SubOptic2019
TO THE BEACH AND BEYOND
RETHINKING GLOBAL NETWORKS

WHY CAN'T WE JUST GET ALONG?

IN PURSUIT OF MORE EFFECTIVE COORDINATION WITH DEEP SEABED MINING

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Abstract: Uncoordinated deep seabed mining remains a significant emerging threat of damage to existing submarine cables, and a source of uncertainty for future submarine cables. To date, the International Seabed Authority ("ISA") and the mining contractors that it regulates have shown little interest in protecting submarine cables from deep seabed mining. The United Nations Convention on the Law of the Sea ("UNCLOS") does not establish any specific coordination mechanisms, including instead only mutual "regard" obligations. Consequently, some mining contractors have argued either that cable owners proceed at their own risk or that mining contractors have a right to exclude submarine cables from their contract areas, which cover vast areas of the seabed. Moreover, the ISA has authorized mining exploration directly over existing submarine cables in the Pacific and Indian Oceans. Submarine cable operators and the International Cable Protection Committee ("ICPC") therefore have significant work to do in persuading governments to ensure more effective cable protection within the ISA and under domestic law, in charting submarine cables in areas of likely mining activity, in direct outreach to mining contractors, and in pursuit of tribunal decisions interpreting UNCLOS obligations in a manner favorable to submarine cables.

1. THE AREA AND THE ISA

Deep seabed mining exploration and exploitation is authorized and regulated by the ISA, a treaty body created under the UNCLOS and headquartered in Jamaica. The ISA has jurisdiction over exploitation of resources of the seabed and subsoil thereof in areas beyond the continental shelf of any coastal state, defined as "the Area" by UNCLOS.[1] It does not have general geographic jurisdiction over the range of seabed activities that might occur in the Area, meaning that it has no authority to review or approve transits of submarine cables in the Area. The ISA has a conflicted role as both a regulator and promoter of deep seabed mining. The ISA's role in promoting mining has led it to view submarine cable protection as a nuisance and impediment to mining.

The ISA operates through: a Secretariat established to perform administrative functions (but which runs the ISA on a day-to-day basis and exercises significant oversight and control over most ISA

[1] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. (entered into force on Nov. 1, 1994) ("UNCLOS").

activities); a 30-member Legal and Technical Commission ("LTC") that supervises contractor activities, oversees environmental matters, and makes recommendations about contractor applications; a 36-member Council that acts as the ISA's executive organ, makes decisions about specific policies and contractor actions, and elects LTC members; and an Assembly consisting of all ISA members that establishes general policies and elects Council members. The ICPC has entered into a memorandum of understanding with the ISA, holds observer status at the ISA, and participates in the ISA's annual Council and Assembly meetings.

Mining activities in the Area are conducted by contractors sponsored by states that are parties to UNCLOS. Sponsoring states and the ISA share legal responsibility for overseeing and regulating mining contractors.[2]

Institutionally, the ISA suffers from significant issues with transparency and stakeholder engagement, making it difficult for parties such as the ICPC and even member states that are not represented on the LTC to understand or influence the ISA's actions. For example, contractor applications are generally confidential, and summaries of their key details (including geographic coordinates for planned activities) are made public—if at all—only after approval by the Council. Moreover, most LTC activities—including preparation of draft regulations—are conducted confidentially, in contravention of the LTC's own rules of procedure. These shortcomings make coordination with submarine cables particularly challenging.

2. MINERALS EXPLORATION AND EXPLOITATION

UNCLOS recognizes the resources of the Area as "the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States."[3] Although the ISA has jurisdiction over all resources of the Area, its activities to date have focused on three mineral resources: polymetallic nodules (consisting mostly of nickel, copper, cobalt, and manganese), polymetallic sulfides (consisting of copper, lead, zinc, gold, and silver), and cobalt-rich ferromanganese crusts. These minerals are used extensively in industrial activities and products, particularly electronics.

Exploration and exploitation must be conducted either by (a) a mining contractor under the auspices of a sponsoring state, which must be a member of the ISA (and a party to UNCLOS) or (b) the Enterprise, a commercial arm of the ISA that has yet to be established (although the Government of Poland has proposed to establish the Enterprise through a joint venture).[4] Existing exploration takes place pursuant to

[2] Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion (Feb. 1, 2011).

[3] UNCLOS, preamble.

[4] Considerations relating to a proposal by the Government of Poland for a possible joint-venture operation with the Enterprise, Report of the Secretary-General, ISBA/24/C/12 (May 25, 2018).

contracts and plans of work reviewed by the LTC and approved by the Council. To date, no exploitation has taken place, as the ISA has yet to finalize regulations for such activities.

The ISA has promulgated separate regulations governing the exploration of each of those three categories of mineral resources, none of which makes any reference to submarine cables or the need to protect them. The ISA is currently developing regulations that will govern the exploitation of all such resources, but those regulations remain mired in significant disagreements among states regarding the environmental impact of exploitation, the establishment of a specific financial model for the commercialization of seabed minerals, and the benefit-sharing regime to realize the "common heritage of mankind" concept in UNCLOS. In spite of the efforts of ICPC and certain governments such as France, the issue of submarine cable protection has not been a key focus area and is treated in a cursory manner in the draft regulations.

Numerous states and environmental NGOs have expressed considerable concerns about the impact of seabed mining on the marine environment, particularly due to expected mineral-laden sediment plumes in the deep ocean and scarring of the seabed. The financial model has critical importance for deep seabed mining, as the flooding of world minerals markets with cheap minerals from the seabed could lead to a collapse in prices and render seabed mining uneconomic.

3. HARMS FROM UNCOORDINATED DEEP SEABED MINING

Uncoordinated exploration and exploitation of deep seabed minerals poses two principal harms to submarine cable operators.

First, it threatens damage to submarine cables. Such damage, which can occur even at the exploration phase, can result from: direct physical disturbance by equipment on the seafloor, sampling and coring activities; trial and commercial exploitation through extraction of seafloor minerals and sediments; abrasion through contact with minerals/sediments during extraction; and disturbance of out-of-service telephone and telegraph cables, over which active submarine telecommunications cables may be laid.

Second, it threatens to distort or thwart new submarine cable development. Absent effective coordination and protection mechanisms and lack of timely and effective legal recourse in the event of damage (as claims would likely need to be pursued in tribunals of the state where the mining contractor is based), many operators may choose to route around existing and potential mining areas. Such outcomes deprive submarine cable operators of efficient routes, increasing latency, and could render cables less resilient due to clustering or routing through more challenging seafloor topography. Such outcomes also render submarine cables more expensive, necessitating hundreds or thousands of kilometers of additional cable and additional repeaters. Finally, such risks can interfere with the ability of submarine cable operators to attract investment.

4. DUE REGARD AND REASONABLE REGARD

UNCLOS lacks a specific mechanism for coordinating submarine cables with deep seabed mining. Instead, it establishes general legal obligations for states (not including private parties).

- UNCLOS establishes installation of submarine cables and pipelines as a high-seas freedom.[5] It provides that "these [submarine cable] 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."[6]
- UNCLOS also establishes the rights of states to conduct "activities in the Area," *i.e.*, exploration and exploitation of the Area's mineral resources.[7] It further provides that "activities in the Area shall be carried out with reasonable regard for other activities in the marine environment" and that "other activities in the marine environment shall be conducted with reasonable regard for activities in the Area."[8]

Although UNCLOS uses different terms—due regard and reasonable regard—these are generally understood to be identical obligations.[9]

They are also mutual obligations. Due regard and reasonable regard require that competing activities must be reconciled and co-exist.[10] The due regard required by UNCLOS depends on the nature of the rights held, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated, and the availability of alternative approaches.[11]

The ICPC and the ISA have conducted two workshops to foster coordination between submarine cables and deep seabed mining. In 2014, they co-sponsored a workshop looking at the underlying legal obligations, although the resulting report was general in nature and did not make specific recommendations.[12] In October 2018, the ICPC and the ISA conducted a second workshop focused on the development of practical coordination measures, which the ISA Secretariat and mining contractors used as a basis for arguing that such matters need not be addressed in ISA regulations or a legally-binding manner.

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[5] UNCLOS arts. 87(1), 112(1) (stating that "all States are entitled to lay submarine cables and pipelines on the bed of the high seas beyond the continental shelf"). Freedom to repair submarine cables and pipelines may be inferred from article 114, which refers to "laying and repairing."

[6] UNCLOS art. 87(2).

[7] UNCLOS part XI.

[8] UNCLOS art. 147(1), (3).

[9] *See, e.g.*, B. H. Oxman, *The Régime of Warships under the United Nations Convention on the Law of the Sea*, 24 Virginia Journal of Int'l Law 827 n.52 (1984).

[10] *Fisheries Jurisdiction Case* (*United Kingdom v. Iceland*), [1974] ICJ Rep. 3.

[11] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom*), Final Award ¶ 519, ICGJ 486 (Permanent Court of Arbitration, Mar. 18, 2015).

[12] ISA Technical Study No 14: Submarine Cables and Deep Seabed Mining – Advancing Common Interests and Addressing UNCLOS "Due Regard" Obligations (2015).

The report from the second workshop will be published later in 2019.

5. CONTINUING CONFLICT

UNCLOS's due regard and reasonable regard obligations remain woefully under-realized with submarine cables and deep seabed mining. Mining contractors generally fail to conduct desktop studies, seafloor surveys, or other investigatory efforts that would identify proximate submarine cables in advance of conducting exploration activities. Notwithstanding the mutual nature of the due regard and reasonable regard obligations, and the fact that those concepts do not privilege mining over submarine cables, mining contractors and the ISA Secretariat have consistently asserted that the submarine cable industry bears the burden of coordination and the risk of damage, even in cases where the submarine cable has been installed in advance of any mining activity or even award of a mining contract. They frequently assert that the absence of charting of all submarine cables at all ocean depths absolves them of responsibility for coordination, notwithstanding the fact that mining contract areas are not charted and are exceedingly difficult to identify due to the ISA's lack of transparency and the poor functionality of its website. In extreme cases involving certain Chinese mining contractors, the contractors have asserted that they have a legal duty to explore every square meter of a contract area, regardless of any existing submarine cable, and that they may exclude future submarine cables from their contract areas.

Arguments made by the ISA Secretariat and mining contractors regarding charting are misleading, as ISA and contractors have failed to make use of charting data in the two existing cases of overlap between mining exploration and submarine cables.

- ***Honotua***. The Honotua submarine cable system connects the Society Islands of French Polynesia (Bora Bora, Huahine, Raiatea, Moorea, and Tahiti) to Hawaii and is owned by OPT French Polynesia. It is critical to French Polynesia's economy, society, and security. It was constructed in 2009-10 and entered into commercial service in 2010. It has been charted at all ocean depths since 2010. Honotua was installed through what was an ISA reserve area in 2009-10. In 2017, based on a recommendation of the LTC, the ISA entered into a mining contract with China Minmetals covering an area directly over 224 kilometers of Honotua. Neither the LTC nor the Council nor the Secretariat accounted for Honotua during their reviews. Neither OPT French Polynesia nor ICPC was ever contacted by the contractor or the ISA regarding the overlap.

- ***SAFE***. The SAFE submarine cable system connects South Africa, Reunion, Mauritius, India, and Malaysia and is owned by a consortium of nearly 40 telecommunications carriers. It was constructed in 2001 and entered into commercial service in 2002. It has been charted at all ocean depths since 2002. SAFE was installed at the same time as the ISA was considering an exploration contract with the Government of the Republic of Korea ("ROK") for exploration along the

central Indian Ocean ridge (a contract signed in 2002). That contract was renewed in 2014. The SAFE owners have attempted to contact the ROK Government, with no response. The ROK Government has never initiated contact with the SAFE owners.

Conflicts between submarine cable operators and mining contractors are likely to increase in the coming years due to a number of factors. First, submarine cable technology continues to advance, allowing for more efficient ultra-longhaul systems on routes like Sydney-Los Angeles that would traverse the Clarion-Clipperton Zone, a 4,000-kilometer-long swathe of contract areas for exploration of polymetallic nodules. Second, the mining industry continues to discover new resource areas in additional areas of the seabed that have not previously been explored in any detail. Third, scientists may identify new resources and resource uses over which the ISA would have jurisdiction.

6. A WAY FORWARD

First, submarine cable operators must mobilize their governments to speak up within the ISA's LTC, Council, and Assembly and hold the ISA Secretariat accountable with respect to submarine cable protection from uncoordinated deep seabed mining, including:

- Support for the joint submission of the ICPC and France proposing amendment of the draft Exploitation Regulations to include specific procedural mechanisms that would require mining contractors to identify and coordinate with proximate submarine cables during initial planning and application processes and that would require the LTC and the Council to enforce such provisions;
- Opposition to China's proposal to delete from the draft Exploitation Regulations any provisions addressing submarine cable protection;
- Support for revision of the three sets of existing exploration regulations to require that mining contractors identify and coordinate with proximate submarine cables during initial planning and application processes and that would require the LTC and the Council to enforce such provisions;
- Support for greater transparency of ISA processes and engagement with submarine cable operators as critical stakeholders; and
- Support for confidential mechanisms to support timely sharing of data between submarine cable operators and mining contractors.

Second, submarine cable operators must mobilize their governments to adopt domestic laws and regulations to hold a country's own mining contractors accountable for the protection of submarine cables and to press other governments to do the same.

Third, submarine cable operators should support, but not rely exclusively on, the efforts of ICPC to monitor the ISA's regulatory activities and promote a more effective submarine cable protection regime.

Fourth, submarine cable operators should continue to promote the appropriate availability of submarine cable location information, including: charting submarine cables at all ocean depths in areas proximate to deep seabed mining activities; supporting the pilot project of the ICPC and the International Hydrographic Organization to

promote systematic charting of submarine cables in such areas; and identifying for the ISA and mining contractors the availability of public and non-public/subscription data regarding the location of existing and planned submarine cables.

Fifth, submarine cable operators should continue to reach out directly to mining contractors proposing new activities in proximity to existing submarine cables and to mining contractors conducting activities proximate to the route of a proposed submarine cable, both to facilitate coordination where possible and to gather evidence of non-cooperation to be used in further advocacy efforts.

Finally, submarine cable operators should consider pressing states to seek advisory opinions from the International Tribunal of the Law of the Sea on questions of ISA responsibility for submarine cable protection and the nature of due regard and reasonable regard obligations owed by states with respect to submarine cables and deep seabed mining.