INTERNATIONAL CABLE PROTECTION COMMITTEE'S COMMENTS ON INTERNATIONAL SEABED AUTHORITY'S DRAFT REGULATIONS ON EXPLOITATION OF MINERAL RESOURCES IN THE AREA

The International Cable Protection Committee ("ICPC") respectfully submits these comments on the "Draft Regulations on Exploitation of Mineral Resources in the Area" issued by the International Seabed Authority ("ISA") on August 25, 2017.

I. BACKGROUND

A. ON THE INTERNATIONAL CABLE PROTECTION COMMITTEE

The ICPC is a non-profit organization dedicated to the protection and security of international submarine cables, including telecommunication, power and scientific cables. Since its creation in 1958, the ICPC's vision is "to be the international submarine cable authority providing leadership and guidance on issues related to submarine cable security and reliability." Today, the ICPC counts 166 members from over 60 countries, representing ownership of over 98% of the various international fibre optic submarine cable systems of the world and most of the cable ships that lay and maintain them. Since 2010, the ICPC has welcomed applications from national governments. The ICPC now has government members from Australia, the United Kingdom, Malta, and Singapore.[1]

The ICPC carries out various activities to promote submarine cable security: it publishes and distributes "Recommendations" of best practices for the submarine cable industry, as well as booklets for fishermen and other seabed users; it supports peer reviewed legal and environmental research on submarine cables; it compiles environmental data on cable installation and maintenance; it collects international cable legislation, legal articles and cases dealing with submarine cables; it proposes legislative amendments to national and international authorities; it

[1] See Exhibit A hereto: *List of ICPC Members*.

cooperates with several international organizations that have related areas of competence; and it regularly makes presentations at international conferences and workshops.

A key component of the protection of submarine cables is to ensure compliance with the United Nations Convention of the Law of the Sea ("UNCLOS"). This "Constitution of the Oceans" does not only protect the freedom to lay and maintain submarine cables, but also provides the regulatory framework for peaceful cohabitation with other seabed users.

The ICPC has thus followed very closely the negotiations of an international legally binding instrument on the conservation and sustainable use of the marine biological diversity of areas beyond national jurisdiction. In August 2016, the ICPC organized a workshop and published a white paper on "Submarine Cables and BBNJ."[2] More recently, the International Cable Law Advisor and the Marine Environmental Advisor of the ICPC co-authored a book entitled "*International Submarine Cables and Biodiversity Beyond National Jurisdiction: The Cloud Beneath the Sea*" (Brill 2017). This book was cited in footnote 11 to the draft implementing agreement issued in August with the encouragement of the Chair of the Preparatory Committee. The ICPC has applied for consultative status with the Economic and Social Committee of the United Nations to intensify its presence at international meetings related to the law of the sea.

B. On The Worldwide Network of Submarine Cables

Submarine cables are the backbone of the global society. There are about 265 submarine cable systems worldwide, totaling a combined length of 1,576,481 km, and carrying no less than

[2] Available at http://www.un.org/depts/los/biodiversity/prepcom_files/ICC_Submarine_Cables_&_BBNJ_August_2016.pdf.

98% of the world's international telecommunications.[3] Each fiber optic system represents a multi-million dollar investment, generally made by a consortium of 4 to 30 private companies.[4] Unlike other maritime constructions, submarine cables have no flag State or sponsoring State. Their owners and operators enter regional cable maintenance agreements to share the cost of keeping highly specialized cable ships on standby. There are about fifty-nine oceangoing cable ships around the world, based at strategic locations to carry out cable repairs on twenty-four hour notice in case of cable fault.[5]

Submarine cables are rarely damaged in areas beyond national jurisdiction, where the great water depth protects them from most human activities. In areas beyond national jurisdiction, worldwide, there are annually on average only about four such deep water repairs.[6] Unlike in shallow waters, there is no need for protective armors or burial into the deep seabed. The surface-laying of cables with a "garden hose" diameter of only seventeen to twenty millimeters thus has a very limited impact on the marine environment of the Area.[7]

However, the few cable faults that occur each year in the high seas can have severe consequences. The extreme water depth and remote location increases the difficulty, length and cost of repair operations. This creates a significant risk of interruption of international telecommunications in the absence of alternative routes with backup capacity. As a result, entire countries may find themselves isolated for several days.

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[3] Douglas Burnett, Michael Lodge, Gwenaëlle Le Gurun and Alice Leonard De Juvigny, "Submarine Cables and Deep Seabed Mining Advancing Common Interests and Addressing UNCLOS 'Due Regard' Obligations," ISA Technical Study: No. 14 (2015) at 17.

[4] *Id.* at 17.

[5] See Douglas Burnett and Lionel Carter, *International Submarine Cables and Biodiversity Beyond National Jurisdiction: The Cloud Beneath the Sea* (Brill 2017) at 45.

[6] *Id.* at 71 (Annex)

[7] *Id.* at 52.

Several provisions of UNCLOS address the respective rights of cable owners and cable offenders in such situations. Four principles are key: the freedom to lay and maintain submarine cables, as defined in Articles 79 and 112; the obligation of "due regard" or "reasonable regard" for other activities, as defined in Articles 87 and 147; the civil and criminal responsibilities of cable offenders, as defined in Articles 113, 114 and 115; and the obligation to protect and preserve the maritime environment, as defined in Part XII.

In its most recent resolution on the law of the sea (A/RES/71/257), the General Assembly of the United Nations "[r]ecognize[d] that fibre-optic submarine cables transmit most of the world's data and communications and hence are vitally important to the global economy and the national security of all States," and "call[ed] upon States to take measures to protect fibre-optic submarine cables and to fully address issues relating to these cables, in accordance with international law, as reflected in the Convention." [8] The ICPC is committed to helping in the development and implementation of such measures.

C. ON THE RISK OF OVERLAP WITH DEEP SEABED MINING AREAS

The ICPC and the ISA entered into a Memorandum of Understanding in 2010 "to avoid potential conflicts between the laying and maintaining of submarine cables and current and future activities in the Area," and for "the protection of the marine environment from harmful effects arising from their respective activities." [9]

The two organizations have already taken several actions towards achieving these goals, including the organization of a joint 10-11 March 2015 international workshop in New York on

[8] Available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/466/62/PDF/N1646662.pdf?OpenElement.

[9] See Exhibit B hereto: *Memorandum of Understanding Between The ICPC And The ISA*, signed by the ISA on December 15, 2009 and by the ICPC on February 25, 2010.

"Submarine Cables and Deep Seabed Mining: Advancing Common Interests and Addressing UNCLOS "Due Regard" Obligations." Diplomats, ISA contractors, cable owners, cable ship operators, and legal experts studied the issues involved where mining and cable operations take place on the high seas. The final report, which was published in 2015 as ISA Technical Study No. 14, concludes that "[i]n the absence of a provision of UNCLOS on the resolution of conflicts between cable owners and ISA Contractors, the best strategy is to avoid disputes and reduce risks with practical solutions by privileging dialogue and exchange of information in compliance with the due regard obligation and to adopt practical procedures to reduce risks." [10] The ICPC and the ISA have already identified several overlaps and notified the persons concerned from the mining and cable communities.

As agreed during the workshop, the ICPC and the ISA have also attended each other's annual meetings and started developing practical recommendations for cable owners and mining contractors. On 31 May 2017, the ICPC issued Recommendation No. 17 on "Submarine Cable Operations in Deep Seabed Mining Concessions Designated by the International Seabed Authority."[11] This document was discussed with several representatives of the ISA at an informal meeting that took place during the 23rd session of the ISA. The ICPC now awaits formal comments from the Legal and Technical Commission on its Recommendation No. 17.[12]

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[10] Available at https://www.isa.org.jm/sites/default/files/files/documents/techstudy14_web_27july.pdf.

[11] See Exhibit C hereto: Recommendation No. 17, *Submarine Cable Operations in Deep Seabed Mining Concessions Designated by the International Seabed Authority* (2017). Like all ICPC recommendations, it is also available to the public at no charge upon request to secretary@iscpc.org.

[12] See Exhibit D hereto: Graham Evans, *Remarks to the Assembly of the International Seabed Authority*, August 15, 2017.

Meanwhile, the ISA has issued its "Draft Regulations On Exploitation Of Mineral Resources In The Area," which includes several references to submarine cables. The ICPC hereby welcomes these references and respectfully submits its comments on the Draft Regulations that are of particular interest to the submarine cable community.

II. COMMENTS

A. ON DRAFT REGULATION 1(4)

Draft Regulation 1(4) provides that "[t]hese Regulations shall not in any way affect the freedom of scientific research, pursuant to Article 87 of the Convention, or the right to conduct marine scientific research in the Area pursuant to Articles 143 and 256 of the Convention," and that "[n]othing in these Regulations shall be construed in such a way as to restrict the exercise by States of the freedom of the high seas as reflected in Article 87 of the Convention."

Although the reference to "the freedom of the high seas" implicitly encompasses "the freedom to lay submarine cables," which is expressly protected by Article 87, the ICPC is concerned by the absence of express recognition of the cable freedoms in Draft Regulation 1.

Whereas the other high seas freedoms protected by Article 87 relate to surface activities that have limited relevance for purpose of the Draft Regulations, *i.e.*, the "freedom of navigation," the "freedom of overflight," and the "freedom to construct artificial islands and other installations permitted under international law," the freedom to lay and maintain submarine cables is exercised on the very surface of the Area. An express recognition of the freedom to lay and maintain cables is thus justified, on the same basis than the express recognition of the "freedom of scientific research" is justified. Draft Regulation 1 could otherwise be interpreted as establishing a hierarchy among high seas freedoms, in conflict with Article 87 of UNCLOS.

B. ON DRAFT REGULATIONS 7(4) AND 26

Draft Regulations 7(4)(e) provides "for Exploitation Activities to be carried out with reasonable regard for other activities in the Marine Environment, including, but not limited to, navigation, laying of submarine cables and pipelines, fishing and scientific research," and Draft Regulation 26 provides that "Contractors shall carry out Exploitation Activities under an exploitation contract with reasonable regard for other activities in the Marine Environment," and that "[e]ach Contractor shall exercise due diligence to ensure that it does not cause damage to submarine cables or pipelines in the Contract Area."

The ICPC welcomes these express references to submarine cables, but regrets the use of the terms "reasonable regard" and "due diligence" to describe the obligations of ISA contractors towards cable owners and contractors, without any reference to the similar but better-established notion of "due regard."

As observed in ISA Technical Study No. 14, Article 147 of UNCLOS requires that activities be carried out with "reasonable regard" in the Area, whereas Article 87 requires that activities be carried out with "due regard" in the high seas. In the absence of definition of either "due regard" or "reasonable regard" in UNCLOS, the participants of the joint workshop focused on the notion of "due regard" and reached the conclusion that "due regard requires first notice, which can be actual or constructive, and then consultation between the cable owners and the Contractors engaged in competing activities in the international seabed Area." The understanding was that these requirements apply equally to "reasonable regard."

This interpretation is consistent with international customary law, as reflected in several decisions recently issued by the International Tribunal for the Law of the Sea under Annex VII of UNCLOS: "In the Tribunal's view, the ordinary meaning of 'due regard' calls for the [each State] to have such regard for the rights of [the other State] as is called for by the circumstances and by

the nature of those rights."[13] The Tribunal emphasized that "[i]n the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State."[14] Already in 1999, Judge Liang noted that "[t]his standard of 'due regard' is less ambulatory and open-textured than is the standard of 'reasonable regard.'"[15]

Describing the obligation of ISA contractors as one of "reasonable regard" or "due diligence" thus creates some uncertainty as to its nature and practical implications. In contrast, describing it as one of "due regard" would clearly imply a requirement of consultation in the majority of cases. Therefore, the ICPC recommends that ISA contractors be required to exercise "due regard" for submarine cable activities under Draft Regulations 7(4)(e) and 26. In addition to confirming the validity of the joint interpretation made in ISA Technical Study No. 14, the use of the expression "due regard" would also parallel the language of ICPC Recommendation No. 17.[16] Such reciprocity is at the very essence of the notion.

The ICPC also recommends that an additional paragraph be inserted in Draft Regulation 26 and cross-referred to in Draft Regulation 7(4)(e) to define and operationalize the notion of "due regard" or "reasonable regard" as applied to ISA contractors and cable owners and operators. This additional paragraph should make clear that the words "due" and "reasonable" have the same meaning in this particular context.

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[13] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award (2015) at 519 (cited in *South China Sea Arbitration (Philippines v. China)*, Award (2016) at 742).

[14] *Id.*

[15] *M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, 1999, Separate Opinion of Judge Laing at 32.

[16] See Exhibit C hereto: Recommendation No. 17, *Submarine Cable Operations in Deep Seabed Mining Concessions Designated by the International Seabed Authority* (2017).

The ICPC proposes that three concrete requirements be listed. First, ISA Contractors should regularly consult nautical charts and other publicly available information to identify any existing or planned submarine cable in their concession area. Second, ISA contractors should notify and consult the owners or operators of any such cable. Third, ISA contractors should use acoustic beacons or other technologies to pinpoint the exact location of any such cable, and then respect a default safety distance of twice the water depth on either side of the cable, provided, however, that the owners or operators of the cable may accept lesser to no safety distance on the basis of a mutual agreement, as explained below in the comments to Draft Annex II and IV.

C. On Draft Regulation 40 and 41

Draft Regulations 40 and 41 list the actions to be taken by ISA contractors in case of "Incident" or "notifiable event." Although Schedule 1 includes "damage to a submarine cable" in the definition of "Incident," and Appendix I likewise includes "contact with submarine [] cables" in the definition of "notifiable event," Draft Regulations 40 and 41 do not require that the owners of the cable be notified and permitted to send a cable repair ship in such circumstances.

The consultation obligation of ISA contractors is limited to "provid[ing] written notification to the Secretary-General" and "ensur[ing] that all regulatory authorities are appropriately notified and consulted." This is not sufficient in case of a cable fault, because not one authority has jurisdiction over all cable activities, whether at the national or international level. The ICPC does not assume this role. On the contrary, the ICPC encourages national governments to remove all regulatory burdens that hinder the speedy repair of submarine cables in their national waters. The ICPC hereby reminds the ISA and its members that there can be no such regulatory burden in areas beyond national jurisdiction: the freedom to maintain cables is an essential corollary to the freedom to lay cables under articles 79 and 87 of UNCLOS.

To ensure the speedy repair of submarine cables, the ICPC recommends that ISA contractors be required to notify the owners or operators of the cable as soon as they become aware of any direct contact with a submarine cable in their concession area. This process should be easy if both actors have already consulted each other before the beginning of the exploitation activities, as required by the "due regard" and "reasonable regard" provisions of UNCLOS. The next step would then be to arrange the intervention of a cable ship at the location of the fault. At stake is not only the physical safety of the persons and equipment present in the concession area, but also the continuity of international telecommunications.

In addition, the ICPC recommends that ISA contractors be required to consider any notification that may be received from cable owners or contractors. The latter may discover the incident before the ISA contractors, especially in case of interruption of telecommunication services. The notification and consultation process should go both ways, in accordance with the mutual "due regard" or "reasonable regard" obligation of cable owners and ISA contractors.

D. On Draft Regulation 75

Draft Regulation 75 defines "confidential information" without any mention of the coordinates of submarine cables or of the related data that may be provided by cable owners.

The ICPC recommends that the confidential nature of cable data be recognized in Draft Regulation 75. More precisely, the scope of the protection should extend to any information that is not publicly available, and that is shared by cable owners or operators on a confidential basis. For the avoidance of doubt, no confidentiality obligation attaches to nautical charts and other publicly available information regarding the location of existing and planned cables.

The ICPC recommends that cable owners have the same consideration for the data that may be shared by ISA contractors. Such mutual respect is essential for the notice and consultation process

to take place without threatening the trade secrets and other proprietary information of the interested companies.

E. ON DRAFT ANNEXES II AND IV

Annexes II and IV describe the items to be considered by ISA contractors during the "Pre-Feasibility Study" and the "Environmental Impact Assessment," without any mention of cables.

The ICPC recommends that ISA contractors be required to verify the absence of submarine cables before starting exploitation activities, as provided in the paragraph that the ICPC suggests adding to Draft Regulation 26. The ICPC also proposes that the following language be added to the list of "minimum information" that must be included in the Pre-Feasibility Study in accordance with Annex II(2): "(i) copy of nautical charts or other publicly available maps showing the location of any existing or planned submarine cable in the proposed Mining Area, together with a copy of the notification sent to the owners or operators of any such cable, and proof of receipt by the latter," or similar language.

The earlier the ISA contractors become aware that their concession area is crossed by a submarine cable, the easier it is to notify and consult the owners of the cable, as required by the "due regard" and "reasonable regard" provisions of UNCLOS. Likewise, the ICPC has recommended that cable owners verify the absence of mining concessions before laying any new cable in areas beyond national jurisdiction. Reciprocal consideration is expected.

In many cases, the engineers of the interested companies would likely be able to develop practical arrangements that preserve the safety of their respective activities. As an example, cable owners already routinely conclude crossing arrangements with oil and gas companies and other seabed users. This permits the safe superposition of cables with pipelines and other submarine infrastructure when necessary. Similar agreements may well be reached with ISA contractors.

Most submarine cable systems are not currently charted at water depths of 2000 or more. Moreover, the International Hydrographic Organization ("IHO")'s charting practices result in charting inaccuracies. The ICPC is currently working with the IHO to ensure charting of cables at all depths and to improve charting accuracy.[17] Meanwhile, the ICPC has encouraged its members to make the coordinates of their cables available to the ISA and known mining contractors for constructive notice to all contractors. Both organizations have already identified at least three cases of crossing between a concession area and a submarine cable. Other crossings are likely to occur. The ICPC calls for the greatest caution and prudent planning on the part of both cable owners and ISA contractors.

F. On Draft Annex V

The "Environmental Impact Assessment Template" refers to "telecommunication cables" at Sections 6.2.6 and 9.2.1. The ICPC welcomes these references, but recommends replacing the word "telecommunication" with the word "submarine" for greater clarity and consistence with UNCLOS. Although electric and scientific cables are rare in areas beyond national jurisdiction, such non-telecommunication cables are granted the same level of protection under UNCLOS. All types of submarine cables should thus appear in the environmental impact assessment.

G. On Draft Schedule 1

First, the definition of "[i]ncident" includes "[d]amage to a submarine cable." Once again, the ICPC welcomes this recognition, but recommends replacing the word "damage" with the word "contact," like in Appendix I. This would avoid interpretation disputes concerning the degree of interference required to trigger application of Draft Regulation 40. Such disputes would be

[17] See Exhibit D hereto: Graham Evans, *Remarks to the Assembly of the International Seabed Authority*, August 15, 2017.

difficult to resolve because the great water depth makes it difficult for ISA contractors to determine whether there has just been contact or also damage in the absence of a clear cable cut. Alerting the owners or operators of the cable as soon as a cable has been touched allows them to mitigate any damages. Conversely, waiting for a clear cut is likely to increase costs for both parties.

Second, the definition of "Good Industry Practice" includes "any other standards that may be adopted by or endorsed by the Authority expressly for the purpose of this definition from time to time." The ICPC recommends that its Recommendation No. 17 be recognized as such. Alternatively, the ICPC proposes to develop a joint protocol for the adoption of practical solutions that would be acceptable to all interested actors and likewise endorsed by the ISA as "Good Industry Practice."

Respectfully submitted,

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Attachments:

- Exhibit A – List of ICPC Members;
- Exhibit B – *Memorandum of Understanding Between The ICPC And The ISA*, signed by the ISA on December 15, 2009 and by the ICPC on February 25, 2010;
- Exhibit C – ICPC Recommendation No.17, *Submarine Cable Operations in Deep Seabed Mining Concessions Designated by the International Seabed Authority* (2017).
- Exhibit D – Graham Evans, *Remarks to the Assembly of the International Seabed Authority*, August 15, 2017.