BBN-WHAT?
WHY A PROPOSED OCEANS LAW TREATY THREATENS SUBMARINE CABLE INSTALLATION AND REPAIR

Kent Bressie (Harris, Wiltshire & Grannis LLP)
Email: kbressie@hwglaw.com

Harris, Wiltshire & Grannis LLP , 1919 M Street, N.W., Suite 800, Washington, D.C. 20036 U.S.A.

Abstract: Proposed regulation to promote conservation and sustainable use of biodiversity beyond national jurisdiction ("BBNJ") through a new global treaty poses a significant threat to the high seas freedoms to install and maintain submarine cables and the biggest change in oceans law since the signing of the United Nations Convention on the Law of the Sea in 1982.[ ] While the subject matter sounds obscure, the treaty could require environmental impact assessments ("EIAs") for high seas areas, restrict cable transits and repairs in new marine protected areas on the high seas, and create a new international regulatory body to oversee such activities. Many of the proposals under consideration by the treaty conference would impose significant costs and delays on new builds and repairs and result in cable routes that are less efficient and resilient. It therefore remains critical for the submarine cable industry to educate stakeholders regarding the socio economic importance of submarine cables, their benign environmental impact, their status as a sustainable use of the oceans, and the potential consequences of adopting treaty provisions that do not account expressly for submarine cables.

1. WHAT IS BBNJ?

BBNJ includes a biological component and a geographical component. The biological component refers to marine organisms and the variability among those organisms and the marine ecological complexes of which they are part. It includes the diversity within species, diversity between species, and diversity of ecosystems.[1]

The geographical component refers to areas beyond national jurisdiction ("ABNJ"). These areas, beyond the territorial sea (extending 12 nautical miles seaward), archipelagic waters (an area dependent on a state's own archipelago), exclusive economic zone ("EEZ," extending 200 nautical miles seaward), and continental shelf (extending 200 nautical miles seaward by default, plus claims recognized by the Commission on the Limits of the Continental Shelf) of any coastal state, encompass the water column of the high seas, which accounts for more than half of the Earth's ocean areas.

2. WHY A NEW TREATY?

In recent years, scientists, governments, and other stakeholders have become increasingly

[1] Convention on Biological Diversity, art. 2, 1760 U.N.T.S. 79; 31 I.L.M. 818 (1992) (in force as of Dec. 29, 1993).

aware of human dependence on the oceans, new marine biodiversity in the deep ocean, the commercial potential of marine genetic resources as new sources of food and pharmaceuticals, and growing threats of pollution and resource over-use in the oceans that could result in mass extinctions of marine species. Concerns about environmental impact have focused on three marine activities: fishing (including threats from illegal, unreported, and unregulated fishing; over-fishing; by-catch; the use of destructive gear in vulnerable marine ecosystems; and pollution from expanding aquaculture); shipping (including discharges of oil, chemicals, waste water, and other materials; introduction of invasive alien species through ship ballast water; and anthropogenic underwater noise); and deep seabed mining (particularly the creation of sediment plumes in the water column). There is also growing concern about new uses of the oceans such as climate change mitigation measures (including iron fertilization and carbon sequestration) and exploration and exploitation of marine genetic resources. Finally, there is concern about the impact of climate change (with redistribution of fish populations) and ocean acidification (which impairs the ability of shellfish, corals, and marine phytoplankton to form their skeletons) on marine biodiversity.

UNCLOS and its implementing agreements[2] establish the legal framework for ocean activities and state jurisdiction over them in certain areas, including obligations to protect the marine environment. Other international agreements and instruments, such as the Convention on Biological Diversity, agreements establishing regional fisheries management organizations, measures adopted by the International Maritime Organization with respect to point and non-point source pollution, and agreements of the World Trade Organization and the World Intellectual Property Organization address certain aspects of the conservation and use of marine biodiversity. In the last 20 years, however, many governments, scientists, and other stakeholders have come to believe that the current legal framework for the oceans is insufficient for conserving and ensuring the sustainable use of BBNJ.

In 2004, the U.N. General Assembly established a working group to examine the issue.[3] In 2017, the U.N. General Assembly decided to convene a treaty conference, known as the Intergovernmental Conference ("IGC"), to consider the recommendations made by an earlier Preparatory Committee (the "PrepCom").[4] The PrepCom's report to the U.N. General Assembly evidenced a lack of consensus on

[2] United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stock, 2167 U.N.T.S. 3 (in force as of Dec. 11, 2001).

[3] U.N. General Assembly Resolution 59/24, ¶ 73 (Nov. 17, 2004).

[4] U.N. General Assembly Resolution 72/249 (Dec. 24, 2017); Report of the Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, A/AC.287/2017/PC.4/2 (July 31, 2017).

many key issues. Rather than propose a text for the BBNJ instrument, it identified (a) "non-exclusive elements" for a BBNJ instrument that "generated convergence among most delegations" and (b) "some of the main issues" on which "there is divergence of views" among delegations.[5]

3. THE TREATY CONFERENCE

As of March 2019, there is as yet no draft treaty text (known as a "zero draft") for consideration by the IGC, which held its organizational session from April 16-18, 2018, at the United Nations in New York, followed by its first session from September 4-17, 2018. Instead, the IGC President, Rena Lee of Singapore, has released two documents—an aid to discussions[6] and a later aid to negotiations[7]—outlining issue areas and options for potential inclusion in the treaty. The IGC will attempt to create a zero draft and move toward a final text at future IGC sessions, including its second session from March 25-April 5, 2019, its third session from August 19-30, 2019, and a fourth session to be scheduled in 2020.

Only states will be parties to the BBNJ instrument. Nevertheless, other stakeholders can and do participate to influence the treaty negotiations. The International Cable Protection Committee ("ICPC") participates in the treaty conference and has made verbal and written statements to the IGC, engaged in extensive outreach to governments and other stakeholders, and hosted a side event during the second session of the IGC. Much work remains to be done, however, as the PATN does not reference submarine cables at all.

4. SUBSTANTIVE CONCERNS

Even absent a zero draft text, the PATN and negotiations to date raise a number of concerns for submarine cable operators.

Silence About Submarine Cables. Nowhere does the PATN include any reference to submarine cables. While this situation could be seen as beneficial, as it avoids characterizing submarine cables as having the same degree of environmental impact as commercial fishing, shipping, and deep seabed mining, experience suggests that silence about submarine cables disadvantages them in terms of legal and practical protections, as evidenced by the failure of the exploration regulations of the International Seabed Authority ("ISA") to address coordination with and protection of submarine cables. The UNCLOS preamble notes the "desirability of establishing through this Convention . . . a legal order for the seas and oceans which will facilitate international communication." The BBNJ instrument should include that same language.

Consistency with UNCLOS. The PATN omits any option of characterizing the BBNJ instrument as an implementing agreement of UNCLOS, which would ensure greater

[5] Report of the Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, A/AC.287/2017/PC.4/2 (July 31, 2017).

[6] President's Aid to Discussions, A/CONF.232/2018/3 (June 25, 2018).

[7] President's Aid to Negotiations, A/CONF.232/2019/1 (Dec. 3, 2018) ("PATN").

protection of submarine cable freedoms than the "not undermine," "complement," and "due regard" language in some of the PATN options. These PATN options could be seen to weaken the high seas freedoms to install and maintain submarine cables as enshrined in UNCLOS articles 87 and 112. By expressly characterizing the BBNJ instrument as an UNCLOS implementing agreement, the parties would ensure that the language of UNCLOS itself would govern.

General Principles and Objectives. The PATN includes statements of general principles and objectives in various sections. None of these references submarine cables. While some states oppose the inclusion of such general or aspirational language, sections outlined in the PATN should include language regarding the need to continue promoting international communications through the deployment of new infrastructure and maintenance and repair of existing infrastructure, particularly in relation to developing and small island developing states.

Area-Based Management Tools, Including MPAs. It remains to be seen how area-based management tools, including MPAs, might be applied or constituted under the BBNJ instrument, whether by states, through regional bodies, or through a new international body. Regardless of the means, the BBNJ instrument should expressly identify submarine cable operators and ICPC as stakeholders to be consulted in the creation and management of any MPA or application of other area-based management tools. The BBNJ instrument should avoid MPA restrictions that would distort submarine cable routes and render submarine cables less resilient. It should also decline to exclude submarine cables categorically from any marine area. Submarine cables have long existed in MPAs without any significant impact on the environment. Scientific evidence shows that submarine cables and MPAs are not mutually exclusive.

EIAs. The potential for EIAs covering submarine cables in areas beyond national jurisdiction raises concerns about the threshold for a review, the entity or entities that will conduct the review, and the potential public disclosure of sensitive information.

- ***Threshold***. UNCLOS article 206 already requires that "when States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment." At present, however, states do not conduct EIAs for portions of submarine cable systems in areas beyond national jurisdiction. Some states and stakeholders have suggested that the threshold should be more stringent than the article 206 threshold. Some states and stakeholders have also sought to characterize completion of an EIA as a permission for conduct of an activity in areas beyond national jurisdiction. Both of these outcomes would adversely affect submarine cables. The BBNJ instrument should provide that the project proponent make an initial showing whether or not an EIA is required, and where required, prepare a draft EIA to be considered by the relevant state(s) in order to leverage the project proponent's expertise and also expedite the review process. To the extent possible, showings required by EIAs should be harmonized.
- ***Scope of Activities Subject to EIAs***. The IGC is unlikely to agree to a categorical exclusion of submarine cables from EIAs, as such an exclusion would be

inconsistent with UNCLOS article 206. It might, however, adopt language allowing for identification of activities that would not be expected to cause substantial pollution or significant environmental harm absent exceptional circumstances. Submarine cable installation, maintenance, decommissioning, and recovery should be included in any such list.

- ***Entity Responsible for Conduct of Assessment***. Article 206 contemplates that only states will conduct such EIAs, but the PATN considers the option that EIAs will be conducted by regional bodies or a new international body. None of these options is particularly appealing for submarine cable operators. Reviews by states could mean duplicative reviews covering the same areas beyond national jurisdiction, although such reviews would likely be add-ons for reviews covering areas within coastal state jurisdiction. Reviews by regional bodies or a new international body might eliminate duplication, but they could introduce additional regulatory risk in terms of timing and mitigation conditions.

Role for Sectoral Bodies. The PATN includes various options granting authority to sectoral bodies with respect to area-based management tool/MPA implementation and review and EIAs. There is an expectation within the IGC that intergovernmental organizations with regulatory authority (the regional fisheries management organizations for commercial fishing, the International Maritime Organization for shipping, and the ISA for deep seabed mining) will receive authority to implement certain elements with respect to their sectors, rather than have those sectors default to the general rules. For submarine cables, however, ICPC is not a sectoral body with regulatory authority. This could disadvantage submarine cables. The industry should guard against the recognition of ICPC as an admission that submarine cables are environmentally harmful. It should also emphasize that the absence of a sectoral body overseeing submarine cables results from the express recognition in UNCLOS of the high seas freedoms to lay and maintain submarine cables and the absence of need for a global oversight body.

5. RECOMMENDED ACTIONS BY THE SUBMARINE CABLE INDUSTRY

To maximize the chances of a favorable BBNJ instrument, the submarine cable industry should:

- Participate in the IGC;
- Consult with key states to understand and influence their negotiating positions;
- Educate stakeholders and promote awareness and understanding of the socio-economic and security importance of submarine cables, their benign environmental impact, and their status as a sustainable use of the oceans;
- Promote peer-reviewed scientific research demonstrating the benign nature of submarine cables; and
- Maintain dialogue with IGC presidency to understand the path of negotiations.

It remains critical that individual submarine cable operators, suppliers, survey companies, and customers consult directly with their governments. ICPC has created messaging and advocacy tools to assist the industry, but governments are most likely to be persuaded by their own nationals making the case with those tools.