



International Cable Protection Committee Ltd.

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30 September 2018

BY ELECTRONIC SUBMISSION

International Seabed Authority
14-20 Port Royal Street
Kingston, Jamaica
consultation@isa.org.jm

Re: Comments of the International Cable Protection Committee on the International Seabed Authority's Draft Exploitation Regulations

To the International Seabed Authority:

The International Cable Protection Committee (“ICPC”) welcomes this opportunity¹ to comment on the current draft of the draft Exploitation Regulations of the International Seabed Authority (the “Authority”).² To give meaning to the “reasonable regard” obligations of the United Nations Convention on the Law of the Sea (the “Convention”) and ensure effective protection of submarine cables, ICPC believes that the draft Exploitation Regulations require further revision, with language that ICPC has developed in collaboration with the Government of France and has included below.

The Council President’s statement to the Legal and Technical Commission (“LTC”) at the conclusion of the March 2018 Council meeting requested that the LTC “examine ways and means to pay reasonable regard to other activities in the marine environment, such as navigation, laying of submarine cables and pipelines, fishing and scientific research.” The Council President’s request regarding reasonable regard for submarine cables and pipelines reflects the language of article 147 of the Convention, which provides that activities in the Area be conducted with reasonable regard for other activities in the marine environment, and vice versa. As explained in the judgment of the International Court of Justice in the *Fisheries Jurisdiction Case*, 1974 I.C.J. 3, “reasonable regard” means that activities must be reconciled and co-exist.

¹ International Seabed Authority, Note No. ISA/OLA/2018/227.

² Draft Regulations on Exploitation of Mineral Resources in the Area, ISBA/24/LTC/WP.1/Rev.1 (9 July 2018).

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At present, however, the draft Exploitation Regulations do not pay such reasonable regard to submarine cables and pipelines. Instead, what was previously Draft regulation 26(1) has been renumbered as Draft regulation 33(1) without any textual changes to address the Council President's request. Draft regulation 33(1) simply states that "Contractor shall exercise due diligence to ensure that it does not cause damage to submarine cables or pipelines in the Contract Area."

ICPC continues to believe that this language is insufficient to protect existing submarine cables because it does not address submarine cable protection early enough in the development and review of the Contractor's plan of work for exploitation. Instead, it suggests that submarine cable protection be addressed only once a Contract Area has been finalized.

ICPC believes that coordination at such a stage is too late in the process. As submarine cable operators know from working with other marine industries, particularly oil and gas companies and offshore wind farm operators, parties have the greatest opportunity for coordination and compromise at the earliest stages of the project planning process, before plans and financing are finalized and become difficult to change.

Given that certain Contractors take the position that they have a right to exclude submarine cables from their Contract Areas, ICPC believes it is imperative for the Exploitation Regulations to include a procedural mechanism to ensure that reasonable regard is paid to submarine cables and pipelines. As article 157(1) of the Convention provides that "the Authority is the organization through which States Parties shall, in accordance with this Part, organize and control activities in the Area," ICPC believes that it is the Authority—through its regulations—that must operationalize the reasonable regard obligation.

ICPC therefore recommends that the Authority replace the existing language in Draft regulation 33(1) pertaining to submarine cables with the following new Draft Regulation (labeled "Draft regulation 33A" for ease of reference) that ICPC has developed in collaboration with the Government of France (and included in the Government of France's own separate submission in this consultation):

Draft regulation 33A

Reasonable Regard with Respect to Submarine Cables

1. Prior to submitting any proposed Plan of Work to the Commission, a Contractor shall exercise due diligence to identify in-service and planned submarine cables transiting or proximate to the area under application by using publicly-available data and resources. Contractors shall coordinate directly with operators of such submarine cables using the best available tools, in order to reduce the risk of damage to any submarine cable.

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2. To be deemed complete for purposes of regulation 10, any proposed Plan of Work submitted by a Contractor to the Commission shall identify any in-service or planned submarine cables transiting or proximate to the area under application, summarize efforts to coordinate with submarine cable operators using the best available tools, and describe any measures agreed to mitigate the risk of damage to any in-service or planned submarine cable.
3. The Commission shall decline to recommend Council approval for a Plan of Work that fails to demonstrate that the Contractor has exercised due diligence to identify in-service and planned submarine cables that transit or are proximate to a Contract Area and has coordinated with operators of such submarine cables to mitigate the risk of damage to any in-service or planned submarine cable transiting or proximate to a proposed Contract Area.
4. In reviewing any proposed Plan of Work, the Commission shall consider the effects of that Plan of Work, in aggregate with other Plans of Work, on the ability of a submarine cable operator to route a new submarine cable through significant portions of the Area, without significant re-routing.
5. For future submarine cables that may be planned to transit through or proximate to an area covered by a Plan of Work previously approved by the Authority, the Contractor shall coordinate directly with operators of such submarine cables using the best available tools in order to reduce the risk of disruption to exploitation activities authorized by the Plan of Work and damage to any submarine cable.

ICPC does not seek to include any detailed, prescriptive coordination measures in the Exploitation Regulations. As ICPC's members know from coordinating with other marine industries, parties need flexibility to address commercial needs, sea floor topology, and available technology, among other considerations. ICPC also prefers to encourage direct engagement between Contractors and submarine cable operators, starting with the joint workshop organized by ICPC and the Authority to be held in Bangkok on 29 and 30 October 2018. ICPC does, however, seek procedural requirements in the Exploitation Regulations to ensure that diligence and coordination take place, as reflected in the proposed Draft regulation 33A.

ICPC therefore respectfully requests that the Authority consider the inclusion of the new proposed regulation in the Exploitation Regulations.

Respectfully submitted,

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