

# INTERNATIONAL LAW ASSOCIATION

## SUBMARINE CABLES AND PIPELINES UNDER INTERNATIONAL LAW

### INTERIM REPORT 2020

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### I. BACKGROUND

1. The International Law Association (ILA) Committee on Submarine Cables and Pipelines under International Law (ILA Committee) was established by the ILA Executive Council in November 2018. In doing so, the ILA acknowledged that the international legal regime governing submarine telecommunication and power cables and oil and gas pipelines established by the United Nations Convention on the Law of the Sea of 1982 (LOSC)<sup>1</sup> (and other conventions), and the implementation of States' rights and obligations concerning submarine cables and pipelines, may not address the myriad of challenges that States, and cable and pipeline companies currently face in the development of policies relating to submarine cables and pipelines, particularly given their extensive use.<sup>2</sup>
2. Some of these challenges have been briefly outlined in the original proposal for the establishment of the ILA Committee<sup>3</sup> and include issues of how to address the impact of competing ocean activities such as shipping, fishing, oil and gas activities, seabed mining, and other new or emerging uses of the oceans on activities relating

<sup>1</sup> *United Nations Convention on the Law of the Sea*, adopted 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) (LOSC).

<sup>2</sup> Submarine communications cables provide 95% of international telecommunications and have been described as “critical communications infrastructure” and “vital to the global economy and the national security of all States.” General Assembly Res. 65/37A, para. 112, U.N. Doc. A/RES/65/37A (Dec. 7, 2010). As of 2020, it has been estimated by some sources that there are approximately 406 submarine communication cables in service around the world amounting to approximately 1.2 million kilometres of submarine cables in service globally. Telegeography online <https://www2.telegeography.com/submarine-cable-faqs-frequently-asked-questions>. There are no equivalent publicly available statistics available for submarine power cables and pipelines, although the International Cable Protection Committee (ICPC) is developing a list of submarine power cables. ICPC website available at <https://www.iscpc.org/information/cable-data/>.

<sup>3</sup> Proposal for the Establishment of a New ILA Committee on Submarine Cables and Pipelines available at <https://www.ila-hq.org/index.php/committees>.

to submarine cables and pipelines (and vice versa);<sup>4</sup> increasing coastal State regulation of cable and pipeline activities in a manner that may be inconsistent with the LOSC; the interaction between submarine cables and pipelines activities and the protection of the marine environment; and the need to protect submarine cables and pipelines from a variety of threats, including natural hazards, accidental and intentional damage.

3. These challenges are compounded by the fact that under the LOSC, State jurisdiction provides the principal way of maintaining legal order over activities at sea whereas submarine cables and pipelines (a) are often owned by private corporate entities and even consortia, the individual members of which may be incorporated in several different States; (b) are laid in maritime zones within and beyond national jurisdiction; and (c) multiple non-State entities are often involved in different activities relating to submarine cables and pipelines (for instance, the company that lays a cable or pipeline may differ from the one that owns the cable or pipeline; or a company that owns a cable or pipeline may differ from the one that maintains and operates it).<sup>5</sup> Coastal States may have some form of ‘territorial’ jurisdiction over some activities relating to submarine cables and pipelines in their territorial sea pursuant to their sovereignty over the territorial sea.<sup>6</sup> Coastal States may have jurisdiction over activities relating to submarine cables and pipelines on their continental shelf which is based on their exclusive sovereign rights over their continental shelves.<sup>7</sup> States may also enjoy extraterritorial jurisdiction on the basis of nationality, relating to submarine cable and pipeline activities on the high seas and the Area, but also in maritime zones within another State’s national jurisdiction. Additionally, some submarine cables and pipelines activities may involve vessels (for instance, vessels involved in route surveys for laying or laying itself), and the jurisdiction of the flag State may be engaged (in addition to any other State’s jurisdiction that may have some other link to the cable and pipeline). This means that in maritime zones within national jurisdiction, there may be instances of concurrent jurisdiction of the coastal State and the State of nationality of cables and pipelines. Moreover, identifying the State of nationality of cables and pipelines may be challenging. Submarine cables and pipelines are not normally registered in State registries and, as explained above, may be owned and/or operated by a consortia of companies incorporated in different jurisdictions. Accordingly, issues concerning State jurisdiction over submarine submarine cables and pipelines—especially given the multifaceted involvement of non-State actors in activities concerning submarine cables and pipelines explained above—remain ambiguous and complex, because, *inter alia*, it is difficult to establish which State enjoys legislative and enforcement jurisdiction over cables and pipelines in all maritime zones. The ILA Committee considers that some clarification of these issues will dispel uncertainty in scholarship and in practice, and will contribute to bringing about some order in relation to these activities at sea.

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<sup>4</sup> ‘Activities relating to submarine cables and pipelines’ has been defined for purposes of this Interim Report in para. 14 below.

<sup>5</sup> For instance, the Third European Union (EU) Energy Package requires unbundling and one of the options of such unbundling is that a different company owns the network from the one that operates and maintains it. For independent system operator option and transmission system operator option in relation to gas pipelines, see Article 14: 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L211/109. For independent system operator option in relation to electricity cables, see Article 13, Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/E, OJ L211/55).

<sup>6</sup> The term ‘functional jurisdiction’ is often used in the law of the sea to capture coastal States’ limited jurisdiction over the activities in maritime zones within their national jurisdiction and, to a limited extent, to any State’s jurisdiction over certain activities on the high seas. Such a term does not necessarily illuminate the problem arising in this context about grounds permitting extra-territorial jurisdiction by other States in maritime zones of the coastal State. Hence, the distinction between the different bases of jurisdiction under its classic understanding – ‘territorial’ and ‘extra-territorial’ – is being used here instead. For instance, as explained in the text of paragraph 3 itself, the underlying premise of coastal State jurisdiction in the territorial sea is the sovereignty enjoyed therein.

<sup>7</sup> Since ‘continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State’ (Aegean Sea Continental Shelf, Judgment of 19 December 1978, ICJ Reports 1978, p. 3, para. 86), one could speak of some limited ‘territorial’ jurisdiction being exercised by the coastal State in the continental shelf. However, such terminology is used with caution and hence the use of quotation marks. Equally, one could refer to the sovereign rights or express jurisdiction conferred to the coastal State in the continental shelf as a form of ‘extra-territorial’ jurisdiction based on a functional ground permitted by international law.

4. Further, and as a separate matter, there are no intergovernmental organisations specifically mandated with functions relating to submarine cables and pipelines generally, although there are international organisations established under bespoke pipeline agreements, that have been delegated with powers over the management of specific transboundary pipelines, such as the Authority of the West-Africa Gas Pipeline; and the European Union (EU) has among its competences shared competence with its member States in relation to energy, which cover electricity and gas networks, such as electricity cables and pipelines.<sup>8</sup> The International Cable Protection Committee (ICPC) is the leading non-governmental organisation promoting protection of submarine cables from human and natural hazards. It was created in 1958 and presently consists of submarine cable owners, submarine cable maintenance authorities, cable ship operators, submarine cable route survey companies, and governments. It currently has 172 members from over 60 countries.<sup>9</sup> There are also regional non-governmental organisations concerned with cable safety, such as the North American Submarine Cable Association and the European Submarine Cable Association,<sup>10</sup> primarily composed of industry actors. While the cable industry co-operates through the ICPC (and other regional cable protection committees), there is no equivalent and similarly active non-governmental organisation for pipelines. However, there are some pipeline associations, such as the International Pipeline and Offshore Contractors Association, created in 1966 as a non-profit organisation bringing together major international onshore and offshore pipeline contractors, their significant subcontractors, owners and/or operators of pipeline systems and associated facilities, and universities and research institutions. Another example is the European Pipeline Research Group ('ERPG'), created in 1972 and a registered association of European pipe manufacturers, pipeline operators, installation contractors and service providing companies that are active in the field of pipeline safety.

#### A. Methodology

5. In the first stage of the Committee's research for the purpose of this Interim Report, the Committee aimed at 'mapping the field' so as to help identify the existing law on submarine cables and pipelines, with a specific focus on law of the sea, and to assess whether there is a need for further clarification or development of the law. To this end, the Interim Report is structured as follows: it examines the relevant articles on submarine cables and pipelines in maritime spaces beyond national jurisdiction—high seas [LOSC, Articles 87(1)(c) and 112–115] and the Area [LOSC, Article 145(a)]—as well as maritime spaces within national jurisdiction—continental shelf (CS) [LOSC, Article 79], the exclusive economic zone (EEZ) [LOSC, Article 58], the territorial sea [LOSC, Articles 19(2)(k) and 21(c)] as well as archipelagic waters [LOSC, Article 51(2)]. The Interim Report primarily focuses on exploring the 'legislative history' of these articles based on the main treaties in the field of the law of the sea that deal with submarine cables and pipelines: the preparatory works of the 1884 Convention for the Protection of Submarine Telegraph Cables (1884 Convention);<sup>11</sup> the 1956 International Law Commission's Articles on the Law of the Sea (1956 ILC Articles);<sup>12</sup> the negotiations at the First United Nations (UN) Conference on the Law of the Sea (UNCLOS I) leading to the adoption of the 1958 Geneva Conventions on the Law of the Sea (1958 Geneva Conventions);<sup>13</sup> and the negotiations at the Third UN Conference on the Law of the Sea (UNCLOS III), culminating in the adoption of LOSC.
6. The goal is to provide a better understanding about what the preparatory works reveal regarding the meaning and content of those LOSC articles that expressly make reference to submarine cables or pipelines. Other articles,

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<sup>8</sup> Article 194, Treaty on the Functioning of the European Union ('TFEU'), in Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306, 2007/C 306/01.

<sup>9</sup> See International Cable Protection Committee online available at <https://www.iscpc.org/>.

<sup>10</sup> See, for example, the North American Submarine Cable Association online available at <https://www.n-a-s-c-a.org/>; European Submarine Cable Association online available at <https://www.escaeu.org/>.

<sup>11</sup> *Convention for the Protection of Submarine Telegraph Cables*, 163 CTS 241 (14 March 1884, in force 1 May 1888).

<sup>12</sup> Articles concerning the Law of the Sea with Commentaries, 1956 Yearbook of the International Law Commission ('ILCYB'), Vol. II (1956) 265, 278, para. 4 [1956 ILC Articles].

<sup>13</sup> *Convention on the High Seas*, adopted 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962); *Convention on the Continental Shelf*, adopted 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964); *Convention on the Territorial Sea and the Contiguous Zone*, adopted 29 April 1958, 15 UST 1606 (entry into force 10 September 1964).

which do not expressly refer to submarine cables or pipelines but may apply to them, will be considered in future reports.<sup>14</sup>

7. Further, the Interim Report analyses the relevant international case law (of which there is relatively little) and provides a preliminary survey of scholarly literature commenting on these provisions. Finally, some preliminary general (analytical) conclusions are drawn from these materials on the main issues that raise contestation or are subject to a lack of clarity and proposes where the Committee's future work may focus.
8. The Co-Rapporteurs have also undertaken preliminary research on State practice, including domestic legislation and domestic case law. This research is ongoing and has so far covered the practice of, *inter alia*, Australia, Belize, Greece, India, Indonesia, Malaysia, Singapore, United Kingdom and the USA. Committee Members are welcome to provide instances of State practice from their own (or other) jurisdictions—other than the ones provided illustratively above—so as to assist in making the research more complete. The next Report will address the practice of States parties and non-States parties to the LOSC.
9. As a general point, and as highlighted by Members of the Committee, submarine telecommunication cables, submarine power cables, and submarine pipelines differ in several important ways. While space constraints prohibit an in-depth discussion on this, some obvious differences include the size and imprint of submarine telecommunication cables, power cables and pipelines; the manner in which this infrastructure is installed and repaired (which may in turn vary greatly based on purpose, size and weight of infrastructure, tools and equipment used) and environmental and safety characteristics. In this regard, it must be mentioned that at the time of the law of the sea codification efforts by the ILC in the 1950s, submarine telephone cables (and its predecessor, the submarine telegraph cable) were actually in use and consequently regulated by international law as early as 1884. Submarine power cables and pipelines were not extensively utilized at the time and had not been the focus of much discussion under international law. This is discussed further in paragraphs 33–36 below. However, submarine cables (including both telecommunication cables and power cables) and pipelines were often considered together in the ILC discussions leading up to the adoption of the 1956 ILC Articles, as well as the negotiations at UNCLOS I and UNCLOS III.<sup>15</sup> Accordingly, with the exception of Articles 51, 79(2) and 145,<sup>16</sup> the LOSC addresses submarine cables and pipelines in the same articles. For this reason, this Report examines submarine cables and pipelines together so as to better understand the reasoning behind their common or divergent treatment.
10. On 5<sup>th</sup> April 2020, the Committee met virtually and discussed the draft Interim Report. Thereafter, the Co-Rapporteurs issued a new revised draft Interim Report on 30 June 2020 and invited the comments of the Members of the Committee. The discussion and comments by Members made during the 5<sup>th</sup> April meeting and subsequently after the revised draft Interim Report was issued are reflected in the present Interim Report.

## **B. Definitions**

11. The LOSC does not define or explicitly reference any type of submarine cable. However, the Commentary to Article 27(3) of the 1956 ILC Articles made it clear that 'submarine cables' applied not only to telegraph and

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<sup>14</sup> For example, Article 147 of the LOSC addresses "Accommodation of Activities in the Area and in the Marine Environment" which provides, *inter alia*, that "activities in the Area shall be carried out with reasonable regard for other activities in the marine environment," and "other activities in the marine environment shall be conducted with reasonable regard for activities in the Area." This article does not explicitly refer to submarine cables and pipelines but clearly has implications for activities related to submarine cables and pipelines in the Area. This article, along with other articles in the LOSC which do not mention submarine cables and pipelines, may be discussed in future reports.

<sup>15</sup> The reasons for this are discussed in paras. 33–36 below.

<sup>16</sup> Article 51 only addresses submarine cables but not pipelines; Article 79(2) differentiates between submarine cables and pipelines in that it explicitly recognises the coastal State's right to take reasonable measures for the prevention, reduction and control of pollution from pipelines only; Article 145 addresses pipelines only. For a discussion of these provisions, please refer to paras. 193–204 on Article 51; paras. 126–156 on Article 79; and paras. 112–125 on Article 145 below.

telephone cables but also to high-voltage power cables (see discussion in para. 36 below).<sup>17</sup> The LOSC refers to the breaking or injury of a submarine cable in such a manner as to interrupt or obstruct ‘telegraphic or telephonic communications’ as well as the breaking or injury of a ‘high-voltage power cable.’<sup>18</sup> Telegraph and telephone cables are the predecessors to modern-day submarine fibre optic communications cables which are currently in use.<sup>19</sup>

12. Similarly, there is no definition in the 1958 Geneva Conventions or the LOSC of ‘submarine pipelines’ or of ‘pipelines.’ Unlike the Commentary to Article 27(3) in the 1956 ILC Articles, which suggests that the term ‘submarine cables’ applies to telegraph and telephone cables, and high-voltage power cables, the ILC Articles did not define the term ‘pipelines’. It is likely that this omission reflects the belief that the term is self-evident. The Oxford English Dictionary defines the term ‘pipeline’ as ‘a long pipe [...] for conveying oil, gas etc. over long distances.’<sup>20</sup> Other treaties define the term ‘pipeline’ (or a composite term): the term ‘offshore pipelines’ in the OSPAR Convention means ‘any pipeline which has been placed in the maritime area for the purpose of offshore activities’ (Article 1(2)(m)).<sup>21</sup> The Energy Charter Treaty, whose material scope only covers ‘energy materials and products’, uses the following more precise descriptions of pipelines that fall within the wider term ‘energy transport facilities’: ‘high-pressure gas transmission pipelines, [...] crude oil transmission pipelines, coal slurry pipelines, oil product pipelines, and other fixed facilities specifically for handling Energy Materials and Products’ (Article 7(10)(b)).<sup>22</sup> The Virginia Commentaries on the LOSC note that the term ‘pipelines’ refers primarily to those carrying hydrocarbons (both oil and gas) but is not limited to those uses.<sup>23</sup> Other uses may include the carriage of fresh water or other material, such as waste.
13. Taking into account these definitions, for the purposes of this Interim Report, ‘*submarine communication cables*’ refer to submarine fibre optic cables used for the transmission of data in maritime spaces within and beyond national jurisdiction. It should be noted that submarine fibre optic cables are not only being used for telecommunications but are being employed for other purposes such as data collection for scientific purposes, military purposes or to provide communications for offshore oil and gas platforms.<sup>24</sup> Similarly, ‘*submarine power cables*’ refer to cables used for the transmission of electrical power or energy in maritime spaces within and beyond national jurisdiction. The term ‘*pipelines*’ means ‘any pipeline for the transmission of gas, crude oil and oil products, coal or water (or other materials) located in maritime spaces’.<sup>25</sup> The term ‘maritime spaces’ (as opposed to ‘under water’) is used in order to capture the narrow scope of the present report, which covers submarine cables and pipelines placed in maritime spaces within and beyond national jurisdiction thus being governed by the law of the sea, and does not include cables and pipelines placed in spaces (transboundary or not) such as lakes or rivers. The term ‘maritime spaces’ rather than ‘maritime areas’ is used to avoid any confusion with the term ‘Area’ defined in Article 1(1) LOSC.
14. A number of different activities relating to submarine cables and pipelines take place in maritime spaces. As mentioned in paragraph 9 above, activities relating to cables and to pipelines may vary greatly based on purpose, size and weight of infrastructure, tools and equipment used for installation and repair, and environmental and

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<sup>17</sup> See Commentary to Article 27(3), 1956 ILC Articles, *supra* note 12, 265, 278, para. 4.

<sup>18</sup> LOSC, Article 113, *supra* note 1.

<sup>19</sup> For a history of the development of submarine cables from its inception to current day: Stewart Ash, “The Development of Submarine Cables,” in D.R. Burnett *et al* (eds.), *Submarine Cables: The Handbook of Law and Policy* (2014), 19–40.

<sup>20</sup> Oxford English Dictionary Online (accessed 15 December 2019).

<sup>21</sup> *Convention for the Protection of the Marine Environment of the North-East Atlantic*, 22 February 1992, 2354 UNTS 67.

<sup>22</sup> The Energy Charter Treaty (with annexes) (done 17 December 1994, entered into force 16 April 1998), 2080 UNTS 95, as amended by the Final Act of the International Conference and Decision by the Energy Charter Conference in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, Annex 1 (adopted 24 April 1998, entered into force 21 January 2010).

<sup>23</sup> S.N. Nandan and S. Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. III (1995), 82 at para. 87.9(e) (Nandan *et al*, Vol. III).

<sup>24</sup> For more details, see Chapters 14, 15 and 16, in D.R. Burnett *et al* (eds), *Submarine Cables: The Handbook of Law and Policy* (2014).

<sup>25</sup> G.K. Walker, *Definitions for the Law of the Sea: Terms not Defined by the 1982 Convention* (2012), at 310–315.

safety characteristics. However, for ease of reference solely for the purpose of this Interim Report, these activities are described as ‘activities relating to cables and pipelines,’ and consist of the following:<sup>26</sup> (a) surveying of submarine cable and pipeline routes;<sup>27</sup> (b) the laying of submarine cables and pipelines; (c) drilling for the purposes of laying submarine cables and pipelines;<sup>28</sup> (d) burial of submarine cables and pipelines; (e) securing of submarine cables and pipelines to the seabed;<sup>29</sup> (f) operation of submarine cables and pipelines; (g) repair and maintenance of cables and pipelines;<sup>30</sup> and (h) abandonment or removal of submarine cables and pipelines after a decision has been made to withdraw them from service.<sup>31</sup>

## II. INTERNATIONAL LAW ON SUBMARINE CABLES AND PIPELINES

15. International law governing submarine cables and pipelines consists of various treaties and rules of customary international law. For present purposes, as explained in paragraph 5 above, this Report focuses on treaties—albeit where there is evidence, it also addresses customary international law—and specifically on the LOSC and discusses key law of the sea treaties that apply to submarine cables and pipelines in order to better map the legislative history of the LOSC. For completeness, the annex to the Interim Report provides a non-exhaustive list of treaties that may apply to submarine cables and/or pipelines consisting of (a) treaties exclusively addressing submarine cables; (b) treaties exclusively addressing submarine pipelines (or also applying only to pipelines); and (c) treaties applying to both submarine cables and pipelines.
16. The Report’s sections on ‘legislative history’ of the LOSC cover (a) the negotiations and regime of the 1884 Convention (where applicable); (b) the ILC’s work leading to the adoption of the 1956 ILC Articles; (c) negotiations at UNCLOS I leading to the adoption of the 1958 Geneva Convention on the High Seas (1958 HSC) and the 1958 Geneva Convention on the Continental Shelf (1958 CSC); and (d) the negotiations at the Sea-Bed Committee and UNCLOS III. The 1884 Convention, which is in force as between its parties at the time of writing this Interim Report,<sup>32</sup> is the first convention on the protection of submarine telegraph cables.<sup>33</sup> Because three of its provisions (Articles II, IV and VII) have been used as the basis for the 1956 ILC Articles and in the negotiations of the 1958 HSC and LOSC, they form part of the ‘legislative history’ of the HSC and LOSC.
17. Before examining the relevant articles of the LOSC, the analysis in this Report addresses four systemic themes that cut across the LOSC provisions, and which warrant further in-depth discussion that go beyond the scope this Interim Report. These systemic themes are discussed here, as well as whenever they arise in relevant provisions examined in detail in Parts II (B)–(G) of the Interim Report.

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<sup>26</sup> Individual activities described in (a)–(e) may not occur in each and every life cycle of a submarine cable or pipeline.

<sup>27</sup> For the surveying of cable routes, a desktop survey is first developed by reviewing scientific and grey literature, fault rates of previous cables in the area, detailed nautical and bathymetric data, and fisheries and shipping information. Thereafter, a survey vessel is sent to verify the route identified by the Desktop Survey, using an array of technologies to identify potential hazards and further refine the Desktop Survey. These technologies include multi-beam echo sounders, side-scan sonar, sub-bottom profilers, magnetometers, seismic profiling and seabed mapping systems (the latter is used to accurately chart depth, topography, slope angles and seabed type).

<sup>28</sup> Laying of cables and pipelines may in certain circumstances require horizontal directional drilling in order to land the cables on shore.

<sup>29</sup> Submarine cables may be secured against displacement by waves, currents, or sediments, such as traversing a reef passage entering a lagoon. Pipelines may be similarly secured where trenching and partial or full burial is not feasible.

<sup>30</sup> The laying, repair and maintenance of cables and pipelines, as well as their removal, are carried out by specialized vessels with specially trained crew.

<sup>31</sup> In the second round of comments by Committee Members, some Members pointed out that after a decision has been made to withdraw a submarine cable from service, submarine cables owners recover and recycle submarine cables for other purposes and this may involve the reinstallation of out-of service cables in new geographic locations. This was not subject to detailed discussion by the Committee but may be the subject of greater analysis in future reports.

<sup>32</sup> For a list of States Parties to the 1884 Convention, please see the Treaty Database of the Treaty of Netherlands, available at <https://verdragenbank.overheid.nl/en/Verdrag/Details/001885.html>.

<sup>33</sup> Its adoption was prompted by complaints of British cable companies to the British government in 1881 after several telegraphic cables had been damaged in the North Sea by the negligence of fishermen. A. Leonard de Juvigny (now Colarossi), ‘How to Achieve the Missed Goals of the 1884 Convention for the Protection of Submarine Telecommunication Cables’ (unpublished work in progress, copy with one of co-rapporteurs).

## A. Systemic Themes That Cut Across the LOSC Provisions

### i. *Regulating Different Activities Relating to Submarine Cables and Pipelines*

18. Different LOSC provisions refer to different activities relating to submarine cables and pipelines. For instance, Articles 87(1)(c) and 112(1) refer only to laying of submarine cables and pipelines; Article 145(a) refers to “drilling, dredging, excavation, disposal of waste, construction, operation or maintenance of...pipelines;” Articles 79(1), (2) and (5) refer to laying, maintenance and repair of submarine cables and pipelines; Article 58(1) refers to both laying and operation of submarine cables and pipelines; Article 51(2) refers to repair, maintenance and replacement of cables only. Of the activities relating to submarine cables and pipelines described in paragraph 14 of this Interim Report, surveys, drilling for purposes of laying submarine cables and pipelines, burial of submarine cables and pipelines, securing of submarine cables and pipelines to the seabed and abandonment or removal of submarine cables and pipelines are not expressly mentioned in the LOSC. This varying approach vis-à-vis the activities relating to submarine cables and pipelines raises a question about the material scope of each right and obligation under the LOSC: are all or some activities included or excluded from the scope of each provision? For instance, while Article 87 refers to laying, Articles 79(2) and (5) refer to maintenance and repair: does this entail an argument in favour or an argument *a contrario* about the meaning of the term ‘laying’ in Article 87 and the scope of Article 87? This question can be answered through treaty interpretation. In this regard, the Committee’s assumption has been that not all LOSC provisions necessarily include all activities relating to cables and pipelines (as described in paragraph 14 above). Even if all or some of them do, the interpretative method and reasoning for determining that the scope of a LOSC provision encompasses other activities relating to cables and pipelines, and if so which ones, will differ depending on a variety of factors, including the terms of the provision in question, whether the activity relates to a submarine cable or pipeline, the activity itself as well as the maritime space in which such activity takes place. The following sub-paragraphs set out some illustrative examples on how this interpretative method and reasoning may work as well as some difficulties which may arise, subject to the caveat that the Committee takes no position on these issues at the moment and that these matters warrant further discussion in future reports:

- (a) With regard to the surveying of submarine cable and pipeline routes, Articles 87, 112 and 79 refer to laying of cables and pipelines. Surveys for laying are *necessary* in order for laying to take place: if surveys for laying were not included in the freedom of laying, the latter would be defeated and would be meaningless. Thus, the effective interpretation of this provision calls for surveys to be part of the freedom to lay cables and pipelines – a matter that will be considered in further detail in future reports.
- (b) With regard to drilling for the purpose of the laying of submarine cables and pipelines, a similar argument could be made. In the event drilling does occur in the continental shelf or in the seabed of the high seas for purposes of laying submarine cables or pipelines, one could argue that it is *necessary* in order for laying to take place and thus included in the freedom or entitlement to lay cables and pipelines. On the other hand, drilling for the purpose of laying cables and pipelines in the continental shelf clearly falls within the exclusive right of the coastal State “to authorize and regulate drilling on the continental shelf for *all purposes*.”<sup>34</sup> Thus, drilling for purposes of laying submarine cables and pipelines may be part of the freedom to lay submarine cables and pipelines in the high seas (excluding pipelines used for activities in the Area<sup>35</sup>) but not included in the a State’s entitlement to lay submarine cables and pipelines in the continental shelf, again a matter that warrants further analysis.
- (c) With regard to the operation, repair and maintenance of cables and pipelines, the same reasoning used to argue that surveys are included in the laying of cables and pipelines (effective interpretation) may not necessarily work. Operation, repair and maintenance are implicitly included in the Article 87 freedom to lay submarine cables and pipelines because the *purpose* of laying in Article 87 is the *operation* of the cable or

<sup>34</sup> LOSC, Article 81, *supra* note 1.

<sup>35</sup> See discussion in paras. 112–125 below.

pipeline. On the basis of this, operation is thus covered by the freedom to lay cables and pipelines, and although repair and maintenance of the cable or pipeline may not be necessary for their laying (repair and maintenance happens after the laying of cables and pipelines), repair and maintenance are necessary for the *operation* of cables and pipelines, i.e., these activities are necessary in order to achieve the *purpose* of the freedom of laying (which is the operation of cables and pipelines). For these reasons, it can be said that the Article 87 freedom to lay submarine cables and pipelines also encompasses operation, repair, and maintenance.

- (d) With regard to the burial of submarine cables and pipelines and the securing of submarine cables and pipelines to the seabed, an analogous argument to repair and maintenance above could be made. Both burial and the securing of submarine cables and pipelines are done for the protection of submarine cables and pipelines and are necessary in order to achieve the purpose of the freedom of laying, i.e., the operation of submarine cables and pipelines.
- (e) With regard to the abandonment or removal of submarine cables and pipelines after a decision has been made to withdraw them from service, similar interpretative arguments could be made albeit the strength of such arguments may be contested. For example, the laying of submarine cables and pipelines may be meaningful and occur without the abandonment or removal of such submarine cables and pipelines, and further, that abandonment or removal are not necessary *per se* for the operation of submarine cables and pipelines. It could also be argued that (and particularly in relation to the abandonment or removal of submarine pipelines), that these activities were intended to fall within the jurisdiction of the coastal State in both its continental shelf [LOSC, Article 79(2)] and EEZ [LOSC, Article 56(b)(iii)] as it relates to the prevention of pollution of the marine environment.

**ii. *Who Are the Holders of Rights and Freedoms Relating to Submarine Cables and Pipelines?***

- 19. A crucial question for theory and practice is who are the holders of the freedom to lay submarine cables and pipelines, and more particularly whether individuals acquire and enjoy this freedom directly under international law. This issue was extensively discussed among Committee members. While there was some concern as to whether this issue was merely academic for government officials, representatives of the industry were of the opposite view. Further, some literature<sup>36</sup> (and a minority of Committee members) supported the argument that individuals directly acquired rights under the LOSC (and custom set forth therein) to lay cables and pipelines, such as under the rule established in LOSC Articles 87 and 112, primarily on the basis of two trains of thought: first, these treaty provisions are self-executing in domestic law; second, private entities have been laying cables and pipelines and have been conducting related activities for years and States have not objected. The overwhelming majority of the Committee considered that individuals do not acquire these rights under international law. The Committee's reasoning is summarised in the following paragraphs, along with the analysis provided by the Co-Rapporteurs.
- 20. Whether a treaty is self-executing concerns the question of whether a treaty provision, but for which no implementing domestic legislation has been adopted (or where implementing legislation is insufficient or otherwise not in conformity with the treaty provision), can be applied by domestic courts. This is a domestic law matter. Further, in relation to the separate argument that States may have permitted individuals to conduct certain activities on the high seas or in areas within national jurisdiction does not *necessarily* mean that the State in question has established individuals' rights under international law. For one thing, this permission may entail that States have permitted individuals under their jurisdiction to conduct themselves in accordance with what international law permits (or requires) States to do: rights or obligations under international law are those of States, and the rights of individuals rest on the domestic law implementation of the freedoms or rights of States. In *Costa Rica v. Nicaragua* (2009), the International Court of Justice ('ICJ') faced a case where the parties to the dispute agreed that the practice of inhabitants of the Costa Rican bank of the San Juan river fishing for subsistence

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<sup>36</sup> See discussion in para. 69 below.



is long established. However, they disagreed about whether ‘the practice has become binding on Nicaragua thereby entitling the riparians as a matter of customary right to engage in subsistence fishing from the bank.’<sup>37</sup> The ICJ considered that ‘the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant. *The Court accordingly concludes that Costa Rica has a customary right.*’<sup>38</sup> The ICJ did not consider that the practice of individuals (nationals of another State in the territory of another State) created a right of these individuals directly under international law. Rather, it found that such a customary right existed for their State of nationality–Costa Rica. Similarly, the practice of entities undertaking activities relating to submarine cables and pipelines (whose conduct is not attributed to the State) on the high seas does not necessarily prove that these entities have a right under treaty or custom. Rather, such practice may instead support the existence of a right of States (which in turn permit these entities to exercise that right).

21. Instead, the following (persuasive) arguments can be made in favour of the position that only States Parties to the LOSC are holders of the freedom of laying submarine cables and pipelines under the LOSC.<sup>39</sup>
22. First, the Advisory Opinion of the Permanent Court of International Justice (PCIJ) in *Jurisdiction of the Courts of Danzig* may serve as a point of departure for an analogy regarding the question whether the individual, including a corporation, can be a bearer of international rights and obligations. The main question in this case was whether an international agreement between Poland and the City of Danzig (under international regime at the time), conferred upon Danzig railway officials a right of action against the Polish Railway Administration for the recovery of pecuniary claims. The PCIJ upheld that ‘according to a well-established principle of international law, [...] an international agreement, cannot, as such, create direct rights and obligations for private individuals.’<sup>40</sup> However, the very *object of an international agreement*, according to the *intention* of the contracting Parties, may be the adoption of some *definite rules creating individual rights and obligations* and enforceable by the national courts.<sup>41</sup> The PCIJ did not accept that individuals are in all circumstances unable to be holders of international rights (and bearers of such obligations). It accepted that a treaty may establish such rights (and obligations), under the condition that this is the intention of the treaty parties. This passage has brought about some confusion, because it refers to enforceability before domestic courts, which may suggest that in order for a treaty to create rights for individuals, self-execution of the particular provisions of the treaty invoked before domestic courts is a requirement (or evidence of a right under international law). Another interpretation is that by Anzilotti who viewed this passage as unsupportive of the argument that a treaty can confer rights or impose obligations on individuals *per se* under international law, because the Court referred to rights ‘enforceable by the national courts.’<sup>42</sup> On the other hand, Lauterpacht focused on the Court’s requirement that the treaty’s object is to create rights of individuals directly under international law.<sup>43</sup>
23. Second, that the intention of the parties is to create rights on individuals is consistent with the current structure of the law of treaties. Treaties cannot create rights or obligations for third States, unless the intention of the parties has been to create such rights and obligations and third States have consented to such rights and obligations (Articles 34–36, Vienna Convention on the Law of Treaties).<sup>44</sup> Conscious of the difference between the rights/obligations of third States vis-à-vis treaties and rights/obligations of individuals, an analogy may be drawn in the sense that the question is about whether and under which conditions non-parties to treaties may

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<sup>37</sup> *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, ICJ Reports (2009), para. 141.

<sup>38</sup> *Ibid* (emphasis added).

<sup>39</sup> The freedom to lay submarine cables and pipelines also exists under customary international law and third States vis-a-vis LOSC are also entitled to exercise this freedom. The crucial point here is that States and not individuals are right holders of this specific freedom which also finds treaty reflection in LOSC.

<sup>40</sup> *Jurisdiction of the Courts of Danzig* (Advisory Opinion) [1928] PCIJ Rep, Series B 15, p. 17.

<sup>41</sup> *Ibid*, 17–18.

<sup>42</sup> D. Anzilotti, *Cours de droit international* (1929), 407.

<sup>43</sup> H. Lauterpacht, *Le Development of International Law by the Permanent Court of International Justice* (1934), 51.

<sup>44</sup> *Vienna Convention on the Law of Treaties* (adopted 23 May 1969), 1155 UNTS 331 (entered into force 27 Jan 1980).

acquire rights/obligations. As a bare minimum, the intention of the treaty parties is a requirement for the creation of rights and obligations for third States; this should also be a requirement if individuals are to acquire rights and/or obligations under a treaty. This proposition is consistent with the structure of the existing law of treaties.

24. Third, international investment arbitration decisions made under treaties between States concerning the protection of foreign investment may provide some guidance by analogy about the question as to whether individuals acquire rights under the LOSC. In three investor-State arbitrations under Chapter XI of NAFTA brought by US investors against Mexico, Mexico argued as a defence that it did not comply with its investment protection obligations under NAFTA as a countermeasure against the US, the State of nationality of the investors that were Claimants, because the US had first violated the trade obligations under NAFTA. In *ADM v. Mexico* (2007), one of the Claimants' arguments was that Mexico's measures impaired their 'individual substantive rights' under Chapter XI of NAFTA, which provides substantive and procedural rights for investors independent from the inter-State relationship between NAFTA's treaty parties.<sup>45</sup> The Tribunal found that Chapter XI sets forth substantive obligations that are inter-State and do not confer substantive rights to individuals. It considered that this position 'respects the traditional structure of international law and the *object and purpose* of Chapter Eleven,'<sup>46</sup> and that the correct interpretation of NAFTA, including by examining the subsequent practice of its treaty parties, is that it only confers a right of action against a State (a procedural right) under investor-State arbitration.<sup>47</sup> In *Corn Products v. Mexico* (2008),<sup>48</sup> the claimant objected to the invocation of countermeasures, including by arguing that Chapter XI of NAFTA conferred rights to the investors which were separate and distinct from the rights and obligations of the US,<sup>49</sup> and thus countermeasures that affect these rights are unlawful under custom because the wrongfulness of countermeasures is only precluded *vis-à-vis* the responsible State against which countermeasures are targeted, not *vis-à-vis* third parties whose rights (rather than mere benefits) have been affected by such countermeasures. The Tribunal found that since the investor acquires substantive and procedural rights (not mere interests) under NAFTA Chapter XI, the wrongfulness of Mexico's violations cannot be precluded *vis-à-vis* the investors. More specifically, its reasoning was that 'States are not the only entities which can hold rights under international law; individuals and corporations may also possess rights under international law. *In the case of rights said to be derived from a treaty, the question will be whether the text of the treaty reveals an intention to confer rights not only upon the Parties thereto but also upon individuals and/or corporations.*'<sup>50</sup> It considered that '*the intention of the Parties was to confer substantive rights directly upon investors. That follows from the language used and is confirmed by the fact that Chapter XI confers procedural rights upon them.*'<sup>51</sup> Finally, in *Cargill v. Mexico* (2009),<sup>52</sup> the Tribunal found that investors acquire rights directly under NAFTA and for this reason, countermeasures cannot preclude the wrongfulness of actions in respect of a claim asserted under Chapter XI of NAFTA by a national of the allegedly offending State.<sup>53</sup> More specifically, the Tribunal reasoned that '*the rights of investors under Chapter 11 derive from the agreement of the State Parties and that they may to some extent, at least as far as the reach of Chapter 11, be dependent on the continuation of that agreement. [...] Chapter 11 creates a framework within which it is the investor that acts upon and benefits from the obligations which are set forth in Chapter 11.*'<sup>54</sup> Although the Tribunal in *Cargill v. Mexico* did not specify how such an agreement was to be identified, the Tribunals in *ADM v. Mexico* and *Corn Products v. Mexico* both implicitly considered that this is a matter of treaty interpretation. *ADM v. Mexico* focused on the

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<sup>45</sup> Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, para. 161.

<sup>46</sup> *Ibid*, para. 168 (emphasis added).

<sup>47</sup> *Ibid*, paras. 171-179.

<sup>48</sup> *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/1), Decision on Responsibility, 15 January 2008.

<sup>49</sup> *Ibid*, para. 72.

<sup>50</sup> *Ibid*, para. 168 (emphasis added).

<sup>51</sup> *Ibid*, para. 169 (emphasis added).

<sup>52</sup> *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) (A NAFTA Chapter 11 Arbitration under the UNCITRAL Arbitration Rules before the ICSID Additional Facility), Final Award, 18 September 2009.

<sup>53</sup> *Ibid*, para. 429.

<sup>54</sup> *Ibid*, para. 426.

object and purpose of Chapter XI of NAFTA and the subsequent practice of its parties, while *Corn Products v. Mexico* focused on the treaty text. But, all three Tribunals considered that the agreement of treaty parties reflecting their intention can be constitutive of rights of individuals under the treaty in question.

25. Fourth, the practice of one LOSC party confirms the interpretation that some LOSC provisions do not establish rights for individuals. In *Intertanko* (2008), the European Court of Justice found that under numerous LOSC provisions concerning navigation individuals are not granted rights.<sup>55</sup> The Court's pronouncement concerning freedom of navigation, which to some extent is *structurally* similar to that of the freedom to lay submarine cables and pipelines, may *by analogy* support the position taken here that the LOSC freedom to lay submarine cables and pipelines is not conferred on individuals.

26. On the basis of this reasoning, the following sections in Part II (B)–(G) below demonstrate that there is no evidence in the preparatory works or the LOSC provisions themselves that the LOSC provisions examined here establish rights (directly under the LOSC) of individuals involved in activities relating to submarine cables and pipelines.

**iii. Obligation of 'Due Regard'**

27. It is the understanding of the Committee that the term 'due regard' in different LOSC provisions is intended to have the same meaning unless there is any evidence provided to the contrary. However, the scope of each obligation of due regard changes depending on each provision's additional terms *vis-à-vis* what due regard is to be paid. This will be elaborated on in paragraphs 41–47 below.

**iv. Issues of State Jurisdiction**

28. As alluded to in paragraph 3, numerous questions arise concerning the exercise of extraterritorial jurisdiction of States, which have not been addressed during the negotiations of the LOSC, in international case law or by publicists, and which relate to cable and pipeline activities beyond and within national jurisdiction. Due to constraints of space, these questions can only be sketched out in general terms:

(a) which State may be able to exercise such jurisdiction on the basis of active nationality? Is it the State of nationality of the owner or operator of the cable or pipeline (which may be a single company or a consortium of several different companies incorporated in different States) or of the installer, or any State in which the submarine cable or pipeline lands, depending on the activity taking place? Further, with regard to activities that are conducted by vessels (including surveys for laying of cables and pipelines, drilling for laying of cables and pipelines, actual laying and repair and maintenance), does the flag State of that vessel exercise jurisdiction or does the State of nationality of the installer company (for instance) exercise jurisdiction? Or are they both concurrently exercising jurisdiction? Another option may be to take a functional approach: when the vessel navigates, flag State may have jurisdiction; when anchored and operating as a platform or when it operates exclusively as a means for conducting the laying or repair or maintenance activities, then perhaps the State of nationality of the operator, installer etc. may have jurisdiction. Or even a different alternative may be taken in relation to issues strictly concerning the vessel—the flag State has jurisdiction; but for other matters, the State of nationality of installer or owner has jurisdiction.

(b) Are there restrictions to establishing nationality?

(c) Is nationality the only criterion for a link between the State and the private entity that benefits from that State's freedom (and faces limitations on the basis of the duties of the State)?

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<sup>55</sup> Case C-308/06, *International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Committee, Lloyd's Register, International Salvage Union, v Secretary of State for Transport*, Judgment (Grand Chamber), 3 June 2008, para. 59.

29. The Committee has not taken a position on this matter in this Interim Report. However, the Co-Rapporteurs have flagged that these issues call for further consideration in future reports, while making sure that these questions are taken into account in the examination of each LOSC provision examined below with a view to understanding whether the provisions and their preparatory works (as well as international case law and literature) address the above questions or may support any of these options discussed in paragraph 28 above. It can be concluded that the following analysis does not provide any evidence that answers the above questions or favours any of the above options.

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30. The following sections are devoted to the examination of LOSC provisions and the main issues that have arisen, taking into account the preparatory works, international jurisprudence and scholarly literature.

## B. The High Seas

### i. Article 87(1)(c) LOSC

31. Article 87(1)(c) includes the freedom to lay submarine cables and pipelines, subject to Part VI of LOSC (Continental Shelf), among the freedoms of the high seas. The provision reads:

#### Article 87

##### *Freedom of the high seas*

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States: [...]

(c) freedom to lay submarine cables and pipelines, subject to Part VI; [...]

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

#### *Legislative History*

32. **1884 Convention:** It has been argued that the 1884 Convention did not include a provision comparable to Article 87(1)(c) LOSC because it was “evident that freedom of use was conceded by all.”<sup>56</sup> In any event, Article I of the 1884 Convention provided that the Convention applies “outside territorial waters to all legally established submarine cables landed on the territories, colonies or possessions of one or more of the High Contracting Parties.” In 1927, *the Institut de Droit International* recognized that freedom of the high seas includes the freedom to lay submarine cables.<sup>57</sup>

33. **ILC:** In his 1949 Report, the ILC Special Rapporteur for the High Seas, J.P.A. François, observed that the legal problems arising in connexion with submarine telegraph cables did not present any real difficulties except regarding their protection on the high seas.<sup>58</sup> Interested States were unable to ensure the effective protection of submarine telegraph cables except by adopting regulations *vis-à-vis* their own vessels and States should be asked whether they wish to rely on provisions in the 1884 Convention or whether such provisions should be modified.<sup>59</sup> Subsequently, in the 1950 session of the ILC, it was recognized that all States were entitled to lay submarine

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<sup>56</sup> Myres S. McDougal and William T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (1962), 781.

<sup>57</sup> Institut De Droit International, *Annuaire* 1927, Tome III, p 339.

<sup>58</sup> First Report of JPA François, Special Rapporteur, Regime of the High Seas, ILCYB, Vol. II (1950), Doc. A/CN.4/17, 42.

<sup>59</sup> *Ibid.*

telegraph and telephone cables on the high seas<sup>60</sup> on the basis that this right had not been questioned and was admitted by writers.<sup>61</sup>

34. Pipelines were not regulated by dedicated treaties prior to the ILC's work on the law of the sea. In 1950, the ILC stated that the freedom to lay submarine cables should apply to pipelines (although there was debate about whether laying of pipelines was part of State practice).<sup>62</sup> It has been suggested that this coupling of cables and pipelines was because the ILC saw both pipelines and cables as a means of communication.<sup>63</sup>
35. The ILC initially viewed the legal regime governing submarine cables to be confined to only submarine telegraph cables and/or telephone cables. However, in 1954, the first submarine high voltage direct cable (HVDC) was installed by Sweden between its mainland and the island of Gotland.<sup>64</sup> In 1956, Sweden, Norway and the United Kingdom (UK) observed that 'with modern technical resources, it was also possible to transmit electric power under the sea by high tension cables.'<sup>65</sup> It was therefore proposed that the words "high tension power cable" be added to the 1956 ILC Articles.
36. Article 27(3) of the 1956 ILC Articles provides that freedom of the high seas comprises, *inter alia*, the freedom to lay submarine cables and pipelines. The accompanying commentary notes that the term 'submarine cables' applies not only to telegraph and telephone cables but also to high voltage power cables.<sup>66</sup>
37. **UNCLOS I:** In Article 2(3) of the HSC, the core of the text of Article 27(3) of the 1956 ILC Articles was retained with some additions. Article 2(3) reads:

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States: [...]

(3) Freedom to lay submarine cables and pipelines;

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

38. The sentence '**under** the conditions laid down by these articles and by the other rules of international law' was derived from the ILC's commentary and Article 1(2) of the 1956 ILC Articles, concerning the territorial sea.<sup>67</sup> This proposal was supported on the grounds that 'any freedom that was to be exercised in the interests of all

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<sup>60</sup> Report of the ILC on its Second Session, Official Records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316), Doc. No A/CN.4/34 (1950), 384.

<sup>61</sup> Summary Records of the Second Session, 5 June–29 July 1950, ILCYB Vol. I (1950), Doc. A/CN.4/Ser.A/1950, 199.

<sup>62</sup> Report of the ILC to the General Assembly, Doc. A/131/6, July 1950, ILCYB, Vol. II, (1950), Doc. A/CN.4/SER.A/1950.Add.1, 384; Summary Records of the Second Session, 5 June–29 July, ILCYB, Vol. I (1950), Doc. CAN.4/SER.A/1950, 199. Hudson noted that pipelines were very important and during World War II one ran between England and France.

<sup>63</sup> R. Lagoni, "Pipelines," in R. Wolfrum (ed). *Max Planck Encyclopedia of International Law (Online)* (April 2011), para. 9 (Lagoni 2011).

<sup>64</sup> R. Lagoni, *Aspects of Submarine High Voltage Direct Current (HVDC) Cables* (1998), at 2 (Lagoni 1998).

<sup>65</sup> Summary of Replies from Governments and Conclusions of the Special Rapporteur, 1 May 1956, ILCYB, Vol. II (1956), Doc. A/CN.4/SER.A/1956/Add.1), 21, para. 180.

<sup>66</sup> 1956 ILC Articles, Commentary to Article 27, *supra* note 12, 278.

<sup>67</sup> Summary Records of Meetings and Annexes, UNCLOS I, Official Records, Vol. IV, Doc. A/CONF.13/40 (1958), 37.

entitled to enjoy it must be regulated'<sup>68</sup> and that 'freedom of the high seas should be made subject to the articles of the convention and the other rules of international law.'<sup>69</sup>

39. The wording 'both for coastal and for non-coastal States' was also added. Further, the final paragraph was added, which introduced a 'reasonable regard' requirement in the exercise of the freedoms of the high seas, including the freedom to lay submarine cables and pipelines. This insertion was proposed by the UK,<sup>70</sup> and was seen as implicit in the analysis in the ILC's commentary to Article 27(3).<sup>71</sup> More specifically, the explanation in paragraph 1 of the commentary was that 'States are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other States.' In a similar vein, paragraph 5 of the commentary to Article 27 provides that '[a]ny freedom that is to be exercised in the interests of all entitled to enjoy it, must be regulated' and 'the law of the high seas contains certain rules ... which are designed, not to limit or restrict the freedom of the high seas, but to safeguard its exercise in the interests of the entire international community.'<sup>72</sup>
40. **UNCLOS III:** The LOSC underwent several minor changes from Article 2(3) HSC to Article 87(1)(c). Article 87(1)(c) subjects States' freedom to lay cables and pipelines to Part VI on the continental shelf (which includes Article 79 discussed below).<sup>73</sup> Further, Article 87(2) LOSC is based on Article 2 HSC. During the negotiations of the LOSC, 'reasonable regard' was changed to 'due consideration' in 1975, and was eventually changed to 'due regard' on the recommendation of the Drafting Committee.<sup>74</sup> This change stemmed from the belief that 'reasonable regard' (Article 2(3) HSC) was a vague and subjective term.<sup>75</sup> Further, the language in Article 87(2) accommodated the establishment of the new regime of the Area in the LOSC.

#### *International Case Law*

41. There is no international case law that deals specifically with the freedom to lay cables and pipelines on the high seas (or specifically Article 2(3) HSC or Article 87(1)(c) LOSC). It may be possible to draw some conclusions from the reasoning of international courts and tribunals concerning other high seas freedoms, and the 'reasonable regard' and 'due regard' rules that also apply to the freedom to lay cables and pipelines (under the HSC and LOSC respectively).
42. In the 1974 *Fisheries Jurisdiction case (United Kingdom v. Iceland)*, the ICJ considered the meaning of 'reasonable regard' reflected in Article 2 HSC (the 'predecessor' to the due regard obligation in Article 87(2) LOSC). The ICJ found that Iceland's unilateral action in extending its fishing limits and the manner of implementation of such limits, violated the principle of reasonable regard in Article 2.<sup>76</sup> Iceland's preferential fishing rights (as a State especially dependent on coastal fisheries) and UK's historic or traditional fishing rights according to the Court must be 'reconciled,'<sup>77</sup> and must continue to co-exist.<sup>78</sup> Neither right is absolute<sup>79</sup> and 'both States have an obligation to take full account of each other's rights and of any fishery conservation measures the necessity of which is shown to exist in those waters.'<sup>80</sup> According to the Court, the most appropriate

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<sup>68</sup> *Ibid.*, 39.

<sup>69</sup> *Ibid.*, 42–43.

<sup>70</sup> UNCLOS I, Official Records (Vol. VII) (adopted by vote 30 to 18, 9 abstentions), A/CONF.13/C.2/L.68 (1958), 134.

<sup>71</sup> Summary Records of the 16th to 20th Meetings of the Second Committee, UNCLOS I, Official Records, Vol. IV A/CONF.13/C.2/SR.16–20, 54–55, para. 8.

<sup>72</sup> Commentary to Article 27, ILC Articles on the Law of the Sea, *supra* note 12, 278.

<sup>73</sup> Nandan et al, Vol III, *supra* note 23, 262, para. 112.1.

<sup>74</sup> Nandan et al, *ibid.*, 80, para. 87.8.

<sup>75</sup> D. Guilfoyle, "Article 87: Freedom of the High Seas" in A. Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (2017), 678, 680. It is suggested that 'the vagueness of the word "reasonable" had attracted criticism and was strongly associated with McDougal and the New Haven School and: in particular it was not thought to provide a stable criterion or check against subjective determinations of the permissibility of certain activities such as weapons testing.'

<sup>76</sup> *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, [1974] I.C.J Rep. 3, para. 67.

<sup>77</sup> *Ibid.*, para. 69.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, para. 71.

<sup>80</sup> *Ibid.*, para. 72.

method for dispute resolution was negotiation<sup>81</sup> and the parties should conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal right of the other, to the facts of the particular situation and the interests of other States with established fishing rights in the area.<sup>82</sup>

43. The 2015 *Chagos Archipelago Arbitration (Mauritius v. United Kingdom)* pronounced that the terms ‘under the conditions laid down by [...] other rules of international law’ in Article 87(1) is identical to Article 2(3), concerning the territorial sea, and any interpretation the Annex VII Arbitral Tribunal may reach regarding the scope of obligation embodied in the latter provision would apply equally to the former. The Tribunal found that the preparatory works of Article 87(1) LOSC demonstrate that ‘[the insertion of ‘under the conditions laid down by these articles and by the other rules of international law’] constituted a restriction on the freedom of the seas.’<sup>83</sup> It also found that ‘[t]here is no indication that through [Article 1(2) which was identical to 87(1) and on which LOSC negotiators based the language in 87(1)] the [ILC] intended to create an obligation of compliance with any bilateral commitment [...] in the territorial sea, nor is there any basis to assume that the intent of the provision changed between the [ILC] Articles and the [LOSC adoption]’.<sup>84</sup> The Tribunal concluded that the obligation in Article 2(3) LOSC is limited to exercising sovereignty subject to the *general* rules of international law,<sup>85</sup> and that general international law requires a LOSC party to act in good faith in its relations with other LOSC parties, including with respect to bilateral agreements or unilateral undertakings.<sup>86</sup> By analogy, this reasoning may inform the meaning of ‘exercised under the conditions laid down by [...] other rules of international law’ (Article 87(1) LOSC) to suggest that LOSC parties are obliged to comply with general international law rules that apply in the high seas and to act in good faith in their relations with other LOSC parties, including with respect to bilateral agreements or unilateral undertakings.

44. Regarding ‘due regard,’ the *Chagos Archipelago Arbitration* was concerned with ‘due regard’ specifically in Article 56(2) LOSC. The Tribunal’s reasoning may provide some guidance by analogy here. The Tribunal found that the ordinary meaning of ‘due regard’ calls for the UK:

to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights. The Tribunal *declines to find in this formulation any universal rule of conduct*. The Convention *does not impose a uniform obligation to avoid any impairment of Mauritius’ rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights*. Rather, *the extent of the regard required by the Convention will depend upon 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. In the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State.*<sup>87</sup>

45. The Tribunal concluded that the obligation of ‘due regard’ in Article 56(2) required both consultations with the State whose rights and interests are to be affected (with provision of information to the other State and a reasonable exchange between them), as well as a balancing exercise between the rights and interests of the bearer of the obligation and those of the other States (which requires some compromise and willingness to offer assurances, but not a presumption that unilateral decision-making is to the interest of the States).<sup>88</sup>

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<sup>81</sup> *Ibid*, para 73.

<sup>82</sup> *Ibid*, para. 78.

<sup>83</sup> *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, available at: <http://www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf>, para. 513.

<sup>84</sup> *Ibid*, para. 516.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Ibid*, para. 517.

<sup>87</sup> *Ibid*, para. 519 (emphasis added).

<sup>88</sup> *Ibid*, para. 534.

46. In the 2016 *South China Sea Arbitration (Philippines v. China)*, the Annex VII Arbitral Tribunal had to consider whether the actions of the Chinese Government in escorting and protecting Chinese fishing vessels while fishing in the EEZ of the Philippines was a breach of the obligation to have due regard to the rights of the Philippines under Article 58(3) LOSC. The Tribunal found that:

[...] China, through the operation of its marine surveillance vessels in tolerating and failing to exercise due diligence to prevent fishing by Chinese flagged vessels at Mischief Reef and Second Thomas Shoal in May 2013 failed to exhibit ‘due regard’ for the Philippines sovereign rights with respect to fisheries in its exclusive economic zone. Accordingly, China has breached its obligations under Article 58(3), UNCLOS.<sup>89</sup>

47. In the 2012 *Bangladesh v. Myanmar* decision, the International Tribunal for the Law of the Sea (ITLOS) applied the due regard obligation reflected in Articles 56, 58, 78 and 79 and in other provisions of the LOSC to grey areas,<sup>90</sup> even though this is not explicitly stated in the LOSC.<sup>91</sup> In its 2015 *Advisory Opinion on the Request submitted by the Sub-Regional Fisheries Commission (SRFC)*, ITLOS pronounced that coastal States’ sovereign rights to explore, exploit, conserve and manage the living resources in the EEZs are subject to the obligation to pay due regard to the rights and duties of one another, including States’ Parties obligation to protect and preserve the marine environment which is a “fundamental principle underlined in Articles 192 and 193 of [LOSC] [...]”<sup>92</sup>

#### *Commentary by Publicists*

48. Lagoni has observed that the right to lay submarine cables, includes the right of maintaining and repairing them,<sup>93</sup> on the basis that Article 79 (in Part VI on the continental shelf) refers to ‘laying or maintenance’ of submarine cables and ‘repairing’ of existing cables,<sup>94</sup> and that it encompasses the right to take preparatory survey operations for their laying because activities of this kind are necessary for exercising the right itself.<sup>95</sup>
49. Churchill and Lowe have argued that the ‘due regard’ obligation seems to require that where there is a potential conflict between two uses of the high seas, there should be a case-by-case weighing of the actual interests involved in the circumstances in question in order to determine which use is the more reasonable in that particular case,<sup>96</sup> and that ‘such weighing of interests will normally occur through negotiations between the States concerned.’<sup>97</sup> They recognize that, in practice, stronger States have often been able to insist upon their own uses of the high seas even if such uses may appear unreasonable to other States. As a separate matter, they also suggest that ‘arguably there is a presumption in favour of an established use over as against a new use.’<sup>98</sup> Similarly, Lagoni argued that cables and pipelines must be laid in such a way as not to hamper navigation, or other freedoms of the high seas and that in areas traditionally used for trawl fishing, the cable should be buried in the seabed in order to pay due regard to the freedom of fishing.<sup>99</sup> Finally, Treves observed that the implementation of the

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<sup>89</sup> *South China Sea Arbitration (Philippines/China)*, Award, 12 July 2016, para. 757.

<sup>90</sup> *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports (2012), 4, para. 475. Grey areas in the context of the Bangladesh/Myanmar decision refer to a specific geographic situation where State X has sovereign rights over a continental shelf area where State Y also has sovereign rights in the EEZ superjacent to the continental shelf after delimitation has taken place.

<sup>91</sup> T. Treves, “‘Due Regard’ Obligations under the 1982 UN Convention on the Sea: The Laying of Cables and Activities in the Area,” 34 *Int. J. Mar. & Coastal L.* (2019) 167–194, 178.

<sup>92</sup> Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, 4 ITLOS Reports, 2015, 4, para. 216.

<sup>93</sup> Lagoni (1998), *supra* note 64, 12.

<sup>94</sup> LOSC, Articles 79(2) and 79(5), *supra* note 1.

<sup>95</sup> Lagoni (1998), *supra* note 64, 12.

<sup>96</sup> R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3<sup>rd</sup> Edition (1999), 206.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.* However, it has been pointed out that bottom trawling is usually conducted along the geological continental shelf-slope boundary and landward, on the continental shelf itself, and can pose significant risks to cables and pipelines. On the high seas, at significant water depths, it is most likely mid-water trawling, longlining among other fishing types. The risk of bottom contact



obligation of due regard to ‘the rights under this Convention with respect to activities in the Area’ must be sought through practical arrangements which should consider international case law,<sup>100</sup> and that in the LOSC, ‘reasonable regard’ is equivalent to due regard.<sup>101</sup>

### *Analysis and Conclusions*

50. A number of questions arise in relation to this provision from the negotiations, in international jurisprudence and in scholarship. These are discussed and analysed below.
51. First, in relation to whether the ‘freedom to lay submarine cables or pipelines’ on the high seas encompasses all or any activities relating to cables or pipelines (other than the laying itself), there is no evidence in the preparatory works of LOSC that the term ‘laying’ encompasses other such activities. However, there is no evidence that the negotiators specifically purported to exclude any other such activity. The reasoning set out in paragraph 18 above of the Interim Report applies here: it would depend on treaty interpretation, although the interpretative method and reasoning used may depend on the terms of the relevant provision, whether it concerns submarine cables or pipelines and the activity in question. As explained in paragraph 18, surveying done for purposes of laying cables and pipelines, repair and maintenance of cables and pipelines would be covered by the ‘freedom to lay submarine cables and pipelines’ in the high seas under Article 87. Further, whether abandonment or removal is included in the freedom to lay submarine cables and pipelines is arguable but may be contested, given that the laying of submarine cables and pipelines may be meaningful and occur without abandonment or removal of such submarine cables and pipelines and that abandonment or removal are not necessary *per se* for the operation of submarine cables and pipelines.
52. Second, according to the text of LOSC Article 87, the bearers of the freedom to lay submarine cables and pipelines are all States—without any distinction between coastal and landlocked States. As explained in paragraphs 19–27 above, whether LOSC provisions establish rights for individuals to lay submarine cables and pipelines (and to conduct any other activities relating to submarine cables and pipelines) depends on the intention of the parties, which cannot be presumed. In relation to this provision, there is no evidence in the text or in the preparatory works that individuals were specifically intended to be the bearers of this freedom.
53. Third, questions also arise as to the meaning and content of the due regard obligation. Article 87(1)(c) affirms the freedom of all States to lay submarine cables/pipelines in the high seas beyond the continental shelf. This freedom is subject to Part VI on the continental shelf (Article 79), as well as to the obligation of ‘due regard’ for the interests of other States in their exercise of the freedom of the high seas, and of ‘due regard’ for the rights under LOSC with respect to activities in the Area. ‘Due regard’ is not a uniform obligation to abstain from impairing other States’ rights or interests, but it also does not permit merely the taking note of others’ rights and interests. The extent of the regard required depends on the circumstances of each case and the obligation may require some consultation with the rights-holding State. However, it is unclear whether the obligation *vis-à-vis* the rights in the Area may require consultations with specific States and/or with the International Seabed Authority (ISA) and further consideration is warranted given recent developments regarding the laying of submarine cables in the Area.<sup>102</sup>

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fishing gear with the seabed of the high seas is slim. Additionally, it would be a rare occasion when a ship drops an anchor in the high seas (owing to water depths) and the risk to navigation would be minimal.

<sup>100</sup> Treves, *supra* note 91, 186.

<sup>101</sup> *Ibid.*, 170.

<sup>102</sup> See Articles 147(1) and (3), coupled with Article 87(2), LOSC. For elaboration on the issues raised by the due regard / reasonable regard obligation applicable in the Area in the context of submarine cables, see International Seabed Authority, Deep Seabed Mining and Submarine Cables: Developing Practical Options for the Implementation of the ‘Due Regard’ and ‘Reasonable Regard’ Obligations under UNCLOS, ISA Technical Study No. 24 available at [https://ran-s3.s3.amazonaws.com/isa.org/jm/s3fs-public/files/documents/technical\\_study\\_24\\_-\\_amazon\\_jan\\_2020\\_eversion.pdf](https://ran-s3.s3.amazonaws.com/isa.org/jm/s3fs-public/files/documents/technical_study_24_-_amazon_jan_2020_eversion.pdf).

54. The language in Article 87(1)(c) and Article 87(2) may be interpreted to entail some incorporation of the environmental obligations of Part XII LOSC, and in any event, such obligations apply on the high seas. Given that the environmental obligations under Part XII apply on the high seas, a normative conflict may arise between the exercise of the freedom to lay submarine cables and pipelines and the environmental obligations in Part XII which may be resolved by requiring LOSC parties to exercise their rights in a way that complies with their Part XII obligations. This matter merits further consideration by the Committee in the future (including but not limited to the implications of a future treaty on biodiversity in areas beyond national jurisdiction).

*ii. Article 112*

55. Article 112(1) LOSC reads:

***Right to lay submarine cables and pipelines***

1. All States are entitled to lay submarine cables and pipelines on the bed of the high seas beyond the continental shelf.
2. Article 79, paragraph 5, applies to such cables and pipelines.

56. Article 79(5) provides that ‘when laying submarine cables or pipelines, States shall have due regard to cables or pipelines already in position’ and ‘in particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.’

*Legislative History*

57. **1884 Convention:** Although the 1884 Convention did not explicitly refer to the freedom to lay cables on the high seas, it applied ‘outside territorial waters to all legally established submarine cables landed on the territories, colonies or possessions of one or more of the High Contracting Parties.’<sup>103</sup>

58. **ILC:** This assumption (i.e., that submarine cables could be laid in the high seas) was the basis of Article 61(1) of the 1956 ILC Articles<sup>104</sup> and is an implementation of Article 27(3) of the 1956 ILC Articles recognizing the freedom to lay submarine cables and pipelines in the high seas (discussed in relation to Article 87 of the LOSC above).<sup>105</sup> Article 61(1) provides that ‘[a]ll States shall be entitled to lay telegraph, telephone or high-voltage power cables and pipelines on the bed of the high seas,’ and according to the ILC, reflected existing international law that could be extended to include high-voltage cables and pipelines beneath the sea.<sup>106</sup>

59. Article 61(2) of the 1956 ILC Articles states: ‘[s]ubject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of such cables or pipelines.’ This was based on a draft article proposed by Special Rapporteur François in his Sixth Report on the Regime of the High Seas and taken from Article 5 of the 1953 Draft Articles on the Continental Shelf adopted by the ILC.<sup>107</sup>

60. **UNCLOS I:** At UNCLOS I, the US proposed to remove the reference to high-voltage power cables and use the more general term ‘submarine cables’ in the relevant provisions.<sup>108</sup> Accordingly, Article 26 HSC states:

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<sup>103</sup> 1884 Convention, Article I, *supra* note 11.

<sup>104</sup> The ILC Commentary notes that paragraph 1 of Article 61 is taken from article I of the 1884 Convention. See Commentary to Article 61, 1956 ILC Articles, *supra* note 12, 294.

<sup>105</sup> Nandan et al (Vol. III), *supra* note 23, 262.

<sup>106</sup> See Commentary to Article 61, 1956 ILC Articles, *supra* note 12, 293–294.

<sup>107</sup> Sixth Report on the Regime of the High Seas by J.P.A. François, A/CN.4/79, 22 March 1954, Article 16, 18–19. The 1953 Draft Articles on the Continental Shelf formed the basis of Section III of the 1956 Draft Articles on the Law of the Sea.

<sup>108</sup> Proposal by US, Doc. A/CONF.13/L.108 (3 April 1958), UNCLOS I, Official Records, Vol. IV, Doc. A/CONF/13/40 (1958), 146. Article 27 HSC (presently 113 LOSC) which addresses the ‘injury of a submarine pipeline or high-voltage power cable’ still refers to “high-voltage power cables” because of the structure of the article.

1. All States shall be entitled to lay submarine cables and pipelines on the bed of the high seas.

2. Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of such cables or pipelines.

3. When laying such cables or pipelines the State in question shall pay due regard to cables or pipelines already in position on the seabed. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.

61. Article 26(2) HSC was based on Article 61(2) of the 1956 ILC Articles and was ultimately combined with Article 4 of the CSC and moved to Part VI LOSC on the continental shelf (currently Article 79(2) LOSC). This will be discussed further in relation to Article 79 below.
62. Article 26(3) HSC on due regard to other submarine cables and pipelines already in position was also moved to Part VI LOSC on the continental shelf (i.e., Article 79(5) LOSC) but applies in the high seas by virtue of the express wording in Article 112(2). Article 26(3) HSC (which did not appear in the 1956 ILC Articles) originated in a proposal by Denmark,<sup>109</sup> and by Venezuela (the latter's proposal derived from the commentary to Article 70 of 1956 ILC Articles).<sup>110</sup> It was considered that 'the coastal State and other States which laid cables or pipelines had a great interest in seeing that they were laid in such a manner that they did not affect the performance of those already installed (or the exploration and exploitation of the continental shelf).'<sup>111</sup>
63. **Sea-Bed Committee and UNCLOS III:** Although there are broad similarities between Article 26(1) and (3) HSC and the corresponding articles in the LOSC, i.e., Article 112(1)–(2), the submarine cable and pipeline provisions were the subject of rigorous consideration both at the meetings of the Sea-Bed Committee and during UNCLOS III.<sup>112</sup> Discussions appear to have focused on two main areas. First, some States wanted to ensure that the laying of submarine cables and pipelines did not interfere with other uses of the high seas. Accordingly, at the 1973 session of the Sea-Bed Committee, China proposed that while all States had the right to lay cables and pipelines 'on the sea-bed of the international sea area,' they must ensure that the legitimate interests of other States and the common interests of all States were not to be prejudiced.<sup>113</sup> At the third session of UNCLOS III in 1975, a consolidated text on the high seas prepared by an informal consultative group added a qualification to the high seas freedom to lay cables and pipelines, i.e., the phrase 'provided that such cables and pipelines do not subsequently present a risk to navigation.'<sup>114</sup> These suggestions were not ultimately accepted. In the Informal Single Negotiating Text in 1975, the provision on submarine cables and pipelines in the high seas was modified to reflect (with some changes) what is currently Article 112.<sup>115</sup>
64. The other concern during UNCLOS III was the interaction of the high seas regime on submarine cables and pipelines with the new regime of the EEZ and the existing continental shelf regime. A footnote in the consolidated text on the high seas prepared by the informal consultative group stated that the provision on submarine cables and pipelines on the high seas was 'without prejudice to the definition of the high seas and the extent to which these provisions will apply in the economic zone.'<sup>116</sup>

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<sup>109</sup> Proposal by Denmark, Document A/CONF.13/C.2/L.101 (3 April 1958), UNCLOS I, Official Records, Vol. IV, Doc. A/CONF/13/40 (1958), 143.

<sup>110</sup> Summary Records of the 26th to 30th Meetings of the Second Committee (Venezuela), A/CONF.13/C.2/SR.26–30, UNCLOS I, Official Records, Vol. IV, Doc. A/CONF/13/40 (1958), 89–90, para. 22.

<sup>111</sup> *Ibid.*

<sup>112</sup> D. Guilfoyle and C. Miles, "Article 112: Right to Lay Submarine Cables and Pipelines", in A. Proelss, (ed), *United Nations Convention on the Law of the Sea: A Commentary* (2017), 780.

<sup>113</sup> Nandan et al (Vol. III), *supra* note 23, 263.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

65. Article 112 LOSC is a slightly modified version of Articles 26(1) and (3) HSC. Instead of ‘[a]ll States shall be entitled to lay submarine cables and pipelines on the bed of the high seas,’ in Article 26(1) HSC, Article 112(1) has changed to ‘[a]ll States are entitled to lay submarine cables and pipelines on the bed of the high seas beyond the continental shelf,’ to take account of the continental shelf regime. Article 112(2) applies Article 79(5) (based on Article 26(3) HSC) to the high seas.

*International Case Law*

66. No international case law has been found regarding this provision. Relevant international case law about whether LOSC provisions, such as Article 112, creates rights for individuals has been examined in detail in paragraphs 19–26 above of this Report.

*Commentary by Publicists*

67. The two main issues on submarine cables discussed by publicists focus on (1) whether the reference to ‘[a]ll States’ in Article 112(1) also gives natural or legal persons the right to lay such cables in the high seas; and (2) implementation of the due regard obligation in relation to submarine cables and pipelines already in position.
68. With regard to whether the wording ‘[a]ll States’ in Article 112(1) gives individuals the right to lay cables and pipelines in the high seas, the Virginia Commentaries observe (unpersuasively):

The expression “All States” in paragraph 1 (and in article 79) is not to be read restrictively. In practice many submarine cables and pipelines are privately owned and are laid by corporations or other private entities. The term therefore refers to the right of States or their nationals to lay cables and pipelines.<sup>117</sup>

69. Lagoni (in his book concerning only submarine cables) argues that the private cable owner is entitled or obliged by such provisions of the law of the sea only if the relevant treaty provisions are self-executing,<sup>118</sup> and that Article 112 addresses States and is not a self-executing provision. Hence, the cable owners lay, maintain and operate their cables on the high seas on the basis of and in accordance with their domestic law. He explains:

The relevant domestic law is either the law of the nationality of the cable owner or the law of its principal place of residence, unless the cable owners have chosen another law. The law of the flag of the cable laying vessel, which might well be registered in any other State, is not applicable to the cable laying project because navigation and the laying of submarine cables are separate and independent activities representing both in international and domestic law different rights and freedoms of the sea.... Until now, however, States have apparently not adopted particular rules and regulations for the laying and/or repair of cables on the high seas by natural or legal persons under their jurisdiction.... Therefore, the legal basis for the laying and maintenance of cables on the high seas are generally constitutional rights and freedoms like, for example, in Germany the general freedom of action stated in article 2(1) of the Basic Law.... As a consequence, the laying or repairing of a submarine HVDC cable on the high seas does not require a license or permission unless the domestic law of the cable owner requires it.<sup>119</sup>

70. Lagoni argues that the obligation to give ‘due regard’ to submarine cables and pipelines in position applies to owners of submarine cables and pipelines, because the State ‘[cannot] grant its nationals an unlimited freedom and right to lay submarine cables and pipelines on the high seas because its own freedom and right is limited in this respect through the mentioned [international law rules].’<sup>120</sup>

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<sup>117</sup> Nandan et al (Vol. III), *supra* note 23, 263.

<sup>118</sup> Lagoni (1998), *supra* note 64, 13.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*, 15.

71. Treves acknowledges that the flag State of the vessel laying the cable or pipeline may be the State exercising the freedom of laying and has the corresponding obligations in relation to the limits of this freedom and right. However, he argues that the State under whose jurisdiction the owners of the cable or pipeline fall can be considered to be a State enjoying the freedom of laying submarine cables and pipelines and having the corresponding obligation of ‘due regard.’ This is reinforced by Article 114 LOSC.<sup>121</sup>

#### *Analysis and Conclusions*

72. Article 112 complements the high seas regime on submarine cables and pipelines established in Article 87(1)(c). The bearers of the freedom are all States—coastal and landlocked. The term ‘all States’ includes not only States of nationality of the pipeline or cable owner or under whose jurisdiction the pipeline or cable owner(s) operate, but also exporter or importer States of the pipeline project. More specifically, States from which submarine power cables carrying electricity and submarine pipelines carrying oil and gas are coming from and States to whom these power cables and pipelines are destined, enjoy this freedom too; this is especially so if we consider that freedom to lay entails freedom to operate submarine cables and pipelines. In some cases, the State of nationality of the owner of the submarine cable or pipeline or of the operating company may not have any interest in the project (e.g., NordStream AG is incorporated in Switzerland). However, the exporter and importer States have an interest (and may also have a legal interest) to invoke their own freedom to lay submarine cables and pipelines—even when they are not the State of nationality of the operator/owner or installer of the submarine cable or pipeline in question.
73. As a separate matter, there is no evidence in the text or the preparatory works that the provision directly establishes rights of individuals. Rather, the holders of the freedom are States. Individuals enjoy the benefits of the rights that their State of nationality (or other States to which they are connected) enjoy under international law, and bear duties through the exercise of the State’s prescriptive jurisdiction (again, see discussion in paragraphs 19–27 above).
74. The freedom to lay submarine cables and pipelines is not unlimited—it is expressly subject to (1) the obligation to pay due regard to the interests of other States in their exercise of the freedom of the high seas (Article 87(2) LOSC); (2) the obligation to pay due regard to the rights under this Convention with respect to activities in the Area (Article 87(2) LOSC); and (3) the obligation to pay due regard to cables or pipelines already in position, ensuring that possibilities of repairing existing cables or pipelines shall not be prejudiced (Article 112 LOSC).
75. Uncertainty remains as to (a) which State has jurisdiction over such cables and pipelines, (b) the relationship of the ‘due regard’ obligation with respect to the freedom to lay submarine cables and pipelines and activities in the Area, and (c) the relationship between the freedom to lay submarine cables and pipelines with environmental obligations under Part XII in areas beyond national jurisdiction. These issues merit further consideration by the Committee.

#### *iii. Article 113*

76. Article 113 states:

##### Article 113 Breaking or Injury of a Submarine Cable or Pipeline

Every State shall adopt the laws and regulations necessary to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine pipeline or high-voltage power cable, shall be a punishable offence. This provision shall apply also to conduct calculated or likely to result

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<sup>121</sup> Treves, *supra* note 91, 186–187.

in such breaking or injury. However, it shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid such break or injury.

### *Legislative History*

77. **1884 Convention:** The origin of Article 113 can be traced to Article II of the 1884 Convention which provides:
- It is a punishable offence to break or injure a submarine cable, wilfully or by culpable negligence,<sup>122</sup> in such manner as might interrupt or obstruct telegraphic communication, either wholly or partially, such punishment being without prejudice to any civil action for damages.
- This provision does not apply to cases where those who break or injure a cable do so with the lawful object of saving their lives or their ship, after they have taken every necessary precaution to avoid so breaking or injuring the cable.
78. On its own, Article II would seem to suggest that the breaking or injury of a cable on the high seas is a criminal offence that attracts universal jurisdiction. Indeed, in 1869, the United States (US) had proposed to view crimes against cables as equivalent to crimes of piracy (subject to universal jurisdiction).<sup>123</sup> This was rejected by most States during the conference.<sup>124</sup> The 1884 Convention confers primary jurisdiction on the State of registration of the offending vessel and secondary jurisdiction to the state of citizenship of the offender (Article VIII). Warships may require the master of a vessel suspected of having broken a cable to provide documentation to show the ship's nationality and, thereafter, to make a report to the flag State (Article X).
79. The 1884 Convention does not provide a general rule for civil claims for submarine cable damage, but provides that penal responsibility does not prejudice civil action for damages. The drafters considered that the right of cable owners to pursue civil remedies would be covered by general principles of civil liability applicable in each State party.<sup>125</sup>
80. In a declaration signed by the signatory governments of the 1884 Convention on the meanings of Article II and Article IV of the 1884 Convention, certain terms were clarified. In relation to 'wilfully,' it was agreed that penal responsibility does not apply to cases of breakage or injury caused accidentally or by necessity in the repair of a cable, when all precautions have been taken to avoid such breakage or injury.<sup>126</sup>
81. **ILC:** Article II of the 1884 Convention was adopted in Article 62 of the 1956 ILC Articles, except in that States are obliged to 'take necessary legislative measures to provide that the breaking or injury of a submarine cable beneath the high seas is done wilfully or through culpable negligence [...]'. It also extends the protection of the 1884 Cable Convention to high-voltage power cables or pipelines (see discussion in paras. 34–37 above). The ILC commentary observed about culpable negligence: 'if the presence of the cable or pipeline has not been adequately marked, there can be no question of 'culpable negligence' on the part of navigators.'<sup>127</sup>
82. In the ILC's work, there had been a proposal to include a provision in its Articles that '[t]he coastal State is entitled to establish a safety zone of 250 metres on either side of these pipelines in which ships are not to anchor

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<sup>122</sup> 'Culpable negligence' has been taken from a holding of an English court in the first reported case involving cable damage by a vessel: *Submarine Cable Company v. Dixon*, *The Law Times*, 5 March 1864, Reports Vol. X, NS at 32–33.

<sup>123</sup> De Juvigny, 19, *supra* note 33, citing the 1882–1883 Conference at 122.

<sup>124</sup> *Ibid.* An alternative was proposed by the British delegate that crimes against submarine cables would be subject to the jurisdiction of the state closest to the place where the break occurred. 1882–1883 Conference at 122.

<sup>125</sup> De Juvigny, *ibid.*, 29.

<sup>126</sup> Declaration on Protection of Submarine Cables, signed on 1 December 1886 (entered in force 1 May 1888), 25 Stat. 1424, Treaty Series 380-2; available at: <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0112.pdf> (accessed 15 December 2019).

<sup>127</sup> Commentary to Article 62, 1956 ILC Articles, *supra* note 12, 294.

and trawlers are forbidden to fish.’ But, this proposal was not taken on because the Special Rapporteur was of the view that such a provision would encroach on freedom of navigation and fishing and that it would be practically difficult to mark the limits of such a zone, while he considered that the articles on the high seas and more specifically the one that became Article 62 was sufficient to address the problem.<sup>128</sup>

83. **UNCLOS I:** During UNCLOS I, the Netherlands commented that the discussions on Article 62 of the 1956 ILC Articles raised questions of international penal law and that ‘it was clearly not the intention of the article to enable any State to take legislative measures against nationals of another State causing injury to a submarine cable.’<sup>129</sup> Accordingly, considering Article VIII of the 1884 Convention, the Netherlands proposed that the words ‘by a ship flying its flag or by a person subject to its jurisdiction’<sup>130</sup> be inserted into Article 62.
84. Further, the US proposed that 1956 ILC Articles 62–65 be deleted because they ‘were not necessary or even desirable.’ It felt that the inclusion of some, but not all, of the technical implementing provisions of the 1884 Convention might be interpreted to mean that its other provisions had been rejected. Yet, ‘to include all the provisions of the Convention would be tantamount to reenacting it, which was hardly necessary.’<sup>131</sup> Other States did not share the concern that inclusion of these provisions would undermine the 1884 Convention and considered that their inclusion would re-affirm the principles set forth in that Convention. For these reasons, they opposed the US proposal.<sup>132</sup> In light of this general opposition against the US proposal, the US withdrew its proposal.<sup>133</sup> Overall, no State objected to the similar regulation of cables or pipelines under these articles, and any opposition to what became Article 27 (and Articles 28–29) HSC had to do with other reasons.
85. Article 27 HSC provided:

Every State shall take the necessary legislative measures to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine pipeline or high-voltage power cable shall be a punishable offence. This provision shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid such break or injury.

86. **Sea-Bed Committee and UNCLOS III:** During UNCLOS III, the phrase ‘[t]his provision shall apply also to conduct calculated or likely to result in such breaking or injury’ was added to the provision which ultimately became Article 113. This was prompted by ‘concerns with fishing vessels anchoring to pipes in the North Sea and with exploration by researchers around cables.’<sup>134</sup> ‘Necessary legislative measures’ was also changed to ‘laws and regulations.’ Unlike Article II of the 1884 Convention, Article 113 does not mention that action taken under Article 113 is ‘without prejudice to any civil action for damage.’

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<sup>128</sup> ILCYB (1956), Vol. II, Doc. A/CN.4/SER.A/1956/Add. I, 12, paras. 66–67.

<sup>129</sup> See Comments by the Netherlands, UNCLOS I, Official Records, Vol. IV, Doc. A/CONF.13/40, (1958), 88.

<sup>130</sup> *Ibid.*

<sup>131</sup> Summary Records of the 26th to 30th Meetings of the Second Committee, A/CONF.13/C.2/SR.26–30, UNCLOS I, Official Records, Vol. IV, Doc. A/CONF.13/40 (1958), 89, para. 12.

<sup>132</sup> *Ibid.*, 89, para. 15 (Romania); *ibid.*, 89, para 17 (Yugoslavia); *ibid.*, 89, para. 19 (UK); *ibid.*, 89, para. 21 (USSR); *ibid.*, 90, para. 24 (Iran).

<sup>133</sup> Except vis-à-vis Draft Article 64, which concerned trawling (and applied to both cables and pipelines). The US stated that Draft Article 64 ‘did not come under the 1884 Convention, but under resolution I of the 1913 London Conference,’ and it was necessary that ‘a uniform standard be adopted for trawling equipment’. Summary Records of the 26th to 30th Meetings of the Second Committee, A/CONF.13/C.2/SR.26–30, UNCLOS I, Official Records, Vol. IV, Doc. A/CONF.13/40 (1958), 90, para. 26. The US proposal was finally successful and there is no equivalent provision in HSC.

<sup>134</sup> Nandan et al (Vol. III), *supra* note 23, 268.

87. Article 97 LOSC ('Penal Jurisdiction in Matters of Collision or any Other Incident of Navigation') provides that in case of collision or *any other incident of navigation*, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, the flag State of a vessel or the State of nationality has exclusive penal jurisdiction. The ILC observed regarding the predecessor of Article 97 that such incidents include damage to 'submarine telegraph, telephone or high-voltage power cable or to a pipeline.'<sup>135</sup>

#### *International Case Law*

88. No international case law on this provision or the rule therein concerning pipelines or cables has been found.

#### *Commentary by Publicists*

89. Article 113 leaves the implementation of domestically punishable offences (prescribed in Article 113) to the flag State's domestic law and jurisdiction, and also does not specify any minimum penalty. For these reasons, the scholarly literature criticizes this provision as not being appropriate to deal with more systemic threats to critical infrastructure, such as terrorist attacks or infrastructure thefts.<sup>136</sup> Some have also called for adoption of a global convention on the protection of submarine cables.<sup>137</sup>
90. Lagoni has noted that under Article 94(7), flag States have a duty to cause an inquiry to be held by or before a suitable qualified person or persons into every incident of navigation provided that it 'caused loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the environment.' While he notes that this provision does not directly relate to submarine cables, '[o]ne can nevertheless assume an analogous duty of the flag State to cause such inquiry in the case of any breaking or serious injury to a submarine cable.'<sup>138</sup>
91. It has also been observed that civil remedies have not proved particularly effective at obtaining compensation for damage to cables, some of which can cost US\$1 million or more and that the 'absence of a clear rule on civil liability has led to various interpretations of its conditions and consequences.'<sup>139</sup> De Juvigny highlights that courts in different jurisdictions have applied different standards as to proof of fault by vessels and in the absence of harmonised rules, cable owners tend to avoid lengthy and uncertain civil proceedings.<sup>140</sup>

#### *Analysis and Conclusions*

92. Article 113 obliges States Parties to adopt laws and regulations that criminalise the breaking or injury of a submarine cable and pipeline beneath the high seas (as well as conduct calculated or likely to result in such breaking or injury) done wilfully or through culpable negligence by a ship flying its flag or by a person subject to its jurisdiction. Accidental damage is excluded, as well as any damage resulting from necessity in the repair of a cable or pipeline, when all precautions have been taken to avoid such breakage or injury. Culpable negligence will not be established if cables or pipelines have not been adequately marked, although it is unclear under LOSC *where* these submarine cables or pipelines should be marked. Generally speaking, official nautical charts or Notices to Mariners issued by States are updated by national hydrographic offices and these charts may not contain up-to-date information on the location of cables and pipelines, although submarine cable owners engage in cable awareness programmes which include marine liaison programmes as well as the issuance of charts or

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<sup>135</sup> Commentary to Article 35, 1956 ILC Articles, *supra* note 12, 281.

<sup>136</sup> S. Kaye, "International Measures to Protect Oil Platforms, Pipelines and Submarine Cables from Attack," 31 *Tul. Mar. Law J.* (2007) 337 at 422; M.P. Green and D. Burnett, "Security of International Submarine Cables Infrastructure: Time to Rethink?," in M. Nordquist et al (eds), *Legal Challenges in Maritime Security* (2008), 557 at 559–560. The latter authors focus on cables theft, but similar issues may arise in relation to pipelines. The UN Office on Drugs and Crime has also taken up the question of threats to cables: <https://www.unodc.org/unodc/en/frontpage/2019/February/key-actions-to-protect-submarine-cables-from-criminal-activity-identified-at-unodc-global-expert-meeting.html>.

<sup>137</sup> T. Davenport, "Submarine Communications Cables and Law of the Sea: Problems in Law and Practice," 43(3), *Ocean Dev. & Int. Law* (2012), 201–242, 219–220; R. Beckman, "Protecting Submarine Cables from Intentional Damage: The Security Gap," in D.R. Burnett et al (eds), *Submarine Cables: The Handbook of Law and Policy* (2014), 290–294.

<sup>138</sup> Lagoni (1998), *supra* note 64, 56.

<sup>139</sup> De Juvigny, *supra* note 33, 29–30.

<sup>140</sup> *Ibid*, 30.



cable data which can be loaded directly into a vessel's navigation system.<sup>141</sup> From a legal perspective, the question then arises as to where should these cables and pipelines be adequately marked and by whom before a finding of culpable negligence is established on the part of the vessel.<sup>142</sup>

93. Article 113 requires States to exercise their prescriptive jurisdiction penalising particular conduct, but without prescribing prosecution (or an *aut dedere aut judicare* rule).
94. Article 113 has not been adequately implemented by States and has been critiqued as being inadequate to address the multitude of new risks and threats facing submarine cables and pipelines.<sup>143</sup>

*iv. Article 114*

95. Articles 114 and 115 address civil liability. Article 114 LOSC states:

Every State shall adopt the laws and regulations necessary to provide that, if persons subject to its jurisdiction who are the owners of a submarine cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost of the repairs.

*Legislative History*

96. **1884 Convention:** Article 114 was inspired by Article IV of the 1884 Convention which states:

The owner of a cable who, on laying or repairing his own cable, breaks or injures another cable, must bear the cost of repairing the breakage or injury, without prejudice to the application, if need be, of Article II of the present Convention.

97. A 1887 declaration on Article IV stated that ‘Article IV of the Convention had no other object and is to have no other effect than to empower competent tribunals of each country to decide in conformity with their laws and according to the circumstances, the question of the civil responsibility of the owner of a cable, who, in laying or repairing his own cable, breaks or injures another cable, as well as the consequences of such responsibility if it is recognized as existing.’<sup>144</sup>
98. **ILC:** Article IV of the 1884 Convention provided the basis for Article 63 of the 1956 ILC Articles, with some modifications: ‘Every State shall take necessary legislative measures to provide that, if persons subject to its jurisdiction who are the owners of a cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost.’ There was not much discussion on Article 63 in the ILC sessions.
99. **UNCLOS I:** Article 63 of the 1956 ILC Articles was adopted with some minor modifications in Article 28 HSC. The primary change was a clarification that the liability of the owner would be limited to the cost of repairs and ‘not to its replacement or for any loss of profits incurred as a result of the damage.’<sup>145</sup> This was done in order to

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<sup>141</sup> Robert Wargo and Tara Davenport, “Protecting Submarine Cables from Competing Uses,” in D.R. Burnett *et al* (eds), *Submarine Cables: The Handbook of Law and Policy* (2014), 246, 248.

<sup>142</sup> One of the essential elements to establish a civil claim for damage to submarine cables is said to be that the vessel must have either actual notice or constructive notice as a result of the cable's position being shown on a nautical chart: see Wargo and Davenport, *ibid*, 270.

<sup>143</sup> The failure of States to implement adequately Article 113 of the LOSC has been recognized in General Assembly Resolution on Oceans and the Law of the Sea adopted on 10 December 2019, UN Doc. A/Res/74/19, para. 178, 180. Also see discussion in paragraphs 89 and 91.

<sup>144</sup> Declaration, Explanatory of Articles II and IV, of the Plenipotentiaries of the Signatory Governments of the Convention for the Protection of Submarine Telegraph Cables of 14 March 1884.

<sup>145</sup> Nandan *et al* (Vol. III), *supra* note 23, 272; Summary Records of the 26<sup>th</sup>–30<sup>th</sup> Meetings, UN Doc. A/CONF.13/C.2/SR 26–30, UNCLOS I, Official Records Vol. IV, Doc. A/CONF.13/40 (1958), 72, 87–90. Adopted based on proposal from representative of Denmark.

limit the liability to repairing the cable or pipeline, not to replace the cable or pipeline or cover any loss of profits incurred as a result of the damage.<sup>146</sup>

100. **Sea-Bed Committee and UNCLOS III:** Article 28 HSC became Article 114 of LOSC without much discussion and with one minor change from ‘necessary legislative measures’ to ‘laws and regulations.’<sup>147</sup> During the 1971 Session of the Sea-Bed Committee, Malta proposed that the provision apply generally to any break or injury to a cable or pipeline, not just repairs arising out of the course of laying another cable or pipeline. It also proposed that if there was discharge of oil or harmful agents resulting from damage to a pipeline, the persons responsible ‘shall bear the cost of restoring the marine environment to its natural state.’<sup>148</sup> This apparently did not meet with widespread acceptance and was not incorporated into Article 114.

#### *International Case Law*

101. No international case law has been found on this provision regarding pipelines or cables.

#### *Commentary by Publicists*

102. Guilfoyle and Miles note that Article 114 represents a departure from the complete deference to flag State jurisdiction typical in the high seas provisions on cables and pipelines. They observe that the principal basis of Article 114’s prescriptive jurisdiction would appear to be the nationality principle (i.e., the nationality of the cable owner), although the passive personality doctrine or effects doctrine could be invoked.<sup>149</sup> A State may also wish to invoke the protective principle especially vis-à-vis oil pipelines and the convergence between energy and national security interests.<sup>150</sup> They also point out that Article 114 does not clarify the precise threshold of causation or agency between the actual individual that causes the damage/injury and the owner of the pipeline, and that this is left to domestic law.<sup>151</sup> They also suggest that domestic law may go beyond the LOSC and establish liability on the basis of tort for economic or other consequential loss.<sup>152</sup>
103. Overall, this provision requires States to exercise their prescriptive jurisdiction on the basis of ‘active nationality’ (the nationality of the owner of the cable or pipeline) or arguably another form of jurisdiction (passive personality doctrine or effects doctrine) over the owner of the cable or pipeline: to adopt legislation that provides that, if persons subject to its jurisdiction who are the owners of a submarine cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to an existing cable or pipeline, they shall bear the cost of the repairs. It is concerned with break or injury to cables or pipelines occurring in the course of laying or repairing cables or pipelines by private individuals, and establishes their civil liability. It covers only ‘the cost of repairs,’<sup>153</sup> and not lost profits<sup>154</sup> (or the cost of the lost content of the pipeline that has been broken or injured or of the lost opportunity to transmit telecommunications or power through the cable).<sup>155</sup>

#### *v. Article 115*

104. Article 115 LOSC on Indemnity for Loss Incurred in Avoiding Injury to a Submarine Cable and Pipeline states:

Every State shall adopt the laws and regulations necessary to ensure that the owners of ships who can prove that they have sacrificed an anchor, a net or any other fishing gear, in

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<sup>146</sup> Summary Records of the 26th to 30th Meetings of the Second Committee ((Denmark), A/CONF.13/C.2/SR.26–30, UNCLOS I, Official Records, Vol. IV, Doc. A/CONF.13/40 (1958), 89, para. 20.

<sup>147</sup> Nandan et al (Vol. III), *supra* note 23, 273.

<sup>148</sup> *Ibid*, 272.

<sup>149</sup> D. Guilfoyle and C. Miles, “Article 114: Breaking or Injury by Owners of a Submarine Cable or Pipeline of another Submarine Cable or Pipeline,” in A. Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (2017), 787.

<sup>150</sup> *Ibid*.

<sup>151</sup> *Ibid*, 787.

<sup>152</sup> *Ibid*, 788.

<sup>153</sup> Nandan et al (Vol. III), *supra* note 23, 273.

<sup>154</sup> L.D.M. Nelson, ‘Submarine Cables and Pipelines’, in R.-J. Dupuy and D. Vignes (eds), *A Handbook on the New Law of the Sea* (Vol. II) (1991), 977 at 983.

<sup>155</sup> Guilfoyle and Miles, *supra* note 149, 788.

order to avoid injuring a submarine cable or pipeline, shall be indemnified by the owner of the cable or pipeline, provided that the owner of the ship has taken all reasonable precautionary measures beforehand.

### *Legislative History*

105. **1884 Convention:** Article 115 LOSC is originally based on Article VII of the 1884 Convention:

Owners of ships or vessels who can prove that they have sacrificed an anchor, a net, or other fishing gear in order to avoid injuring a submarine cable, shall receive compensation from the owner of the cable.

In order to establish a claim to such compensation, a statement, supported by the evidence of the crew, should, whenever possible, be drawn up immediately after the occurrence; and the master must, within 24 hours after his return to or next putting into port, make a declaration to the proper authorities.

The latter shall communicate the information to the consular authorities of the country to which the owner of the cable belongs.

106. **ILC:** Article 65 of the 1956 ILC Articles was based on Article VII of the 1884 Convention, although it did not include the paragraphs on how to establish a claim for compensation. Article 65, however, included the sentence ‘provided the owner of the ship has taken all reasonable precautionary measures beforehand’ to make it ‘quite clear that compensation cannot be claimed if there has been any negligence on part of the ship.’<sup>156</sup>
107. **UNCLOS I:** There were no proposals at UNCLOS I relating to this provision and Article 65 of the 1956 ILC Articles became the basis of Article 29 HSC.<sup>157</sup> ILC Article 65 raised little debate in the negotiations given that the rule was well-established at least in relation to submarine cables under the 1884 Convention. The US proposal to delete this provision along with Draft Articles 62–65 was withdrawn (with the exception of its proposal to delete Draft Article 64 which was finally successful) (see discussion above in para. 85) owing to clear opposition.
108. **Sea-Bed Committee and UNCLOS III:** During the 1971 session of the Sea-Bed Committee, Malta’s proposal to expand the list of equipment that would warrant an indemnity claim to include ‘an anchor, a net or any fishing or other gear’ was not accepted.<sup>158</sup> Article 115 was not the subject of significant debate during UNCLOS and the only change was a cosmetic one from ‘necessary legislative measures’ to ‘laws and regulations.’<sup>159</sup>

### *International Case Law*

109. No international case law has been found in relation to pipelines or cables and this provision.

### *Commentary by Publicists*

110. It has been argued that since there is no precise jurisdictional link provided in the provision, the State of nationality of the owner of the vessel is the one referred to in Article 115.<sup>160</sup> However, it has also been argued that the flag State of the vessel in question also has jurisdiction<sup>161</sup>—yet it is unclear whether that State would be obliged to adopt such domestic laws for vessels carrying its flag.
111. The Virginia Commentaries note that because Article 115 does not establish a procedure to claim an indemnity, ‘it is anticipated that more detailed guidelines will be included in the laws and regulations adopted by each State

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<sup>156</sup> Commentary to Article 65, 1956 ILC Articles, *supra* note 12, 294.

<sup>157</sup> Nandan et al (Vol. III), *supra* note 23, 275.

<sup>158</sup> Nandan et al, *ibid*, 276.

<sup>159</sup> D. Guilfoyle and C. Miles, “Article 115: Indemnity for Loss incurred in Avoiding Injury to a Submarine Cable or Pipeline,” in A. Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (2017), 789.

<sup>160</sup> *Ibid*, 788.

<sup>161</sup> Nandan et al (Vol. III), *supra* note 21, 278.

under Article 115.<sup>162</sup> Lagoni states that the owner of the respective ship has to base his claim for indemnity on the domestic law of the cable or pipeline owner or on his own domestic law, whichever is better for him.<sup>163</sup> Guilfoyle and Miles suggest that indemnity would not apply if disentangling the anchor, net or other gear would have been relatively simple, but the ship-owner chose to abandon the item expecting to replace it.<sup>164</sup>

### *Analysis and Conclusions*

112. Article 115 is intended to prevent damage to submarine cables or pipelines. It deals with a narrow instance of civil liability: in instances where damage to a vessel in the form of sacrificing an anchor, net or other fishing gear has occurred in an effort to avoid injuring a cable or pipeline. (1) It is concerned only with sacrificing an anchor, net or other fishing gear. (2) The sacrifice has taken place specifically for avoiding injury on the cable and pipeline, and the owner must have taken all reasonable precautionary measures beforehand. Negligence on the part of the ship means that compensation cannot be claimed.<sup>165</sup> (3) Ship-owners have to be able to prove that they have sacrificed the relevant gear in order to avoid injuring a submarine cable or pipeline. They bear the burden of proof. Negotiations do not indicate any particular agreement vis-à-vis the precise standard of proof.<sup>166</sup>

## C. The Area

### *i. Article 145(a)*

113. Article 145 reads:

#### *Protection of the marine environment*

Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for *inter alia*:

(a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;

(b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.

#### *Legislative History*

114. **1884 Convention:** not applicable.
115. **ILC:** not applicable.
116. **UNCLOS I:** not applicable.
117. **Sea-Bed Committee and UNCLOS III:** Article 145 on the protection of the marine environment in the Area had no predecessor in the 1884 Convention, the 1956 ILC Articles, UNCLOS I or the 1958 Geneva Conventions, as the concept of the Area (i.e., the seabed beyond the CS) was not addressed until UNCLOS III.<sup>167</sup> Since 1969, the Sea-Bed Committee concluded that '[t]he adoption of appropriate safeguards to protect the living resources

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<sup>162</sup> Ibid, 278.

<sup>163</sup> Lagoni (1998), *supra* note 57, 54.

<sup>164</sup> Guilfoyle and Miles, *supra* note 159, 790.

<sup>165</sup> Commentary to Article 65, 1956 ILC Articles, *supra* note 11, 294.

<sup>166</sup> Nandan et al (Vol. III), *supra* note 21, 275–278.

<sup>167</sup> S. Nandan, M. Lodge and S. Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. VI, (2003) 192–193.

of the marine environment as well as of safety measures concerning activities in the Area were not objected to,<sup>168</sup> as it was perceived to be in the interests of coastal States.<sup>169</sup> LOSC Article 145 is based on paragraph 11 of the 1970 Declaration of Principles,<sup>170</sup> which expressly called upon States to take measures to prevent hazards to the marine environment arising out of activities in the Area. LOSC Article 145 was not controversial in UNCLOS III (since the use of Area resources raised more controversy).

118. The draft of Article 145 remained mainly unchanged from 1977 to the conclusion of LOSC with the exception of two changes. First, the power to adopt and implement regulations was given to the ISA (which had been referred to in the 1970 Declaration of Principles). Second, while there was a proposal to refer to ‘all’ activities in the Area,<sup>171</sup> it was not finally taken up, and a (non-exhaustive) list of the types of activities for which measures are required was included. Finally, the 1994 Implementation Agreement<sup>172</sup> did not amend LOSC Article 145, because environmental matters were not perceived as controversial.<sup>173</sup>

#### *International Case Law*

119. In 2011, in its Advisory Opinion, the ITLOS Seabed Disputes Chamber pronounced that the activities listed in Article 145(a) fall within the scope of ‘activities in the Area’, because that provision suggests that ‘harmful effects are [...] directly resulting from [activities in the Area]’.<sup>174</sup> This raises two issues: first, about the precise scope of this provision (does it cover all pipelines or not), which has implications about ISA’s environmental regulatory competence under this specific provision; but also second, and very crucially, about whether the reference to pipelines in this provision and the reasoning of the ITLOS Chamber may be taken to mean that all pipelines in the Area are ‘activities in the Area’ thus giving wider competence to ISA over pipelines, but also carrying specific obligations of States (sponsoring and others) for activities in the Area. Both these major questions hang on the scope of the term ‘pipelines’ in Article 145(a)—a matter analysed below.
120. Pipelines used for different purposes may be laid in the Area, and it is unclear from the provision (and the ITLOS Chamber did not explain) which pipelines are meant to be covered in Article 145(a). It is important to clarify whether any or all of the following pipelines are covered by Article 145(a), since this determines whether the ISA has environmental regulatory authority over them pursuant to that provision:

(a) pipelines that transit through the Area from and destined to a maritime space within national jurisdiction;

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<sup>168</sup> Sea-Bed Committee, Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, GAOR 24, Suppl. 22 (A/7622) (1969), para. 96.

<sup>169</sup> *Ibid*, para. 65.

<sup>170</sup> UNGA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, UNGA Res 2749(XXV), 17 December 1970. See also Nandan et al (Vol. VI), *supra* note 157, 193. Paragraph 11 of the Declaration of Principles reads: “With respect to activities in the area and acting in conformity with the international regime to be established, States shall take appropriate measures for and shall co-operate in the adoption and implementation of international rules, standards and procedures for, inter alia: (a) The prevention of pollution and contamination and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment; (b) The protection and conservation of the natural resources of the area and the prevention of damage to the flora and fauna of the marine environment.”

<sup>171</sup> Sea-Bed Committee, A/AC.138/94/Add.1, reproduced in SBC Report 1973 vol. II, 28 GAOR Supp. 21 (A/ 9021), 39 at 63 (Art. 13).

<sup>172</sup> *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea* of 10 December 1982, 28 July 1994, UNTS vol 1836 Annex, s 2(1-2) (entered into force 28 July 1996) (1994 Implementation Agreement).

<sup>173</sup> GA, Consultations of the Secretary-General on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea: Report of the Secretary-General, UN Doc. A/48/950 (1994), para. 9. However, the Annex to the Implementation Agreement added a requirement to LOSC Annex III Articles 6 and 7 that an application for approval of a plan of work shall be accompanied by ‘an assessment of the potential environmental impacts of the proposed activities and by a description of a programme for oceanographic and baseline environmental studies’. 1994 Implementation Agreement, Section 1, para. 7.

<sup>174</sup> Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion of 1 February 2011, ITLOS Seabed Disputes Chamber, paras. 85, 87 (SDC Advisory Opinion).

- (b) pipelines unconnected with an Area resource that connect an installation or vessel on the high seas above the Area and destined to a maritime space within national jurisdiction;
- (c) pipelines for extraction and lifting of Area resources,<sup>175</sup> such as polymetallic nodules;
- (d) pipelines for evacuation of water, preliminary separation and disposal of material of no commercial interest to be discarded in the process of Area resources exploitation; and
- (e) pipelines carrying Area resources (e.g., polymetallic nodules) to a maritime space within national jurisdiction, including on land.

121. The pipelines in instances (c) and (d) above do not raise difficulty, because they are directly connected to the exploration and exploitation of Area resources.<sup>176</sup> However, it may be argued that the term ‘pipelines’ in Article 145(a) does not cover pipelines described in instances (a), (b) and (e) for the following reasons. Those in (a) and (b) carry materials other than Area resources and they are not directly connected to Area activities, such as the other activities listed in Article 145(a), including drilling, dredging excavation and disposal of waste. Regarding pipelines in instance (e), although these carry Area resources (e.g., polymetallic nodules), in its 2011 Advisory Opinion, the Chamber was concerned with similar transportation of Area resources by vessels. It found that LOSC Annex IV, Article 1(1) distinguishes between ‘activities in the Area’ and ‘transportation,’ that the latter are excluded from the ambit of the former, and that even though these activities are covered by the definition of ‘exploitation’ in the ISA Regulations,<sup>177</sup> the terms used in the LOSC are assumed to have the same meaning in different provisions.<sup>178</sup> On the basis of this reasoning, the Chamber concluded that ‘transportation to points on land from the part of the high seas superjacent to the part of the Area in which the contractor operates cannot be included in the notion of ‘activities in the Area,’ as it would be incompatible with the exclusion of transportation from ‘activities in the Area’ in Annex IV, [Article 1(1)] of the Convention.’<sup>179</sup> In the same paragraph, the Chamber observed that ‘[t]he inclusion of transportation to points on land could create an unnecessary conflict with provisions of the Convention such as those that concern navigation on the high seas.’ Pursuant to this reasoning, it can be argued that the term ‘pipelines’ in Article 145(a) covers a specific type of pipeline, and that the context of Article 145(a) (being Article 1(1), Annex IV of LOSC) suggests that transportation in general is different from ‘activities in the Area’ in Article 145(a). Thus, the interpretation that ensures consistency and harmony among LOSC provisions (and does not restrict unduly the freedom to lay pipelines) is that pipelines carrying Area resources to spaces under national jurisdiction are not covered by Article 145(a).<sup>180</sup>

122. The Chamber continued that if water evacuation and disposal of material were excluded from ‘activities in the Area,’ the activities conducted by the contractor which are among the most hazardous to the environment would be excluded from those to which the responsibilities of the sponsoring State apply, and that this would be contrary to the general obligation of States Parties under LOSC Article 192 to protect and preserve the marine environment. Some literature seems to suggest that this reasoning determined whether water evacuation and disposal of material fell within the scope of ‘activities in the Area’ in Article 145. In line with such reasoning, it could be argued that any pipeline in the Area (including those described in instances (a), (b) and (e)) falls within the scope of Article 145(a). However, such an argument isolates the Chamber’s reasoning. Rather, the Chamber had focused expressly on whether such activities are ‘directly connected with [exploration and exploitation, including recovery of minerals from the seabed and their lifting to the water surface]’<sup>181</sup> as a criterion for determining whether evacuation of water and preliminary separation of materials constitute ‘activities within the Area.’ Further, when laying of pipelines on the high seas (that are not subject to the competence of the ISA under

<sup>175</sup> During subsea mining operations, it is envisaged that minerals will be extracted from the seabed and pumped with water through a riser pipe to a surface processing vessel.

<sup>176</sup> SDC Advisory Opinion, *supra* note 174, para. 96.

<sup>177</sup> *Ibid*, paras. 87, 89–90.

<sup>178</sup> *Ibid*, para. 93.

<sup>179</sup> *Ibid*, para. 96.

<sup>180</sup> This does not mean that the Enterprise (an ISA organ) does not have competences vis-à-vis such pipelines pursuant to LOSC Annex IV Article 1(1).

<sup>181</sup> SDC Advisory Opinion, *supra* note 174, paras. 94–95.

Article 145(a)), States continue to have obligations under Part XII in parallel with their freedom to lay pipelines. However, how their freedom to lay pipelines is balanced with their obligations under LOSC Part XII is a legal question that arises separately to Article 145(a).

*Commentary by Publicists*

123. There is no literature on Article 145(a) and specifically the question dealt with in the Section on international case law above.

*Analysis and Conclusions*

124. Under LOSC Article 87(2), the freedom of all States to lay submarine cables and pipelines has to be exercised with “due regard for the rights under [LOSC] with respect to activities in the Area.” Further, LOSC established an international organization, the ISA, and conferred on it express powers and functions prescribed by the LOSC (and incidental ones, which are implicit and necessary for the exercise of those powers and functions) in order to organize and control ‘activities in the Area’ (LOSC Article 157(1)–(2)).<sup>182</sup> Numerous questions arise regarding this provision: (a) about which pipelines the ISA has competences under Article 145(a); (b) about the precise scope of regulations to be adopted by ISA under Article 145(a) (e.g., for *any* environmental hazard?); (c) about whether the ISA is the only addressee of the provision’s obligations. At this stage of research, an important question is (a) which pipelines fall within the scope of Article 145(a) and is discussed in the Interim Report. Issues (b) and (c) merit further consideration.
125. Article 145(a) does not confer competence on ISA to regulate all pipelines in the Area. Rather, ISA’s competence exclusively deals with regulating ‘the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities’ listed in Article 145(a), including the construction, operation and maintenance of pipelines. Article 145(a) does not cover all pipelines in the Area, but only those directly connected to the exploration and exploitation of the Area resources (e.g., those for extraction and lifting of Area resources, and those for evacuation of water, preliminary separation and disposal of material of no commercial interest to be discarded in the process of Area resources exploitation). It does not cover pipelines transiting through the Area, pipelines unconnected with an Area resource that connect an installation or vessel on the high seas above the Area and destined to a maritime space within national jurisdiction, and crucially pipelines carrying Area resources to national jurisdiction spaces. Additionally, Article 145(a) (coupled with the reasoning of the ITLOS Seabed Chamber in its 2011 Advisory Opinion) cannot be used as an indication that the construction, operation and maintenance of all pipelines in the Area are ‘activities in the Area’ and thus fall within the competence of ISA.
126. On the basis of the above, a question arises in general (beyond Article 145(a)) about how to resolve the ‘conflict’ between, on the one hand, laying, operating, repairing/maintaining and removing pipelines in (and from) the Area (assuming that all or any of them fall within the freedom to lay pipelines, but also assuming that some do not), and, on the other hand, activities in the Area that do not fall within the scope of ‘activities in the Area’. This issue is not discussed in detail in this Report, but deserves further consideration, including by taking into account the (ongoing work on the) ISA Mining Code.

**D. The Continental Shelf**

*i. Article 79, LOSC*

127. Article 79 LOSC reads:

***Submarine cables and pipelines on the continental shelf***

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<sup>182</sup> For instance, owing to the language in Annex IV, Article 1(1), the Chamber considered that ‘transporting, processing and marketing of minerals recovered from the Area’, which are activities to be carried out by the Enterprise do not fall within the scope of the term ‘activities in the Area’. However, these activities are expressly within the competence of the Enterprise (an organ of ISA) pursuant to Article 1(1) of LOSC Annex IV. SDC Advisory Opinion, *ibid*, para. 83.

1. All States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this article.
2. Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines.
3. The delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State.
4. Nothing in this Part affects the right of the coastal State to establish conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.
5. When laying submarine cables or pipelines, States shall have due regard to cables or pipelines already in position. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.

### *Legislative History*

128. **ILC:** The origins of Articles 79(1) and (2) of UNCLOS can be traced back to draft articles proposed by the Special Rapporteur on the continental shelf regime in 1951. Mr. François's Second Report contained an article which provided that '[t]he recognition of control and jurisdiction of the coastal State over the sea-bed and subsoil outside territorial waters does not affect the existing international law with regard to the laying and operation of cables or pipelines on the sea-bed, subject, however, to the right of the coastal State to take reasonable measures in connexion with the exploration and exploitation of the resources of the continental shelf.'<sup>183</sup>
129. In 1951, the ILC prepared a series of draft articles on the continental shelf and related subjects, based on this report.<sup>184</sup> Article 5 of the 1951 Draft Articles on the Continental Shelf was confined to submarine cables only and stated '[s]ubject to the right of a coastal State to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the exercise by such coastal State of control and jurisdiction over the continental shelf may not exclude the establishment or maintenance of submarine cables.'
130. In 1953 at its fifth session, the ILC adopted a revised version of the Draft Articles on the Continental Shelf, based on the final report by the Special Rapporteur François, which differed in some respects to its 1951 Draft. With regard to Article 5 on submarine cables, there were no significant changes except there was no mention of the coastal State's jurisdiction and control,<sup>185</sup> and it was stated that the coastal State may not prevent the establishment or maintenance of submarine cables (in comparison to 'may not exclude' in the earlier draft).<sup>186</sup>
131. Article 70 of the 1956 ILC Articles, which dealt with submarine cables on the continental shelf, made minor changes to Article 5 of the 1953 Draft Articles on the Continental Shelf. Article 70 read: '[s]ubject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables on the continental shelf.'<sup>187</sup> Article 61(2) of the 1956 ILC Articles was nearly identical but it included both cables and pipelines: '[s]ubject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of such cables *or pipelines*.'<sup>188</sup>

<sup>183</sup> Second Report on the High Seas by Special Rapporteur J.P.A François, A/CN.4.42, 10 April 1951, 69 (Article 3). The ILC started its work on the continental shelf from its 1949 session and the Special Rapporteur was asked to submit a new report.

<sup>184</sup> Note by the Secretary-General on Draft Articles on the Continental Shelf and Related Subjects Prepared by the International Law Commission, A/CN.4/49, 30 July 1951.

<sup>185</sup> The term 'sovereign rights' had been used instead.

<sup>186</sup> Article 5, Draft Articles on the Continental Shelf, Report of the ILC Covering the Work of its Fifth Session, 1 June–14 August 1953, Doc. A/CN.4/76, ILCYB (1953) Vol. II, Doc. A/CN.4/SER.A/1953/Add.1, 212.

<sup>187</sup> Article 70, 1956 ILC Articles, *supra* note 12, 298.

<sup>188</sup> Article 61(2), 1956 ILC Draft Articles, *ibid*, 293.



132. Several issues were subject to considerable debate during the ILC sessions leading up to the adoption of the 1956 ILC Articles. First, there were suggestions that this provision should be extended to pipelines. It had already been recognized that all States were entitled to lay submarine cables *and pipelines* on the bed of the high seas (the continental shelf at the time was considered part of the bed of the high seas).<sup>189</sup> Accordingly, Article 61(2) of 1956 ILC Articles mirrored Article 70 except that it applied both to submarine cables and pipelines.
133. In the early discussions at the ILC sessions, the question of whether the right to lay cables on the continental shelf should be extended to pipelines was seen as complicated, since pumping stations would have to be installed at certain points and these might hamper the exploitation of the subsoil more than cables.<sup>190</sup> Accordingly, as ‘the question does not appear to have any practical importance at the present time, and there is no certainty that it will ever arise, it was not thought necessary to insert a special provision to this effect.’<sup>191</sup>
134. On the other hand, some had ‘regretted the Commission’s decision not to make specific provision for pipelines, since they regarded that as a matter likely to become extremely important in the future.’<sup>192</sup> Further, the UK had suggested that pipelines be added to the provision on submarine cables on the continental shelf.<sup>193</sup>
135. Accordingly, it was suggested in 1956 that a reference may be more appropriately placed in the commentary to the article rather than the article itself to the effect that the same rules would apply to pipelines as to submarine cables, but that the ILC thought that ‘owing to the difficulties which might arise, coastal States might impose even more stringent conditions than they were authorized to impose for cables.’<sup>194</sup> The commentary to Article 70 of the 1956 ILC Articles stated that the answer to whether Article 70 should be extended to pipelines, should in principle be answered in the affirmative but that the question is complicated by the fact that it would be necessary to install pumping stations at certain points which may hinder the exploitation of soil more than cables and that the coastal State might be less liberal in this matter than in the case of cables.<sup>195</sup> For this reason, and the fact that it did not yet seem to be of practical importance, the ILC did not expressly refer to pipelines in Article 70.<sup>196</sup>
136. One final point warrants note in relation to pipelines which are used in relation to the exploration and exploitation of the continental shelf by the coastal State. Article 6 of the 1951 Draft Articles on the Continental Shelf addressed coastal State obligations in relation to installations used for the exploration and exploitation of the continental shelf. It was commented by some members of the ILC that Article 6 only referred to installations and not to pipelines and the question of pipelines ‘raises the no less important problem of the escape of oil into the superjacent waters.’<sup>197</sup> It was also suggested that the coastal State be afforded a right to establish a safety zone of 250 M on either side of these pipelines in which ships are not to anchor and trawlers are forbidden to fish.<sup>198</sup> The Rapporteur observed that ‘such a prohibition would constitute a further encroachment on the freedom of navigation and fishing and that it is consequently unjustified’ and that it would be ‘very difficult, in practice, to

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<sup>189</sup> Article 61(1), *ibid.*

<sup>190</sup> Note by the Secretary-General on Draft Articles on the Continental Shelf and Related Subjects Prepared by the International Law Commission, A/CN.4/49, 30 July 1951, 2.

<sup>191</sup> *Ibid.*, 2.

<sup>192</sup> Comments of Mr. François, 200<sup>th</sup> Meeting, 23 June 1953, Summary Records of 5<sup>th</sup> Session, 1 June–14 August 1953, ILCYB Vol. I (1953), Doc. A/CN.4/SER.A/1953, 102.

<sup>193</sup> Comments by Governments on Provisional Articles Concerning the Regime of the High Seas and Draft Articles on the Regime of the Territorial Sea at its Seventh Session, ILCYB, A/CN.4/99 and Add. 1–9, ILCYB Vol. II (1956), Doc. A/CN.4/SER.A/Add.1.

<sup>194</sup> François, 360<sup>th</sup> Meeting, 5 June 1956, Summary Records of the 8<sup>th</sup> Session, 23 April–4 July, ILCYB Vol. I (1956), 150.

<sup>195</sup> Commentary to Article 70, 1956 ILC Articles, *supra* note 12, 299.

<sup>196</sup> *Ibid.*

<sup>197</sup> Scelle, Report by Special Rapporteur, J.P.A François on the Regime of the High Seas and Regime of the Territorial Sea, 27 January 1956, Doc. A/CN.4/97, ILCYB, Vol. II (1956), Doc. A/CN.4/SER.A/1956/Add.1, 11.

<sup>198</sup> *Ibid.*, 12.

mark the limits of such a zone.<sup>199</sup> He suggested that the high seas provisions which required States to penalize the breaking or injury of submarine cables and pipelines in the high seas should be sufficient to deal with this threat.<sup>200</sup>

137. The second issue that generated debate related to the interaction between the coastal State's rights on the continental shelf and the freedom to lay submarine cables and pipelines on the continental shelf, and in particular, the meaning of 'reasonable measures.' The ILC commentary on the earlier versions of Article 70 observed that while the coastal State may adopt measures reasonably connected with the exploration and exploitation of the subsoil pursuant to the coastal State's exercise of jurisdiction and control, it may not exclude the laying of submarine cables by non-nationals.<sup>201</sup> Subsequent commentary to the same article also observed that the objective of Article 70 was to prevent 'arbitrary prohibition or discrimination against foreign nationals' but was not intended to impair the coastal State's right to take measures reasonably necessary for the exploration of the continental shelf and exploitation of its resources.<sup>202</sup>
138. ILC discussions and comments from States focused on which actor (i.e., the coastal State or the rights-holding State) would have priority. For example, the Special Rapporteur noted that once a coastal State had begun to explore or exploit the sea-bed or subsoil, it could refuse the request of another State to lay a cable in that area.<sup>203</sup> Others expressed concern that a submarine cable could be diverted in the interests of exploiting the natural resources of the seabed and subsoil.<sup>204</sup> It was also commented that the term 'reasonable measures' was quite unrealistic and questioned who was to decide the precise connotation of 'reasonable.'<sup>205</sup> The Danish Government observed that the present formulation raised doubts as to which of the two interests shall be overriding or whether a State may be required to move the cable or vice versa, whether a cable can be laid even where this is at variance with an exploitation intended by the coastal State.<sup>206</sup>
139. The commentary to Article 70 of the 1956 ILC Articles ultimately stated that the 'coastal State is required to permit the laying of submarine cables on the seabed of its continental shelf but in order to avoid unjustified interference with the exploitation of the natural resources of the seabed and subsoil, it may impose conditions concerning the route to be followed.'<sup>207</sup>
140. **UNCLOS I:** During UNCLOS I, there were three major issues of discussion relating to Article 70 of the 1956 ILC Articles. The first issue concerned the similarity between Article 70 (addressing only submarine cables on the continental shelf) and Article 61(2) of the 1956 ILC Articles (addressing submarine cables and pipelines on the bed of the high seas).<sup>208</sup> This came up in both the Second Committee and Fourth Committee at UNCLOS III, and it was ultimately decided to retain both Article 61(2) and Article 70 as it was unclear whether Article 61(2)

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<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.*

<sup>201</sup> Note by the Secretary-General on Draft Articles on the Continental Shelf and Related Subjects Prepared by the International Law Commission, A/CN.4/49, 30 July 1951, 2.

<sup>202</sup> Article 5, Draft Articles on the Continental Shelf, Report of the ILC Covering the Work of its Fifth Session, 1 June–14 August 1953, Doc. No. A/CN.4/76, ILCYB, Vol. II (1953), Doc. A/CN.4/SER.A/1953/Add.1, 215, para. 76.

<sup>203</sup> François, 200<sup>th</sup> Meeting of the ILC, 23 June 1953, ILCYB, Vol. I (1953), Doc. A/CN.4/SER.A/1953, 102, para. 89.

<sup>204</sup> Scelle, 286<sup>th</sup> Meeting, 6 May 1955, ILCYB, Vol. I (1955), Doc. A/CN.4/SER.A/1955, 18, para. 62.

<sup>205</sup> *Ibid.*, 18, paras. 54–55.

<sup>206</sup> Draft Articles on the Continental Shelf, Report of the ILC covering the Work of its 5<sup>th</sup> Session, 1 June–14 August 1953, Doc. No. A/CN.4/76, ILCYB (1953) Vol. II, Doc. A/CN.4/SER.A/1953/Add.1, 215.

<sup>207</sup> Commentary to Article 70, ILC 1956 Articles, *supra* note 12, 299.

<sup>208</sup> It was explained that Article 61 came in Part II of the ILC Draft Articles, which concerned the high seas, and that a specific reference to the seabed of the CS was therefore necessary as reflected in Article 70. See comments of Mr. Patey, Summary Records of the 26<sup>th</sup>–30<sup>th</sup> Meetings of the Fourth Committee, A/CONF.13/C.4/SR. 26–30, UNCLOS I, Official Records, Vol. VI, Doc. A/CONF.13/42 (1958), 79, para. 20. However, it was also mentioned that when the Special Rapporteur, Mr. François, was asked whether there was a reason for the repetition between Articles 61(2) and 70, he replied that it was probably due to haste in the preparation of the draft. See comments of Mr. Mouton, Summary Records of the 26<sup>th</sup>–30<sup>th</sup> Meetings of the Fourth Committee, A/CONF.13/C.4/SR. 26–30, UNCLOS I, Official Records, Vol. VI, Doc. A/CONF.13/42 (1958), 78, para. 10.

was going to be adopted. Because of this, it was not appropriate to decide whether Article 70 or Article 61(2) should be deleted.<sup>209</sup> Article 61(2) was eventually reproduced in Article 26(2) of the HSC and Article 70 was reproduced in Article 4 of the CSC.

141. The second issue was whether Article 70 should also be extended to pipelines. Again, the insertion was proposed by the UK,<sup>210</sup> which pointed out that the ILC commentary had noted that pipelines should be included in the article, that any challenges that may arise with regard to pipelines would be addressed by the right of the coastal State to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources and last, if pipelines were included in Article 61(2), they should not be omitted from Article 70.<sup>211</sup>
142. The third issue that was discussed once again concerned the interaction between the coastal State's rights on the continental shelf and the freedom to lay submarine cables and pipelines on the continental shelf. The ILC commentary to both Articles 61(2) and 70 observed that coastal States could impose conditions on the route of the cable or pipeline to be followed, so as to avoid unjustified interference with the coastal State's exploitation of the natural resources of the seabed and subsoil. During UNCLOS I, Venezuela had proposed amendments to both Article 61(2) and Article 70 of the 1956 ILC Articles which permitted the coastal State to 'impose prior conditions as to the route to be followed in order to prevent undue interference with the exploration of the continental shelf...'<sup>212</sup> However, these were rejected and the term 'reasonable measures' was retained, on the basis that it was 'broader and more flexible.'<sup>213</sup> Indeed, the US Representative observed that 'since it was impossible to foresee all the situations that might arise with regard to article 70, no more definite criterion than that of reasonableness could be established for the measures which coastal States might take.'<sup>214</sup>
143. Ultimately, Article 4 CSC provided that '[s]ubject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables or pipelines on the continental shelf.'
144. **Sea-Bed Committee and UNCLOS III:** During the Sea-Bed Committee discussions and UNCLOS III, the negotiations leading up to the adoption of Article 79 were dominated by several issues. First, the debates on the interaction between coastal States' sovereign rights over the natural resources of the continental shelf and the freedom to lay submarine cables and pipelines continued. Several States had proposed in various formulations to subject the course of delineation of both the laying of submarine cables and pipelines to the *consent* of the coastal State;<sup>215</sup> to subject the laying of submarine cables and pipelines on the continental shelf to the *authorization* of the coastal State without restrictions other than those related to the coastal States' rights over

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<sup>209</sup> Summary Records of the 26<sup>th</sup>–30<sup>th</sup> Meetings, of the Fourth Committee, A/CONF.13/C.4/SR. 26–30, UNCLOS I, Official Records, Vol. VI, Doc. A/CONF.13/42 (1958), 78, para. 10, 79–80.

<sup>210</sup> Proposal by United Kingdom, A/CONF.13/C.4/L.27, UNCLOS I, Official Records, Vol. VI, Doc. A/CONF.13/42 (1958), 134.

<sup>211</sup> Comments by United Kingdom, Summary Records of the 26<sup>th</sup>–30<sup>th</sup> Meetings of the Fourth Committee, A/CONF.13/C.4/SR. 26–30, UNCLOS I, Official Records, Vol. VI, Doc. A/CONF.13/42 (1958) 78, para. 5.

<sup>212</sup> Proposal by Venezuela to Article 61(2), Doc. A/CONF.13/C.2/L.58, UNCLOS I, Official Records, Vol. IV, Doc. A/CONF/13/40 (1958), 131. Proposal by Venezuela to Article 70, Doc. A/CONF.13/C.4/L.34, UNCLOS I, Official Records, Vol. VI, Doc. A/CONF.13/42 (1958), 136.

<sup>213</sup> Comments United States, Summary Records of the 26<sup>th</sup>–30<sup>th</sup> Meetings of the Second Committee, Doc. A/CONF.13/C.2/SR.26–30, UNCLOS I, Official Records, Vol. IV, Doc. A/CONF/13/40 (1958), 89, para. 14.

<sup>214</sup> Comments of United States, Summary Records of the 26<sup>th</sup>–30<sup>th</sup> Meetings of the Fourth Committee, A/CONF.13/C.4/SR. 26–30, UNCLOS I, Official Records, Vol. VI, Doc. A/CONF.13/42 (1958), 79, para. 27. Also see general discussion in Summary Records of the 26<sup>th</sup>–30<sup>th</sup> Meetings of the Fourth Committee, A/Conf.13/C.4/SR. 26–30, UNCLOS I, Official Records, Vol. VI, Doc. A/CONF.13/42, 78 et seq, paras. 16, 33, 35, 37, 43 and 47.

<sup>215</sup> China's Proposal, Section 3(4), Doc. No. A/AC.138/SC.II/L.34, Sea-Bed Committee Report, Vol. III (1973), 71, 74.

the continental shelf;<sup>216</sup> or to subject the laying of *only* submarine pipelines to the consent of the coastal State (i.e., not just the delineation of the course of such pipelines).<sup>217</sup>

145. In 1974, at the Second Session of the Conference, a working paper on trends by the Second Committee, which was based on proposals made either to the Sea-Bed Committee or during UNCLOS III, introduced a formulation that stated ‘the delineation of the course for laying of submarine cables and pipelines on the continental shelf by a foreign State is subject to the consent of the coastal State.’<sup>218</sup> At the third session of UNCLOS III in 1975, negotiations continued in informal meetings and the Evensen Group produced a series of revised texts on the continental shelf, one of which stipulated that coastal State consent for delineation of the course of submarine pipelines only was required.<sup>219</sup> This eventually became Article 79(3) LOSC.

146. Another change occurred during UNCLOS III in relation to pipelines. The 1974 working paper on trends by the Second Committee stated ‘subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources *and the prevention of pollution*, the coastal State may not impede the laying or maintenance of submarine cables or pipelines on its continental shelf.’<sup>220</sup> At the third session of UNCLOS III in 1975, negotiations continued in informal meetings and the Evensen Group produced a series of revised texts on the continental shelf which reflected this requirement that the coastal State could take reasonable measures for the prevention of pollution but confined it only to pipelines and not cables.<sup>221</sup> It read:

Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention of pollution from pipelines, the coastal State may not impede the laying or maintenance of submarine cables or pipelines on its continental shelf.

147. This formed the basis for Article 79(2) LOSC, although ‘prevention of pollution from pipelines’ was changed to ‘prevention, reduction and control of pollution from pipelines’ in 1977 to be brought in line with articles being negotiated in the Third Committee.<sup>222</sup>

148. Besides the nature of coastal State rights over submarine cables and pipelines on its continental shelf which was addressed in Articles 79(2) and (3), the other major addition to the 1958 CSC related to coastal State rights over submarine cables and pipelines that they had jurisdiction over. The US had proposed the following article at the Second Session in 1974:

Nothing in this article shall affect the jurisdiction of the coastal State over cables and pipelines constructed or used in connexion with the exploration or exploitation of its continental shelf or the operations of an installation under its jurisdiction, or its right to establish conditions for cables or pipelines entering its territorial sea.<sup>223</sup>

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<sup>216</sup> Argentina’s Proposal, A/AC.138/SC.II/L.37 and Corr.1, article 23, Sea-Bed Committee Report, Vol. III (1973), 78, 81.

<sup>217</sup> Denmark, article 67 (RSNT II), Reproduced in R. Platzoder (ed.), Third United Nations Conference on the Law of the Sea: Documents, Vol. IV (1987), 470.

<sup>218</sup> See Provision 72, Formula B, Statement of Activities of the Conference During its First and Second Sessions, UN Doc.A/CONF.62/L.8/Rev.1 (1974), UNCLOS III, Official Records, Vol. III, 93, 107, 108.

<sup>219</sup> The Continental Shelf (1975, Mimeo), article 6 (Informal Group of Juridical Experts) reproduced in R. Platzoder (ed), Third United Nations Conference on the Law of the Sea: Documents, Vol. XI (1987), 501.

<sup>220</sup> Provision 72, Formula C, Statement of Activities of the Conference During its First and Second Sessions, UN Doc. A/CONF.62/L.8/Rev.1 (1974), UNCLOS III, Official Records Vol. III, 93, 107, 108 (emphasis added). D. Engländer, “Article 79: Submarine Cables and Pipelines on the Continental Shelf,” in A. Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (2017), 618, 622.

<sup>221</sup> The Continental Shelf (1975, Mimeo), article 6, *supra* note 219.

<sup>222</sup> S.N. Nandan and S. Rosenne (eds), *United Nations Convention on the Law of the Sea: A Commentary*, Vol. II (1993), 915.

<sup>223</sup> United States of America, draft articles for a chapter on the economic zone and the continental shelf, Doc. A/CONF.62/C.2/L.47, 8 August 1974, UNCLOS III, Official Records, Vol. III (Documents of the Conference, First and Second Sessions).

149. This proposal was incorporated in one of the formulations reflected in the 1974 working paper on trends by the Second Committee.<sup>224</sup> Thereafter, it was included in the Evensen Group's series of revised texts on the continental shelf in 1975.<sup>225</sup> In the 1975 Informal Single Negotiating Text, it was included but expanded to recognize the coastal State's jurisdiction over cables and pipelines constructed or used in connexion with the exploration of the continental shelf or exploitation of its resources, as well as over cables and pipelines used in the operation of artificial islands, installations and structures (which were under the jurisdiction of the coastal State).<sup>226</sup> The substance remained the same until its eventual iteration in Article 79(4) LOSC.

150. Article 79(5) of LOSC is based on Article 26(3) of the HSC.

#### *International Case Law*

151. In *Croatia v. Slovenia* (2017), because no part of the boundary of Slovenia's territorial sea, as determined by the Tribunal, directly abuts upon an area of high seas or of EEZ, the whole of Slovenia's territorial sea boundary is adjacent to the territorial sea of either Italy or Croatia. Thus, there was no space 'immediately adjacent to an area in which the applicable legal regime preserves the freedoms referred to in UNCLOS Article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms.' Because the Arbitration Agreement (Article 4) required the Tribunal to determine both 'Slovenia's junction to the High Seas' and 'the regime for the use of the relevant maritime areas,' and to do so applying 'international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances,' the Tribunal determined the regime within the 'Junction Area',<sup>227</sup> intended to guarantee both the integrity of Croatia's territorial sea and Slovenia's freedoms of communication between its territory and the high seas.<sup>228</sup> It pronounced that the freedom of communication consisting in the freedoms under Article 87 LOSC applied in the 'Junction Area', and the freedom to lay submarine cables and pipelines was made subject to Article 79, recognising Croatia's right under Article 79(4) LOSC to establish conditions for such cables and pipelines entering its territorial sea.<sup>229</sup> Given the special nature of the 'Junction area', it cannot be assumed that general conclusions may be drawn from the Tribunal's finding.
152. No international case law addressing specifically this provision (or the CSC) has been found.

#### *Commentary by Publicists*

153. The commentary by publicists on Article 79 focuses on three main (but not exhaustive) issues. First, the relationship between 'reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and prevention, reduction and control of pollution from pipelines' and the freedom to lay cables and pipelines. Langlet as well as Koivurova and Polonen—focusing on pipelines—explain that any action must aim to protect one or more of the listed objectives, and thus it is impermissible to impose restrictions on laying or operation of submarine pipelines for other reasons, such as security or energy policy concerns.<sup>230</sup> Lagoni—focusing on cables—argues that the provision's effect is that 'in the case of a conflict, the sovereign rights of the coastal State for the purpose of exploring and exploiting the natural resources of the continental shelf shall prevail over the right to lay or maintain a submarine cable.'<sup>231</sup> For Lagoni, while a coastal State cannot deny the right to

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<sup>224</sup> See Provision 72, Formula C, Statement of Activities of the Conference During its First and Second Sessions, UN Doc. A/CONF.62/L.8/Rev.1 (1974) UNCLOS III, Official Records Vol. III, 93, 107–108.

<sup>225</sup> The Continental Shelf (1975, Mimeo), article 6 (Informal Group of Juridical Experts), *supra* note 219.

<sup>226</sup> Nandan and Rosenne (Vo. II), *supra* note 222, 913; Informal Single Negotiating Text, Doc. A/CONF.62/WP.8/Part II, article 65, UNCLOS III, Official Records, Vol. IV, 152, 163.

<sup>227</sup> In the matter of an arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia signed on 4 November 2009 (Republic of Croatia v. Republic of Slovenia) (Award of 29 June 2017), PCA Case No 2012-04, paras. 1078–1079.

<sup>228</sup> *Ibid*, para. 1123.

<sup>229</sup> *Ibid*, para. 1128.

<sup>230</sup> D. Langlet, 'Transboundary Transit Pipelines: Reflections on the balancing of rights and interests in light of the Nord Stream Project' 63 *I.C.L.Q.* (2014) 982, 990; T. Koivurova and I. Polonen, 'Transboundary Environmental Impact Assessment in the Case of the Baltic Sea Gas Pipeline' 25 *Int. J. Mar. & Coast. Law* (2010) 151, at 179.

<sup>231</sup> Lagoni (1998), *supra* note 64, 19.

lay, maintain or repair a submarine cable on its continental shelf, the coastal State has in fact control over and influence on the modalities and details of such activities.<sup>232</sup> Lagoni notes that the coastal State normally requires prior information or even a formal permission for the laying of cables on their continental shelf in order to prevent conflicts with their sovereign rights and with the rights of holders of off-shore licenses.<sup>233</sup> He also argues that in certain circumstances, the coastal State can impose conditions on the delineation of a cable route under ‘reasonable measures’ and not just pipelines as mentioned in Article 79(3).

154. Second, in relation to whether ‘reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and prevention, reduction and control of pollution from pipelines’ allow the coastal State to impose environmental measures for laying cables and pipelines, Lagoni observes that whether or not the coastal State may take reasonable measures for the prevention, reduction and control of any environmental effects from submarine cables is an open question.<sup>234</sup> However, he argued that if pollution or similar environmental effects can be expected from submarine power cables, the power that the coastal State has to prevent, reduce and control pollution from pipelines under Article 79(2) should, by analogy, extend to submarine power cables.<sup>235</sup>
155. Third, in relation to Article 79(4) and the ability of coastal States to impose conditions on cables which are not just transiting their continental shelves but are entering their territorial seas, Soons and Carter have argued that the Article 79(1) freedom to lay submarine cables only applies to cables merely transiting the continental shelf. Cables that traverse the coastal State’s continental shelf and enter the coastal State’s territorial sea to land in the coastal State’s territory can be subject to the conditions the coastal State may impose for allowing the cable to enter its territory.<sup>236</sup> On the other hand, Burnett *et al* argue that ‘if coastal States impose additional conditions (apart from those related to the exploration and exploitation of their resources) on the laying or repair of a submarine cable which falls both on its continental shelf and on the seabed of its territorial sea, then the conditions would only apply to the part of the cable located in the territorial sea.’<sup>237</sup>

#### *Analysis and Conclusions*

156. Given that Article 79(2) makes reference to ‘laying or maintenance’, an *a contrario* argument may be made that all other activities relating to cables and pipelines are excluded. The opposite argument rests on the reasoning set out in paragraph 18 of this report. There is no evidence in the preparatory works that any or all other related activities examined in this report were specifically excluded; nor is there evidence that they were intended to be included. Literature does not address this point. However, as explained in paragraph 18, the freedom to lay cables or pipelines would be meaningless if surveys for laying were not included. Drilling for purposes of laying submarine cables and pipelines in the continental shelf, however, is an exclusive right of the coastal State (Article 81 refers to ‘drilling for all purposes’). Operation can be seen as implicit in the purpose of laying, and thus covered by this provision. Yet, as explained in paragraph 18, the same interpretative methodology may not apply to abandonment or removal of submarine cables and pipelines and it is unclear whether abandonment or removal fall within the scope of this provision, given that the laying of submarine cables and pipelines may be meaningful and occur without abandonment or removal of such submarine cables and pipelines. Further, unlike repair and maintenance, abandonment or removal are not necessary for the operation of submarine cables and pipelines. It could also be argued that abandonment or removal (particularly in the case of submarine pipelines relate to the prevention of pollution of the marine environment, and consequently, were intended to fall within the jurisdiction of the coastal State. These issues merit further discussion.

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<sup>232</sup> *Ibid*, 18.

<sup>233</sup> *Ibid*.

<sup>234</sup> *Ibid*, 20.

<sup>235</sup> *Ibid*.

<sup>236</sup> L. Carter and A.H.A. Soons, “Marine Scientific Research Cables,” in D.R. Burnett *et al* (eds), *Submarine Cables: The Handbook of Law and Policy* (2014), 323, 335.

<sup>237</sup> D. Burnett, T. Davenport and R. Beckman, “Overview of the International Legal Regime Governing Submarine Cables,” in D.R. Burnett *et al* (eds), *Submarine Cables: The Handbook of Law and Policy* (2014), 63, 83.

157. Article 79 is the controlling provision on submarine cables and pipelines on the continental shelf. While Article 79 preserves the right of other States to lay submarine cables and pipelines on coastal States' continental shelves, there is uncertainty on several issues which warrant further discussion in future Reports, including, (1) what type of coastal State measures fall within the definition of 'reasonable measures for the exploration of the continental shelf and exploitation of its national resources;' (2) whether the coastal State can subject cable operations to measures related to the prevention, reduction and control of pollution; and (3) whether coastal States can impose additional conditions on submarine cables and pipelines which traverse their continental shelf and land in their territory.

### E. The Exclusive Economic Zone (EEZ)

#### i. Article 58

158. Articles 113–115 apply in the EEZ by virtue of Article 58(2). The above discussion of these articles is relevant in the EEZ.
159. Article 58 LOSC provides:

#### Article 58 Rights and Duties of Other States in the Exclusive Economic Zone

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, 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.

#### Legislative History

160. **1884 Convention:** Not applicable.
161. **ILC:** Not applicable.
162. **UNCLOS I:** Not applicable.
163. **Sea-Bed Committee and UNCLOS III:** The EEZ was a new regime introduced in LOSC and was not discussed in the ILC sessions or in UNCLOS I or II. The concept of the EEZ was initially motivated by the increasing assertion of States to exclusive fishing zones (EFZs) from their coasts.<sup>238</sup> One of the key issues in the initial stages was finding an equilibrium between the rights of the coastal State and the rights of all States.<sup>239</sup>
164. The possibility that the high seas freedom of laying submarine cables and pipelines would also apply in the EEZ appears to have first been proposed in the Declaration of Santo Domingo (1972) (Patrimonial Sea).<sup>240</sup> A reference

<sup>238</sup> D.R. Rothwell and T. Stephens, *The International Law of the Sea* (2010), 83.

<sup>239</sup> Nandan and Rosenne (Vol. II), *supra* note 222, 556, para. 58(2).

<sup>240</sup> *Ibid*, pp. 556–557. Paragraph 5 of the section on Patrimonial Sea reads: “[...] subject only to these limitations (Coastal State rights within the patrimonial sea), there will also be freedom for the laying of submarine cables and pipelines.”

to the freedom to lay submarine cables and pipelines was included in the regime of the EEZ, as early as the first proposal for the concept of the EEZ: Kenya's 1972 proposal to the Sea-Bed Committee concerning 'Draft articles on exclusive economic zone concept' included Article III stating that the EEZ 'shall be without prejudice to the exercise of [...] freedom to lay submarine cables and pipelines as recognized in international law.'<sup>241</sup> Other proposals also referred to the freedom of laying cables and pipelines,<sup>242</sup> including by Malta that proposed that the 'exploration and exploitation of the natural resources [...] shall be conducted with reasonable regard to [...] the *laying and repair* of submarine cables and pipelines.'<sup>243</sup> China made a more restrictive proposal that made the delineation of the course for laying cables and pipelines 'subject to the consent of the coastal State.'<sup>244</sup> The US, Australia and Norway made proposals that did not refer to the freedom to lay cables and pipelines.<sup>245</sup>

165. During the second session of UNCLOS III in 1974, States and groups of States submitted various proposals which set out the respective rights and duties of all States and coastal States.<sup>246</sup> In the third session of UNCLOS III in 1975, the Evensen Group (Informal Group of Juridical Experts) prepared a draft provision on the EEZ which closely mirrored Articles 58(1) and (3) LOSC:

1. All States, whether coastal or land-locked, shall, subject to the relevant provisions of this Convention, enjoy [in] the economic zone the freedoms of navigation and overflight and of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to navigation and communication and shall have other rights and duties provided for in this Convention.
2. [...]
3. In exercising their rights and performing their duties under this Convention in the economic zone, States shall have due regard to the rights and duties of coastal State and shall act in a manner compatible with the provisions of this Convention.<sup>247</sup>

166. This was the first time a draft text had made a reference to 'other internationally lawful uses of the sea related to navigation and communication.'<sup>248</sup> Proposals were made by the Landlocked and Geographically Disadvantaged States (LL/GDS group) to expand the rights of user States by dropping the phrase 'related to navigation and communication' from 'internationally lawful uses of the sea,'<sup>249</sup> but were eventually deemed unacceptable to the majority of States.

<sup>241</sup> Sea-Bed Committee, Kenya: Draft Articles on Exclusive Economic Zone Concept, UN Doc. A/AC.138/SC.II/L.10 (1972), GAOR 27th Sess., Suppl. 21 (A/8721), 180 (Article III).

<sup>242</sup> Sea-Bed Committee, Colombia, Mexico and Venezuela: Draft Articles on Treaty, UN Doc. A/AC.138/SC.II/L.21 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 19, 20 (Articles 9 and 10); see also Sea-Bed Committee, Argentina: Draft Articles, UN Doc. A/AC.138/SC.II/L.37 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 78, 80 (para. 13); Sea-Bed Committee, Algeria et al, Draft Articles on Exclusive Economic Zone, UN Doc. A/AC.138/SC.II/L.40 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 87, 88 (Article IV).

<sup>243</sup> Sea-Bed Committee, Malta: Preliminary Draft Articles on the Delimitation of Coastal State Jurisdiction in Ocean Space and on the Rights and Obligations of Coastal States in the Area under Their Jurisdiction, UN Doc. A/AC.138/SC.II/L.28 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 35, 61 (Article 80) (emphasis added).

<sup>244</sup> Sea-Bed Committee, China: Sea Area within the Limits of National Jurisdiction, UN Doc. A/AC.138/SC.II/L.34 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 71, 73 (para. 2(4)).

<sup>245</sup> Sea-Bed Committee, US: Draft Articles for a Chapter on the Rights and Duties of States in the Coastal Seabed Economic Area, UN Doc. A/AC.138/SC.II/L.35 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 75, 76 (Article 2); Sea-Bed Committee, Australia and Norway, Certain Basic Principles on an Economic Zone and on Delimitation, UN Doc. A/AC.138/SC.II/L.36 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 77, 78 (para. 1(d)).

<sup>246</sup> Nandan and Rosenne (Vol. II), *supra* note 222, 557.

<sup>247</sup> Third UN Conference on the Law of the Sea, The Economic Zone (1975, Mimeo) reproduced in R. Platzoder (ed), *Third United Nations Conference on the Law of the Sea: Documents*, Vol. IV (1983), 209, 211.

<sup>248</sup> A. Proelss, "Article 58: Rights and Duties of Other States in the Exclusive Economic Zone," in A. Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (2017), 447.

<sup>249</sup> Nandan and Rosenne (Vol. II), *supra* note 222, 561.



167. Discussions on this text went on between the third and fifth sessions, and in the sixth session of UNCLOS III, the Castaneda Group prepared a series of proposals about the content of the provision concerning all States' rights and duties in the EEZ. The last text proposed by the Castaneda Group was, for the most part, identical to the final version of Article 58 LOSC.<sup>250</sup> Several revisions were made to the text proposed by the Evensen Group, including the change of the phrase 'other internationally lawful uses of the sea related to navigation and communication' to 'to other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines.' Additionally, paragraph 3 was amended to ensure that all States had the obligation to comply with the laws and regulations of 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.' Germany and the US submitted subsequent proposals to limit the rights of coastal States and widen the freedoms of other States, but these were ultimately unsuccessful.<sup>251</sup>
168. Research in the preparatory works does not reveal a specific intention to include in Article 58 any of the following: route surveys, maintenance, repair, drilling associated with cable or pipeline laying, operation or removal.

#### *International Case Law*

169. The case law on the 'due regard' obligation in the context of Article 87 described in paragraphs 42–47 would also be relevant here. The *Chagos Archipelago Arbitration* has dealt with the meaning of 'due regard' in Article 56(2) LOSC, which can be used here by analogy, since it is logical to presume that the drafters gave the same meaning to the same terms within the same treaty (see paragraphs 44–45 above on discussion of the *Chagos Archipelago Arbitration*).
170. Concerning the meaning of 'other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of [...] submarine cables and pipelines,' international case law has not identified the criterion by which to determine which uses are associated with the operation of submarine cables and pipelines (or any of the freedoms listed in Article 58(1), which could have assisted here by analogy). In *M/V Saiga*, Saint Vincent and the Grenadines and Guinea disagreed about whether the provision of gas oil to fishing vessels in the EEZ fell within the freedom of navigation or a use associated with it. The Tribunal did not address this point; it found that in the EEZ the coastal State is not allowed to apply its customs laws except in respect of artificial islands, installations and structures (Article 60(2) LOSC).<sup>252</sup> In *Virginia G*, Guinea-Bissau had arrested the Panama flagged *Virginia G* in its EEZ for bunkering foreign fishing vessels.<sup>253</sup> Panama argued that bunkering in the EEZ falls within the freedom of navigation and other lawful uses of the sea relating to this freedom,<sup>254</sup> because bunkering is 'intimately linked' with the freedom navigation.<sup>255</sup> Guinea-Bissau disagreed.<sup>256</sup> ITLOS embarked on examining whether bunkering fishing vessels fell within freedom of navigation or other lawful uses of the sea under Article 58 LOSC. It found that Article 58 LOSC should be read together with Article 56 LOSC, and that Article 58 does not prevent coastal States from regulating, under Article 56, bunkering of foreign vessels fishing in their EEZ, given that such competence, derives from the sovereign rights of coastal States under Article 56.<sup>257</sup> However, it continued that 'the bunkering of foreign vessels engaged in fishing in the [EEZ] is an activity which may be regulated by the coastal State concerned. The coastal State, however, does not have such competence with regard to other bunkering activities, unless otherwise determined in accordance with the Convention.'<sup>258</sup> In other words, the Tribunal drew a distinction between types of bunkering, but did not explain

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<sup>250</sup> Proelss, *supra* note 248, 448.

<sup>251</sup> *Ibid.*

<sup>252</sup> *M/V 'Saiga' (No.2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, paras. 123–124, 127.

<sup>253</sup> *M/V 'Virginia G' (Panama v. Guinea)*, Judgment of 14 April 2014, ITLOS Reports 2014.

<sup>254</sup> *Ibid.*, para 165.

<sup>255</sup> *Ibid.*, para 170.

<sup>256</sup> *Ibid.*, para. 185.

<sup>257</sup> *Ibid.*, para. 222.

<sup>258</sup> *Ibid.*, para. 223.

why each fell within or outside the scope of freedoms and uses in Article 58. These may be clarified in the ITLOS pending case of *The M/T "San Padre Pio"* (No. 2) (Switzerland/Nigeria).

#### *Commentary by Publicists*

171. Langlet shows that route surveys for pipeline laying do not constitute marine scientific research.<sup>259</sup> Davenport mentions that cable route surveying is another lawful use related to freedom to lay cables.<sup>260</sup> In general, Proelss argues that 'a sufficiently close relationship between the activity concerned and the freedom of laying submarine pipelines presupposes that it depends on, or is inseparably linked to, one of these freedoms, e.g., because its autonomous execution would have to be qualified as pointless. This will not be the case if the conduct in question can just as well be undertaken independently of laying of cables or pipelines.'<sup>261</sup>

#### *Analysis and Conclusions*

172. Article 58(1) makes express reference to specific freedoms referred to in Article 87 including the laying of submarine cables and pipelines. However, these can be exercised in the EEZ if and to the extent to which they are exercised in accordance with the relevant provisions of LOSC, which in relation to the freedom to lay submarine cables and pipelines, is Article 79.<sup>262</sup>
173. In general, if and to the extent to which the sovereign rights and jurisdiction of the coastal State are not directly affected, measures restricting the freedom to lay submarine pipelines and cables are incompatible with Article 58(1). But, even if the coastal State's jurisdiction is affected (e.g., regarding the protection of the marine environment), this jurisdiction must be implemented in accordance with the relevant provisions of LOSC.<sup>263</sup>
174. The wording of Article 58(1), i.e., 'other internationally lawful uses of the sea related to the freedoms of [...] laying of submarine pipelines and cables', does not clarify how closely related to the high seas freedoms the activity concerned has to be. It has not been the subject of decisions of international courts or tribunals. There are numerous activities that precede or are subsequent to laying cables or pipelines (such as the surveying of cable routes, drilling for purposes of laying cables or pipelines), as well as activities subsequent to the laying (operation, maintenance and repair, burial of submarine cables and pipelines and securing of cables and pipelines to the seabed as well as abandonment or removal of submarine cables and pipelines). As explained in paragraph 18 above, given the variety of activities associated with laying of submarine cables and pipelines, as well as the need to have a clear criterion for determining 'other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of [...] submarine cables and pipelines,' it can be argued that surveying for laying, maintenance and repair fall within the uses of the seas associated with the operation of cables and pipelines, as does the operation of cables and pipelines. This is because operation presupposes and cannot be realized without laying and laying presupposes survey for laying, as well as maintenance and repair. However, drilling in connection to the laying of a pipeline is better seen outside the scope of Article 58, because Article 81 makes the authorization and regulation of 'drilling on the continental shelf for all purposes' explicitly an exclusive right of the coastal State. If the term 'operation' in the term 'other internationally lawful uses of the sea related to these freedoms, such as those associated with the *operation of ships, aircraft and submarine cables and pipelines*' is connected also to submarine cables and pipelines (as opposed to be only referring to that of ships and aircraft), it is not clear whether abandonment or removal would fall within the scope of this provision. However, it may be argued that they do because the provision uses 'those associated with' as examples ('such

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<sup>259</sup> D. Langlet, 'Transboundary Transit Pipelines: Reflections on the balancing of rights and interests in light of the Nord Stream Project' 63 *ICLQ* (2014) 982, at 985–988.

<sup>260</sup> Davenport, *supra* note 137, 210.

<sup>261</sup> Proelss, *supra* note 248, 453.

<sup>262</sup> In the matter of an arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia signed on 4 November 2009 (*Republic of Croatia v. Republic of Slovenia*), Award of 29 June 2017, PCA Case No 2012-04, 372, para. B.d.

<sup>263</sup> Proelss, *supra* note 248, 452.

as'), and thus abandonment or removal may be covered by this provision, and again, this merits further discussion.

## F. Territorial Sea

175. *There are two provisions in the LOSC which expressly deal with submarine cables and pipelines in the territorial sea, Article 19(2)(k) and Article 21(1)(c) of the LOSC.*

### i. *Article 19(2)(k) LOSC*

176. Article 19(2)(k) reads:

#### *Meaning of innocent passage*

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

[...]

(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

#### *Legislative History*

177. **1884 Convention:** not applicable.

178. **ILC:** The 1956 ILC Articles did not provide a list of activities that would render passage non-innocent.

179. **UNCLOS I:** The 1958 Convention on the Territorial Sea and Contiguous Zone (TSC) did not provide a list of activities that would render passage non-innocent.

180. **Sea-Bed Committee and UNCLOS III:** Article 19(2)(k) originated from Fiji's proposal in 1973 to the Sea-Bed Committee.<sup>264</sup> The proposal contained an Article 2(h) which provided that 'any act of interference with any systems of communication of the coastal State' and an Article 2(i) which stated that 'any act of interference with any other facility or installation of the coastal State.' The Fiji wording was slightly altered during UNCLOS III in 1975 to include acts 'aimed' at interference.<sup>265</sup>

#### *International Case Law*

181. No international case law has been found so far.

#### *Commentary by Publicists*

182. Existing *commentary* does not address this provision in depth.

#### *Analysis and Conclusion*

183. LOSC Article 19(2) defines innocent passage by listing activities during the passage of foreign ships which are to be considered prejudicial to the peace, good order or security of the coastal State and are thus not innocent. It is not clear whether the term 'system of communication or any other facilities or installations' includes pipelines. Intention to interfere is required, and thus accidental 'interference' does not suffice for passage to be considered non-innocent. Finally, although Article 19(2) does not specify the measures that the coastal State can take *vis-à-vis* such prejudicial activities, the coastal State may 'take the necessary steps in its territorial sea to prevent passage which is not innocent' (Article 25(1) LOSC).

<sup>264</sup> A/AC.138/SC.II/L.42 and Corr.1, article 3, paragraphs 1 and 2, reproduced in SBC Report 1973, Vol. III, 93 (Fiji).

<sup>265</sup> A/CONF.62/WP.8/Part II (ISNT, 1975), article 16, at 155.

*ii. Article 21(1)(c) LOSC*

184. Article 21 LOSC sets out the laws and regulations of the coastal State relating to innocent passage. It states:

1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

(c) the protection of cables and pipelines;

2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.

3. The coastal State shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.

*Legislative History*

185. **1884 Convention:** not applicable.

186. **ILC:** Article 18 of the 1956 ILC Articles provided that '[f]oreign ships exercising the right of passage shall comply with the laws and regulations enacted by the coastal State in conformity with the present rules and other rules of international law and, in particular, with the laws and regulations relating to transport and navigation.' In its commentary to the 1956 Articles, the ILC gave a non-exhaustive list of examples of laws and regulations related to transport and navigation. Some of the examples included the safety of traffic, protection of coastal waters from pollutions caused by ships, fishing and hunting rights of the coastal State.<sup>266</sup>

187. **UNCLOS I:** Article 17 of the 1958 Convention on the Territorial Sea more or less replicates Article 18 of the 1956 ILC Articles. It did not list which laws and regulations could be adopted by the coastal State in relation to innocent passage.

188. **Sea-Bed Committee and UNCLOS III:** At the 1973 session of the Sea-Bed Committee, Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain and Yemen proposed to have a list of activities in relation to which the coastal State could exercise prescriptive jurisdiction over innocent passage.<sup>267</sup> In 1973, Fiji proposed the addition of the prevention of damage to pipelines to this list.<sup>268</sup> At the Second Session of UNCLOS III (1974), the UK submitted a detailed draft Article 18, which did not refer to pipelines or cables;<sup>269</sup> Fiji proposed the inclusion of the protection of submarine pipelines and cables;<sup>270</sup> and Bulgaria, the German Democratic Republic, Poland and the USSR made a proposal that expressly included 'communication lines and electrical transmissions'

<sup>266</sup> Commentary to Article 18, 1956 ILC Articles, *supra* note 12, 274, para. 2.

<sup>267</sup> Sea-Bed Committee, Cyprus et al, Draft Articles on Navigation Through the Territorial Sea Including Straits Used for International Navigation, UN Doc. A/AC.138/SC.II/L.18 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-III), 3, 5 (Article 5).

<sup>268</sup> Sea-Bed Committee, Fiji, Draft Articles Relating to Passage Through the Territorial Sea, UN Doc. AC.138/SC.II/L.42 and Corr. 1 (1973), GAOR 28th Sess., Suppl. 21 (A/9021), 91, 94 (Article 5).

<sup>269</sup> Second Committee UNCLOS III, United Kingdom, Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1974), Official Records III, 183, 184 (Article 18).

<sup>270</sup> Second Committee UNCLOS III, Fiji, Draft Articles Relating to Passage Through the Territorial Sea, UN Doc. A/CONF.62/C.2/L.19 (1974), Official Records III, 196, 197 (Article 5).

but not a reference to pipelines.<sup>271</sup> Finally, the Informal Single Negotiating Text (1975),<sup>272</sup> which consolidated all these proposals, included a reference to the protection of cables and pipelines. No substantial changes were later made to this draft vis-à-vis pipelines in the subsequent negotiations.

189. Fiji's 1973 proposal to the Sea-bed Committee also included the 'prevention of destruction or damage to submarine or aerial cables and pipelines' in the list of laws and regulations.<sup>273</sup> Later, this was shortened to the protection of cables and pipelines in the Informal Single Negotiating Text (1975).<sup>274</sup> This suggests that the term 'cables' refer to both submarine and aerial cables.<sup>275</sup>

190. Measures envisaged under this provision include 'restrictions on anchoring when incidental to passage, as well as rules on liability and penalties for damage done to pipelines and cables.'<sup>276</sup>

#### *International Case Law*

191. No international case law has been found so far on this provision.

#### *Commentary by Publicists*

192. Not sufficient commentary has been found on this particular provision.

#### *Analysis and Conclusions*

193. Article 21(1)(c) allows the coastal State to exercise its prescriptive jurisdiction, in conformity with the LOSC provisions and other rules of international law, over innocent passage through the territorial sea, in respect of the protection of pipelines and cables.

### **G. Archipelagic Waters**

#### ***i. Article 51 LOSC***

194. Article 51, which only applies to cables and *not* pipelines, states:

Article 51 Existing Agreements, Traditional Fishing Rights and Existing Submarine Cables

1. Without prejudice to article 49, an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third States or their nationals.

2. An archipelagic State shall respect existing submarine cables laid by other States and passing through its waters without making a landfall. An archipelagic State shall permit the maintenance and replacement of such cables upon receiving due notice of their location and the intention to repair or replace them.

#### *Legislative History*

195. **1884 Convention:** not applicable.

<sup>271</sup> Second Committee UNCLOS III, Bulgaria et al, Draft Articles on the Territorial Sea, UN Doc. A/CONF.62/C.2/L.26 (1974), Official Records III, 203, 204 (Article 20).

<sup>272</sup> UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/Part II (1975), Official Records IV, 152, at 155.

<sup>273</sup> A/AC.138/SC.II/L.42 and Corr.1, article 3, paragraphs 1 and 2, reproduced in III SBC Report 1973, at 94 (Fiji).

<sup>274</sup> A/CONF.62/WP.8/Part II (ISNT, 1975), article 18, at 155.

<sup>275</sup> Dupuy & Vignes, (1991), *supra* note 154, 984.

<sup>276</sup> R. Barnes, "Article 19", in A. Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (2017), 205.

196. **ILC:** Although the ILC discussed archipelagos, there was no draft article addressing archipelagos.
197. **UNCLOS I:** UNCLOS I only addressed coastal archipelagos under Article 4 of the TSC. It did not address mid-ocean archipelagos.
198. **Sea-bed Committee and UNCLOS III:** The archipelagic waters concept was discussed in the period leading up to the Sea-Bed Committee and the beginning of UNCLOS III, ultimately culminating in Part IV on archipelagic States. Article 51 was prompted by concerns of several States neighbouring archipelagic States, including Thailand, Singapore and Malaysia. These States were concerned about their existing activities in waters then considered high seas, that would now be enclosed as archipelagic waters. Such existing activities included navigation, rights of local access, rights to fishing resources, rights relating to the laying and maintaining of submarine cables and pipelines and military training.<sup>277</sup>
199. An anonymous proposal was tabled in the Sea-Bed Committee's 1973 Report that archipelagic States shall enter into consultations at the request of any other State with a view to safeguarding 'submarine cables and pipelines.'<sup>278</sup> During the second session of the Conference (1974), States located close to archipelagic States (such as Japan) voiced concerns over the effect the archipelagic regime would have on existing 'submarine cables and pipelines.'<sup>279</sup>
200. Much of the present wording of Article 51(2) was derived from a proposal by Japan in 1976<sup>280</sup> that read:
- Archipelagic States shall respect existing submarine cables laid by other States and passing through the archipelago. In particular, the maintenance and replacement of such cables shall not be hampered.
201. There was no reference to pipelines in Japan's proposal and no attempt was made to introduce pipelines in further negotiations.
202. Further tweaks were made in the RSNT (1976) such as limiting the scope to existing submarine cables that did not make landfall and the requirement of due notice.<sup>281</sup>

#### *International Case Law*

203. No international case law has been found in relation to this provision.

#### *Commentary by Publicists*

204. Existing commentary does not address this provision in depth.

#### *Analysis and Conclusions*

205. The fact that the provision exclusively refers to submarine cables allows for the *a contrario* argument that pipelines were specifically excluded. While it may be argued that not many pipelines were in archipelagic waters at the time of the negotiations and this may have been a reason for which negotiators did not include pipelines, pipelines were considered in earlier proposals, but a reference to pipelines did not finally appear in the text of the convention. Given that both terms 'cables' and 'pipelines' have been used in other provisions of LOSC, it may be argued that the reference only to 'cables' in this provision reflects the intention of the parties to limit the

<sup>277</sup> M. Munavvar, *Archipelagic Regimes in the Law of the Sea* (1995), 159; see Statements made by representatives of Malaysia, Thailand and Singapore, UNCLOS III, Official Records, Vol. II, 198, 265, 268 and 270. Nandan and Rosenne (Vol. II), *supra* note 212, 448–453.

<sup>278</sup> Item 16, "Archipelagos," Variant F, reproduced in IV SBC Report 1973, at 156.

<sup>279</sup> A/CONF.62/C.2/SR.36, para. 17, at 261 (Japan).

<sup>280</sup> Nandan and Rosenne (Vol. II), *supra* note 222, 451.

<sup>281</sup> *Ibid.*, at 452; A/CONF.62/WP.8/Rev.1/Part II (RSNT, 1976), article 123, at 171. [1]  
[SEP]

provision to cables. However, the subsequent practice of LOSC parties (assuming that it meets the requirements of VCLT Article 31(3)(b)) may reveal some evidence about whether pipelines are or not covered by this provision. However, such research has not yet been conducted by the Committee at the time of writing this Report.

### III. OVERALL CONCLUSIONS OF INTERIM REPORT

206. LOSC provisions do not expressly refer to all activities relating to cables and pipelines. This varying approach raises a question about whether all or some activities are included or excluded from the scope of each provision. This is a matter of treaty interpretation of each provision separately.
207. Given that numerous non-State entities but also multiple States may be involved or interested in activities relating to cables and pipelines in the different maritime zones, this Report addressed the question about whether non-State entities, such as laying companies, companies that own a submarine cable or pipeline or their operating company, have acquired rights under the LOSC provisions examined in this Report. The analysis in this Report has demonstrated that there is no evidence that the relevant LOSC provisions establish rights of individuals directly under LOSC, and the preparatory works do not give evidence of any intention of the drafters to establish rights for individuals under LOSC involved in activities relating to submarine cables and pipelines.
208. The term ‘due regard’ in various LOSC provisions has the same meaning, unless there is evidence to the contrary. However, the scope of each due regard obligation changes depending on each provision’s terms.
209. The research for the Interim Report has not furnished any evidence in favour of any approach to be taken *vis-à-vis* which State has ‘extraterritorial’ jurisdiction over activities relating to submarine cables and pipelines.

### IV. FUTURE WORK OF THE COMMITTEE

210. On the basis of the analysis in the Interim Report, it has been decided that future Reports will address certain cross-cutting or global issues that are relevant to submarine cables and pipelines. These could include:
- The difference between marine scientific research and surveys for laying cables and pipelines under LOSC;
  - Issues relating to Article 51 of the LOSC: future work may consider whether at the time of negotiations of UNCLOS III, whether the lack of pipelines laid in archipelagic waters was the reason for not including pipelines in this provision; and will assess whether the subsequent practice of LOSC parties meets the requirements of VCLT Article 31(3)(b) for including pipelines in the interpretation of this provision;
  - The regulation of activities relating to cables and pipelines by coastal States (including fiscal jurisdiction) and its compatibility with the LOSC regime in the EEZ and continental shelf. In relation to LOSC Article 79, future work will *inter alia* deal with the definition of ‘reasonable measures for the exploration of the continental shelf and exploitation of its national resources’ and whether coastal States are allowed to impose conditions on cables/pipelines laid on their continental shelf, including taxes;
  - Issues relating to Article 145 of the LOSC: future work may examine how to resolve the ‘conflict’ between laying, operating, repairing/maintaining and removing pipelines in (and from) the Area, and on the other hand, activities in the Area by taking into account the ongoing work on the ISA Mining Code;
  - The due regard obligation in relation to balancing activities relating to submarine cables and pipelines with other activities at sea (such as fishing), in maritime spaces within and beyond national jurisdiction;
  - The due regard/reasonable regard obligation set out in Articles 87 and 147 in relation to activities relating to submarine cables and pipelines and activities in the Area;
  - The application of LOSC marine environment obligations (Part XII) to activities relating to submarine cables and pipelines (as well as other techniques of harmonisation or conflict resolution between LOSC provisions on submarine cables and pipelines and Part XII) and the manner in which these provisions affect such activities;

- Which State has jurisdiction over activities relating to submarine cables and pipelines in different maritime zones and the implications of the fact that private entities often conduct activities relating to submarine cables and pipelines;
- Maritime security issues relating to the protection of cables and pipelines, which could include the consideration of, *inter alia*, the application of the laws of war and of terrorism conventions, the developing international law on cyber-attacks to submarine cables and pipelines; and whether a new international legal framework is necessary in relation to maritime security of cables and pipelines, and how national implementation could be improved; and
- The activities relating to cables and pipelines in areas where no maritime delimitation has taken place.