lay submarine cables and pipelines.”⁴⁷ However, paragraph 2 of Article 79 comes with caveats stipulating that while a “coastal State may not impede the laying or maintenance of [such] cables and pipelines,” this is “subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources.” And paragraph 3 of Article 58 (EEZ) stipulates, while referring to Article 87 of UNCLOS for the freedom of laying submarine cables that: “(...) States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this part.”

In light of this, several scholarly articles attempted to clarify the extent of the rules and regulations that coastal States can impose in their EEZ or continental shelf with regard

to submarine communications cables, while stressing the freedom to lay submarine cables in these maritime areas. It is argued, in this regard, that coastal States can only impose measures in relation to the exploitation and exploration of the natural resources on the seabed and its subsoil, and these measures need to be reasonable.⁴⁸ Coastal States shall also “have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.”⁴⁹ This argument is further enhanced with reference to Article 78 of UNCLOS, which stipulates that “the exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States provided for in this Convention.”⁵⁰

Furthermore, it was advanced that this freedom, which includes “other internationally lawful uses of the sea related to these freedoms, such as those associated with (...) submarine cables and pipelines, and compatible with the other provisions of this Convention”⁵¹ as stipulated under Article 87 of the Convention, means and includes the repair and maintenance of submarine cables.⁵² This interpretation can also be found in the reading of paragraph 2 of Article 79,⁵³ which stipulates that coastal States “may not impede the laying or maintenance of such cables and pipelines.” Proponents of a minimal interference by coastal States suggest that cable route surveying should also be considered an internationally lawful use of the sea related to submarine cables.⁵⁴

Given this reading of UNCLOS, it is expected that States would have the same interpretation of the relevant UNCLOS provisions, and would only have regulations in their EEZ and continental shelf that are within the confines of this interpretation, and that do not go beyond “reasonable measures” for the exploration and exploitation of the seabed and subsoil, even when there is no definition of what constitutes a reasonable measure under UNCLOS.

However, the practice has been contrary to these expectations and falls out of the line drawn with respect to the rights and duties of coastal States in their EEZ/continental shelf, with coastal States imposing regulations requiring their consent for the delineation of cable routes, permits for laying or repairing submarine cables, and States creating marine protected areas in their EEZ as a means to control cable routing in the area.⁵⁵ It is argued that these measures are contrary to the letter of UNCLOS and impede the freedom to lay submarine cables, and that the ambiguity of the provisions of UNCLOS in relation to submarine cables allows coastal States to push their interests further.⁵⁶

IV. A Possible Interpretation of UNCLOS That Considers the Practice of Coastal States

Although the position outlined above aligns with the freedom to lay submarine cables in the EEZ/continental shelf to a great extent, to facilitate submarine communications cables’ operations and, as a consequence, guarantee the laying, repairing and maintaining of submarine cables for the global good, it is essential to have a closer look at the relevant provisions of UNCLOS which seem to put certain limitations on this freedom in favor of coastal States.

While it is of primordial importance to ensure that cable operators do not face unnecessary hindrance to their submarine cables operations in the EEZ and the continental shelf,

it is equally essential to allow for an interpretation of UNCLOS that takes into consideration the practice of coastal States to be able to achieve the right balance between the interests of coastal States, other States and the cable industry.

The ambiguity of UNCLOS provisions thus becomes an advantage that should be leveraged to permit a regulation of the submarine cables regime in a way that adapts to the evolving practice of States and new challenges that arise. This same ambiguity also permits putting a limit to claims by coastal States that might seem excessive without depriving them of the possibility to impose certain limitations that may be legally justified. It also addresses the concerns raised by coastal States while taking into consideration the demands of the cable industry and operators. Finally, this approach paves the way to regulating the current actions of coastal States under the provisions stipulated in UNCLOS instead of an approach insisting that the current practice of some coastal States constitutes a violation of the provisions of UNCLOS in relation to submarine communications cables, without exploring how we, as the international community, can further clarify the provisions of UNCLOS and adjust any “excessive” behavior by coastal States accordingly.

This paper proposes the adoption of an implementation agreement which would enhance the rights of coastal States based on a different interpretation given to the relevant provisions of UNCLOS, as follows:

First of all, a reading of paragraph 3 of Article 56 of UNCLOS (which refers to Part VI on the continental shelf), together with paragraph 1 of Article 58 (which refers to Article 87 of UNCLOS on the freedom of the high seas, namely the freedom to lay submarine cables), and paragraph 1 of Article 87 (which refers to Part VI for the rules governing the freedom to lay submarine cables), leads to concluding that Part VI is the reference and “constitutes the relevant provision”⁵⁷ when it comes to the rights of the coastal State in relation to the seabed and subsoil in the EEZ/continental shelf. While paragraph 2 of Article 56 requires coastal States to have due regard to the rights and duties of other States in the EEZ, the provisions of Part VI do not contain any similar language. On the contrary, they seem to emphasize the obligation of other States to have due regard to already existing cables. This is further shown in the way Article 56 of UNCLOS is drafted, with paragraph 2 of this Article (due regard by the coastal State) preceding paragraph 3 of the same Article, which refers to Part VI for the rights of the coastal States with respect to the seabed and subsoil, in addition to paragraph 3 of Article 58 which stresses again on the obligation of States to have due regard to the rights and duties of the coastal State when exercising their rights and performing their duties in the EEZ. This paragraph comes after a provision that provides States with the freedom to lay submarine cables in the EEZ.

The only provision in Part VI that stipulates clearly that the coastal State must respect the freedoms provided for in UNCLOS in this regard, comes as a paragraph 2 to Article 78 of UNCLOS on the “(L)egal status of the superjacent waters and airspace and the rights and freedoms of other States,” with an emphasis, on particular, on the freedom of navigation, to ensure that these waters are not affected by the rights of the coastal State in the continental shelf which only include the seabed and subsoil.⁵⁸ While the use of “other rights and freedoms of other States” in paragraph 2 of Article 78 of UNCLOS surely includes the freedom to lay submarine cables, the paragraph puts certain limitations on the obligation of non-interference by coastal States with navigation and other rights and freedoms of other States, with the term “unjustifiable.” Meaning that a reading *a contrario* allows coastal

States to interfere with these freedoms if their interference is “justifiable.”⁵⁹ This is further supported by Article 79 of UNCLOS on submarine communications cables and pipelines, which subjects the interference by coastal States in the laying or maintenance of submarine cables to their right to take reasonable measures for the exploration and exploitation of their continental shelf.

In addition to the above, Article 87 of UNCLOS, which speaks of the freedom to lay submarine cables and which Article 58 of UNCLOS refers to, adds a caveat to this freedom by the use of “subject to Part VI,” and the use in Article 58 of UNCLOS of “subject to the relevant provisions of this Convention” in the exercise of the freedoms indicated under UNCLOS,⁶⁰ means again that the freedom to lay submarine cables always comes with caveats and limitations.

This position is further substantiated by the view which considers that “a closer analysis of the history and ratio of the regime of the EEZ arguably militates in favour of accepting a shift of emphasis in favour of the coastal State,”⁶¹ which is in line with the interpretation given above in relation to the rights of the coastal State exercised on the seabed and subsoil of its EEZ and continental shelf. It is also in line with the view that States are entitled to undertake marine spatial planning in their EEZ,⁶² despite the extent of “the functional allocation of competence”⁶³ it provides to the coastal State in the EEZ and the challenges that accompany the establishment of marine spatial areas that other States may face, and which limit their freedoms in their EEZ and continental shelf.

Further, this interpretation aligns with the view that supports or attempts to find a legal justification in UNCLOS for the establishment of submarine communications cable protection areas in the EEZ, under the umbrella of measures taken in the exercise of sovereign rights by the coastal State in its EEZ, namely exploration and exploitation of the living and non-living resources.⁶⁴

Second, paragraph 1 of Article 58 of UNCLOS prescribes that States enjoy the freedom of laying submarine cables in the EEZ and other internationally lawful uses of the sea related to this freedom. While it was argued that cable route surveys, maintenance, and repair are to be considered internationally lawful uses of the sea related to the freedom of laying submarine communications cables, UNCLOS does not contain any definition of what constitutes an internationally lawful use of the sea related to the freedom in question.⁶⁵ It is nonetheless reasonable to consider that repairing and maintaining submarine cables is naturally a lawful use of the sea related to the freedom of laying submarine cables. However, the fact remains that there is no definition of this term. This could potentially allow the inclusion of all relevant activities, if a definition is to be given to this term, and determine the conditions necessary for an activity to be considered related to the exercise of the freedom in question, such as it being “regular, common, and a necessary requirement for the exercise” of this freedom.⁶⁶ This can include cable route surveying, which is nevertheless a subject of debate.

At this juncture, it is opportune to note that cable route surveying encompasses the collection of seabed soil data, seismic data, and oceanographic data.⁶⁷ It is a geophysical survey conducted on the seabed and subsoil and “a form of marine data collection.”⁶⁸ Some States consider that this activity amounts to marine scientific research, which forms part of the sovereign rights exercised by the coastal State in its EEZ,⁶⁹ and therefore is subject to its consent. While an opposite argument suggests that marine scientific research and surveys

are two different activities, particularly in light of the distinct objectives both activities aim to achieve. It is nevertheless legitimate for a coastal State to consider that surveys evidently lead to collecting marine information similar to that collected in the course of marine scientific research. That being said, UNCLOS does not define marine scientific research or provide a definition for hydrographic surveys. This should, therefore, provide room for a provision in a future implementation agreement that addresses the concerns of all stakeholders. Again, the ambiguity of UNCLOS can be leveraged as an advantage, allowing States to agree on and determine the content of the ambiguous legal provisions in a manner that takes into consideration the interests of all relevant stakeholders.

Third, as indicated above, paragraph 3 of Article 58 of UNCLOS obligates States to have due regard to the rights and duties of the coastal State in the EEZ. This due regard obligation is reiterated in paragraph 5 of Article 79 of UNCLOS, an article solely dedicated to submarine communications cables.

The content of this obligation of due regard has not been identified in UNCLOS. It is therefore possible and plausible for coastal States to want to determine the content of this due regard obligation in their EEZ and continental shelf in light of the sovereign rights they exercise in these maritime areas. This has been the case with coastal States requiring permits for laying, repairing, or maintaining submarine cables. In particular, the due regard obligation in Article 79 imposed on States *vis-à-vis* existing cables in the continental shelf might be a valid ground for coastal States to require permits for laying submarine cables or repairing existing ones, because, simply put, why would the content of this due regard obligation be only left to other States without including the perspective of the coastal State in whose EEZ or continental shelf the submarine cable is to be laid, or is already laid on the seabed.

In this regard and in light of the above, the ICJ had the chance to pronounce on this duty of due regard in the Fisheries Jurisdiction case (United Kingdom v. Iceland), where it stated that “both States have an obligation to take full account of each other’s rights”⁷⁰ and that “the most appropriate method for the solution of the dispute is clearly that of negotiation. Its objective should be the delimitation of the rights and interests of the Parties, the preferential rights of the coastal State on the one hand and the rights of the Applicant on the other, to balance and regulate equitably questions....”⁷¹ The declaration made by Judge Singh to this judgment reiterates that “there has always been the need for accepting clearly in maritime matters the existence of the duty to ‘have reasonable regard to the interests of other States.’”⁷²

The Arbitral Tribunal in the Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom) stated that: “the extent of the regard required by the Convention will depend on the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches.”⁷³ The Tribunal further stated that “in the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State.”⁷⁴ The Tribunal further asserted that the obligation of due regard “entails (...) both consultation and a balancing exercise with (the) rights and interests” of States.⁷⁵

This again leaves room for a solution that takes into consideration the interests of coastal States as well as cable operators through their respective States, particularly if they are part of or are being represented in cable operations in their governmental/ public capacity.

Fourth, Article 79 of UNCLOS permits coastal States to take reasonable measures for the exploration and exploitation of their continental shelf and puts a limitation on the freedom to lay submarine cables, as it is subject to the right of coastal States to take these reasonable measures. UNCLOS does not elaborate on what constitutes “reasonable” measures.⁷⁶ As such, it was, for instance, argued that “it would seem reasonable for a coastal State to impose restrictions on the laying of cables in its richest fishing grounds or coral reefs areas in its EEZ and to put restrictions on the laying of cables in areas designated for off-shore exploration for oil and gas.”⁷⁷ Another view considers unreasonable a “measure of discriminatory character.”⁷⁸ This, as reiterated above, allows States and the cable industry to define what constitutes a reasonable measure in light of best practices.

In conclusion of this part and in addressing the challenges raised in relation to submarine communications cables, it is understandable that the interpretation given above to the provisions of UNCLOS might seem to provide legal ground for what has been labeled by scholarly articles as a “creeping jurisdiction”⁷⁹ of coastal States in their EEZ or continental shelf. This brings us to ask an important question: “will [the territorial temptation] continue to restructure the law of the sea? If so, will it do so within the current conventional framework or occasion its collapse?”⁸⁰

The answer to this question lies in the need to embrace a practical solution to the challenges raised by the competing uses and activities in the maritime space. Regarding submarine communications cables, several challenges have been identified, which could be potentially addressed by adopting an interpretation of UNCLOS that considers the reality on the ground and the current state of affairs with respect to coastal States and the cable industry. This approach, although it allows for more enhanced rights of coastal States in the EEZ and continental shelf, does so with limits, thus resisting attempts to “territorialize the EEZ,”⁸¹ and regulates a situation that seems to have grown out of the desired legal framework.

V. Why An Implementation Agreement, and Why the BBNJ as a Model?

The choice of an implementation agreement as a solution to this problem is a result of the range of possibilities that an implementation agreement provides, offering a legally binding solution through a consultative and consensual process that involves the participation of various stakeholders. An implementation agreement may provide additional clarification to the original treaty⁸² or help regulate a situation that evolves,⁸³ thereby “filling the gap in implementing”⁸⁴ the original treaty.

The three implementation agreements of UNCLOS serve specific purposes. The agreement relating to the implementation of Part XI of UNCLOS in relation to the Area (1994) aimed to ensure universal participation in UNCLOS, particularly from industrialized countries.⁸⁵ This agreement primarily contains procedural articles, as well as articles related to the operationalization of the International Seabed Authority.⁸⁶ The agreement relating to the Conservation and Management of Straddling Fish Stocks (1995) was adopted to address the issue of straddling stocks and highly migratory fish stocks in both the EEZ and the high seas.⁸⁷ This agreement stipulates that the conservation and management of

straddling fish stocks and highly migratory fish stocks must be based on the precautionary approach⁸⁸ (not specified under UNCLOS). It clarifies fundamental principles enshrined in UNCLOS, such as the duty to cooperate.⁸⁹

The BBNJ Agreement, the third implementation agreement to UNCLOS and the most recent (2023), is considered a “historic achievement” and “a veritable triumph for international multilateralism.”⁹⁰ It put in place innovative solutions, provided systemized architecture for ocean governance,⁹¹ allowed States to agree on a legal definition for marine protected areas, and established a mechanism for benefit sharing associated with marine genetic resources, which was absent from UNCLOS. The BBNJ Agreement successfully addressed four main cross-cutting issues: marine genetic resources and benefit sharing, area-based management tools, environmental impact assessments, and capacity-building.⁹²

Drawing parallels with the BBNJ Agreement, which succeeded in striking a balance between the demands of developed and developing countries⁹³ and based on the principle of the Common Heritage of Humankind for activities in the area,⁹⁴ an implementation agreement for submarine communications cables can achieve the same balance between the competing interests of coastal States and other States, and as a consequence, the cable industry.

An implementation agreement, similar to the BBNJ, could serve this purpose. This paper proposes that a new implementation agreement should be based on an interpretation of the relevant provisions of UNCLOS that reflects the practices of both coastal States, other States, and the cable industry, as explained above. This aims to regulate the extent of the power given to coastal States in the exercise of their sovereign rights in the EEZ/continental shelf, thus preventing any abuse of these rights by a coastal State to the detriment of other States and cable operators.⁹⁵ It allows for addressing the security interests of States while enabling the creation of clearly regulated submarine communications cable operations in the EEZ/continental shelf, thus ensuring a stable and predictable legal regime.

VI. The Correlation Between the Extent of States’ Jurisdiction Over Submarine Communication Cables and the Protection of Submarine Cables

The issue of protecting submarine communications cables directly relates to the extent of jurisdiction that States—whether coastal States, the cable owner’s State, or other concerned States—have or might have over these cables⁹⁶ passing through their EEZs or continental shelves, owned by them, or connecting them to the internet. Today, protecting submarine communications cables is increasingly important. The United Nations Secretary-General’s report on the Oceans and Law of the Sea (2015) stated that “submarine cables are critical communications infrastructure, being used for more than 98 percent of international Internet, data, and telephone traffic.”⁹⁷ The same report also asserts that submarine cables “function as the backbone of the international telecommunications system,” and “are a fundamental component of the critical global infrastructure.”⁹⁸ Another report by the UN Secretary-General (2020) indicated that during COVID-19, “reliance on

submarine cables, which carry approximately 99 percent of the world's Internet traffic, intensified by approximately 25–50 percent, as usage for communication, commerce, teleworking, telemedicine, and tele-education expanded.”⁹⁹

The General Assembly Resolution on Oceans and the Law of the Sea (2023) included a paragraph that states as follows: “recognizing that submarine cables and pipelines are vitally important to the global economy and the national security of all States.”¹⁰⁰

It is without doubt that the importance of submarine communications cables is of primordial importance for national and global connectivity. With virtually all States relying on submarine communications cables for a range of purposes,¹⁰¹ from accessing social media to conducting global financial service transactions to military and defense,¹⁰² their protection has become a necessity.¹⁰³

The provisions of UNCLOS on the protection of submarine cables are listed under Part VII (High Seas), which paragraph 2 of Article 58 (EEZ) of UNCLOS refers to. These provisions also apply to the continental shelf.¹⁰⁴ Three main provisions of UNCLOS, namely articles 113, 114, and 115, address the protection of submarine communications cables.

Article 113 of UNCLOS requires States to adopt laws and regulations that hold liable ships flying their flag or persons subject to their jurisdiction if they break or injure a submarine cable, whether willfully or through culpable negligence.¹⁰⁵ Article 114 requires States to adopt laws and regulations that make owners of submarine cables, nationals of these States, who are responsible for breaking or injuring other cables in the operation of laying or repairing the cable they own, to pay the repairing costs of the break or injury they cause to other cables.¹⁰⁶ Article 115 requires States to adopt laws and regulations to ensure that cable owners indemnify ships that sacrifice a fishing gear or an anchor to avoid injuring submarine cables.¹⁰⁷

It is estimated that 80 percent of cable damage is the result of human activity in the sea, particularly fishing, which accounts for 60 percent of the activities causing damage to submarine cables.¹⁰⁸ Additionally, an average of 150 to 200 faults in submarine communications cables occur globally each year.¹⁰⁹

With the number of incidents causing damage to submarine communications cables on the rise, and in light of the importance given to submarine communications cables as critical infrastructure, it is considered that the provisions of UNCLOS on the protection of submarine communications cables are insufficient and do not ensure effective protection of submarine communications cables for multiple reasons:

1. First, these provisions limit any action to be taken in response to the breaking or injury of a submarine cable to the flag State or the State of nationality of the ship or the persons responsible for the breakage.
2. Second, these provisions seem to neglect intentional damage caused to submarine cables. Despite the use of the word “willfully” in Article 113, which can potentially cover all sorts of intentional damage—the use of the word “willfully” without further clarification or elaboration in UNCLOS (which again can allow for a broad and flexible interpretation—including terrorist acts and theft),¹¹⁰ the limitation of jurisdiction in relation to these crimes to flag States do not match the seriousness of the offense committed, namely terrorist acts or theft of cables.¹¹¹
3. Third, the limitation of the jurisdiction to the flag State, or otherwise the principle of exclusive flag jurisdiction, seems to ignore States affected by the intentional damage to

a submarine cable on which these States rely for their connectivity and communication network.¹¹²

4. Fourth, these provisions only entail legislative jurisdiction, not enforcement jurisdiction.¹¹³

5. Fifth, a limited number of States have actually adopted laws and regulations to this effect as prescribed under articles 113 to 115 of UNCLOS, and some of these laws are outdated.¹¹⁴

6. Sixth, damage can occur in a part of the sea that is distant from the flag State, and the injured State would not be, legally, in a position to take any measure, hence the flag State would not be “in the best position to ensure compliance or to prosecute,”¹¹⁵ in addition to the injured State not in a position to take any measures.

7. Seventh, these provisions do not provide any protection for cable ships undertaking cable operations.¹¹⁶

Considering the above, a situation has unfolded that encompasses conflicting views and positions regarding the regime governing submarine communications cables and their protection. While some coastal States are considered to have imposed measures contrary to the provisions of UNCLOS with regards to the laying, repairing and maintaining of submarine cables under an interpretation of UNCLOS provisions that advocate for the freedom to lay submarine cables with no to minimal limitations, there are calls for stronger regulations for the protection of submarine communication cables, which invest coastal States with extended rights. Some of these calls consider measures taken by States such as New Zealand and Australia, which have established cable protection zones within their EEZ/continental shelf and have prohibited fishing, anchoring and other activities in these areas,¹¹⁷ as a solution to an adequate protection of submarine communications cable, and welcome these measures and consider them “as examples of an integrated approach to the management of competing ocean uses through zoning,”¹¹⁸ despite the uncertainty surrounding the legality of these measures and their compliance with the provisions of UNCLOS.¹¹⁹

The need for enhanced protection of submarine communications cables has led to attempts to find legal ground for measures taken by States such as New Zealand and Australia with regards to the establishment of cable protection zones, by arguing, “a protection zone for a submarine cable outside the territorial sea could be validly asserted by a State, provided the basis of jurisdiction was tied to one that could be claimed under the regime for the EEZ or continental shelf. That is to say, protection over a cable could be achieved by restricting activities that could be validly regulated in the EEZ or continental shelf.”¹²⁰

In other words, and to enhance the protection of submarine communications cables, taking a measure such as establishing a cable protection zone in the EEZ or continental shelf, which prohibits activities such as fishing, could be allowed if it eventually restricts or regulates in these zones activities that are usually regulated by the coastal State in its EEZ or continental shelf. While noting that in fact these restrictions are undertaken not for the purpose of exercising a State’s sovereign rights for the purpose of exploring and exploiting resources, or any other activity listed under Article 56 (EEZ) or under Article 77 (continental shelf), these cable protection zones could not be considered other than a circumvention of the provisions of UNCLOS, driven by the need to protect submarine communications

cables, but that impede on the rights and freedoms of other States in the EEZ or continental shelf, namely the freedom to laying submarine communications cables.

In this regard, it is worth noting that the International Law Commission in 1956 rejected the idea of establishing cable protection zones, citing an impediment to the freedom of navigation, even though the proposal concerned only suggested a scaled-down version of this protective zone with a proposal prohibiting “anchoring near cables.”¹²¹

In light of the above, a solution may be inspired from the provisions of UNCLOS itself which allow for exceptions to the exclusive flag State jurisdiction in a balanced manner, namely through adjusting the provisions of Article 100 (on the duty to cooperate in the repression of piracy), Article 108 (on the illicit traffic in narcotic drugs or psychotropic substances), Article 109 (on the unauthorized broadcasting from the high seas), and Article 110 (on the right of visit) to the protection of submarine communication cables.

The new implementation agreement could, as was done under the BBNJ Agreement, explore innovative ways to address the issue of protecting submarine communications cables. This could be done through the creation of a system, at the conception of a submarine communications cable, which includes all States’ EEZs and continental shelves through which the submarine communications cable passes and which provides for a list of legal actions that could be taken in case of breakage or damage to the submarine communications cable under certain conditions agreed upon by the stakeholders involved.

The new implementation agreement could also create a mechanism that allows coastal States to act in case a submarine cable is injured in their EEZ or continental shelf after obtaining the consent of the flag State. The mechanism would include conditions pertaining to indicate a time limit for receiving a response from the flag State, which should depend on the circumstances of the incident and define the extent of the action that the coastal State could take in agreement with the flag State.

On the other hand, the new implementation agreement could borrow some of the provisions of the 1884 Convention on the protection of Submarine Telegraph Cables, namely articles V and VI, which require vessels to keep a distance of one nautical mile from ships engaged in repairing cables and a distance of one-quarter of a nautical mile at least from buoys indicating the location of a cable being laid.¹²²

In elaborating the rules of the new implementation agreement, the recommendations issued by the International Cable Protection Committee (ICPC) should serve as a guideline. The ICPC is a professional organization with a mission to promote the protection of submarine cables.¹²³ Its membership includes governmental administrations, companies owning cables, and companies operating submarine telecommunications.¹²⁴ The ICPC issues recommendations on the protection of submarine communications cables, and works with interested parties (i.e., governments, cable owners, and suppliers) to promote the protection of submarine communications cables and ensure compliance with UNCLOS.¹²⁵

According to the recommendations issued by the ICPC on “Government Best Practices for Protecting and Promoting Resilience of Submarine Telecommunications Cables,”¹²⁶ and to reduce damage to submarine cables, States are advised to implement measures “directed at fishing and anchoring risks.”¹²⁷ This includes, for instance, prohibiting fishing close to submarine cables. The recommendations also include a proposal to undertake the spatial separation of submarine cables from other activities in the sea, a measure already adopted

by several states.¹²⁸ This could surely inform coastal States and other States of the measures they can undertake to protect submarine communications cables.

States can also, and as recommended by the ICPC, “establish clear timeframes that are as short as possible” for permits for the installation and repair of submarine cables.¹²⁹ Furthermore, States could adopt a permitting regime that differs from that applied to pipelines or oil and gas activities, which are known to be polluting activities, in contrast to submarine communications cables.¹³⁰

Given also the nature of submarine communications cables as a “transnational infrastructure,”¹³¹ which can be owned by multiple stakeholders from different jurisdictions,¹³² the need for collective protection is justified on practical grounds. This is further enhanced by the critical importance of submarine communications cables and the plausibility of their protection be elevated to the level of a protection of a global public good,¹³³ depending in particular on the importance of the submarine communications cable in question and the number of States it serves to provide communication to and help connect, or, in the case of a group of cables bundled together and which can result in considerable damage if the bundle is severed, further complicates the situation leading to “responders having little to no chance of restoring the connection by rerouting the traffic to mitigate the effects of the cut.”¹³⁴

This need for a collective protection of submarine communications cables is further reiterated by the General Assembly Resolution on Oceans and the Law of the Sea (2023) which recognized “the crucial role of international cooperation at the global, regional, sub-regional and bilateral levels in combatting, in accordance with international law, threats to maritime security, including (...) terrorist acts against shipping, offshore installations, submarine cables (...) and other critical infrastructure and maritime interests, through bilateral and multilateral instruments and mechanisms aimed at monitoring, preventing and responding to such threats, the enhanced sharing of information among States relevant to the detection, prevention and suppression of such threats, and the prosecution of offenders with due regard to national legislation.”¹³⁵

VII. Conclusion

The regime governing submarine communications cables, as well as their protection, has been under considerable pressure. Practice by some States in their EEZ/continental shelf with regard to submarine communications cables, as well as their protection, has proven to be in contradiction with the needs and aspirations of the cable industry.

While the provisions of UNCLOS protect the freedom to lay submarine cables, this right is not without limitations or caveats. The ambiguity of UNCLOS provisions has allowed for different interpretations, which could well accommodate current developments in ocean space.

Implementation agreements to UNCLOS have played a significant role in elaborating on its provisions, in providing more clarity, but also in creating solutions to challenges that are not addressed under UNCLOS.

The regime governing submarine communications cables under UNCLOS could utilize an implementation agreement to provide legal clarifications for some of its ambiguous

provisions, in light of an approach that seeks to strike a balance between the interests of coastal States, other States, and submarine cable operators. This approach would be based on the provisions of UNCLOS itself. Any limitations placed on the freedom to lay submarine communications cables, or any rights accorded to coastal States, would have to find a legal basis in the provisions of UNCLOS, following an interpretation of these provisions that favors coastal States, while regulating any abuse of rights and limiting excessive claims. As rightly put, “if those favored by the old law court catastrophe if they merely sit on ancient rights, coastal states are hardly likely to make the law that is needed by unilateral assertion. The issue is not, in fact, between *laissez-faire* for shippers and *laissez-faire* for coastal states. The seas—all the seas—cry for regulation as a veritable *res communis omnium*.”¹³⁶

In the same vein, the regime governing the protection of submarine communications cables, which has proved to be insufficient and inadequate, could be enhanced through the adoption of new provisions under the implementation agreement that builds on the exceptions made to the principle of the flag State jurisdiction, but also incorporates into a legally binding agreement (i.e., the implementation agreement) best practices and recommendations, while enhancing the collective protection of submarine communications cable. An implementation agreement of the sort would be the solution to finding “an equilibrium between opposing pressures.”¹³⁷

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