

Submarine NETWORKS World 2010

Permitting Workshop

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The Legal Framework on Permitting for Submarine Cables

Robert Beckman

Director, Centre for International Law (CIL)
National University of Singapore

Part 1

International Regulation of Submarine Cables - Overview

International Regulation of Cables

- No UN body or specialized agency has primary responsible for regulation of submarine cables
- No international registry of submarine cables
- Cables are owned by consortiums of national telecoms companies or multi-national corporations
- Usually no separate legal entity that owns a cable
- Cables are not registered in any State

National Regulation of Cables

- Industry developed submarine cables with little or no assistance from Governments
- In many States it is not clear which Government agency is responsible for submarine cables
- Although UNCLOS give rights to “States” to lay submarine cables, in practice the Governments in most States are often not aware of the issues or problems

History of legal regime

- **1884 Convention for the Protection of Submarine Cables**
 - EIF on 1 May 1888; 39 States Parties, but only Parties in Asia-Pacific are Japan, Australia and New Zealand
 - Served as basis for review of LOS by International Law Association and the International Law Commission in 1950s
- **1958 Conventions on High Seas and Continental Shelf**
 - right to lay submarine cables is high seas freedom
 - incorporated some provisions of 1884 Convention
 - 1982 UNCLOS provisions based on 1958 CS Convention

1982 UNCLOS

- The 1982 United Nations Convention on the Law of the Sea (UNCLOS) establishes a “constitution for the oceans”
- Adopted in 1982 after 9 years of negotiations
- 160 Parties as of 1 October 2010
- UNCLOS is an international treaty between States setting out the rights and obligations of States
- UNCLOS does not establish any rights or impose any obligations on private companies

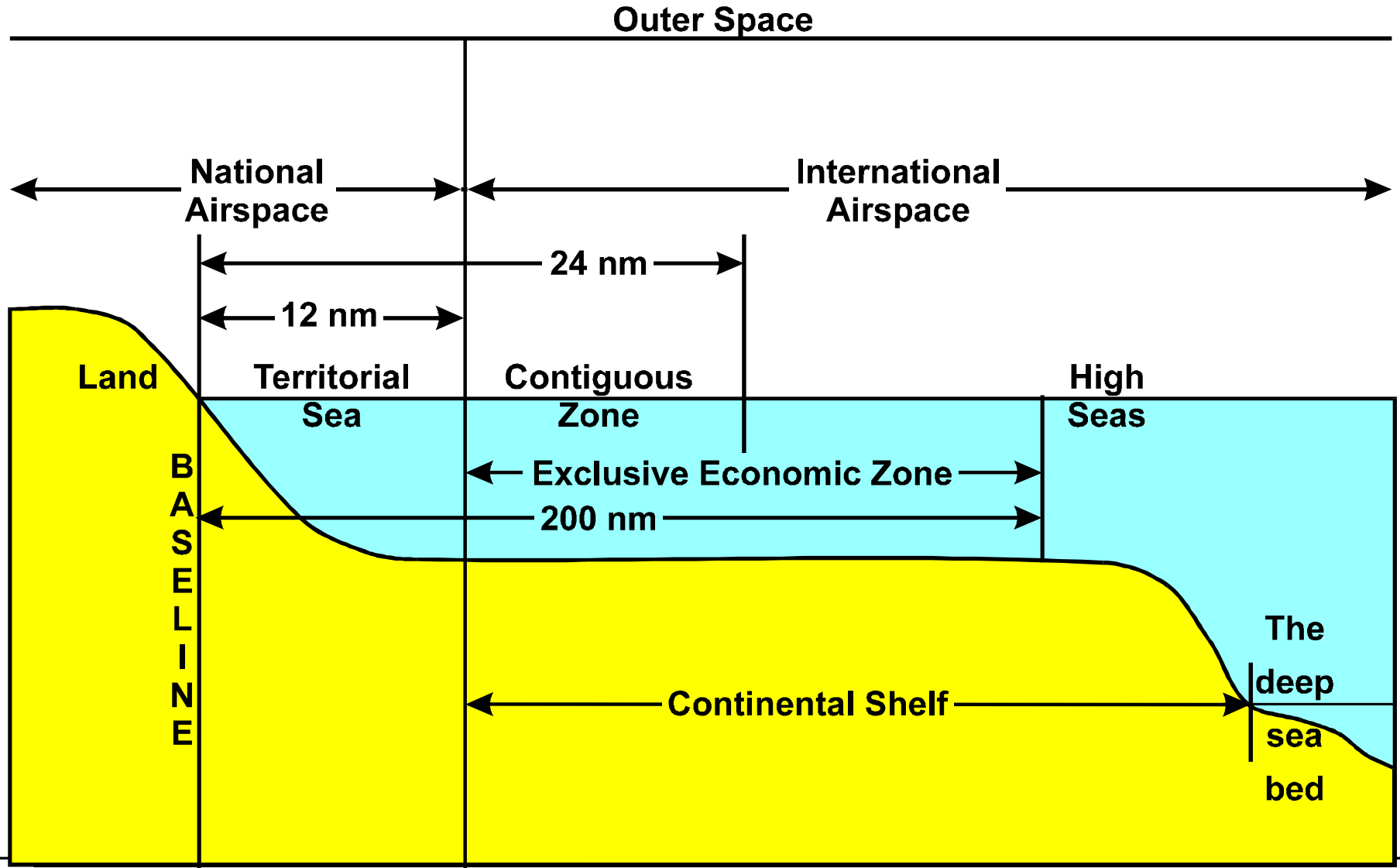
Regulation of Cables under UNCLOS

- Rights of States to regulate cables and obligation of States to protect cables depends upon where the cables are located:
 1. Zones subject to sovereignty – territorial sea and archipelagic waters
 2. Zones outside sovereignty – high seas, contiguous zone, continental shelf and deep seabed

Maritime Zones under UNCLOS

- **Zones under Sovereignty of coastal State**
 - Ports and Internal Waters
 - Territorial Sea (out to 12 nautical miles)
 - Archipelagic waters (e.g., Indonesia & Philippines)
- **Zones outside Sovereignty**
 - High Seas [Part VII]
 - Contiguous Zone (from 12 to 24 nm)
 - Exclusive Economic Zone (out to 200 nm) [Part V]
 - Continental Shelf (seabed & subsoil) [Part VI]
 - Deep Sea-Bed ("The Area") [Part XI]

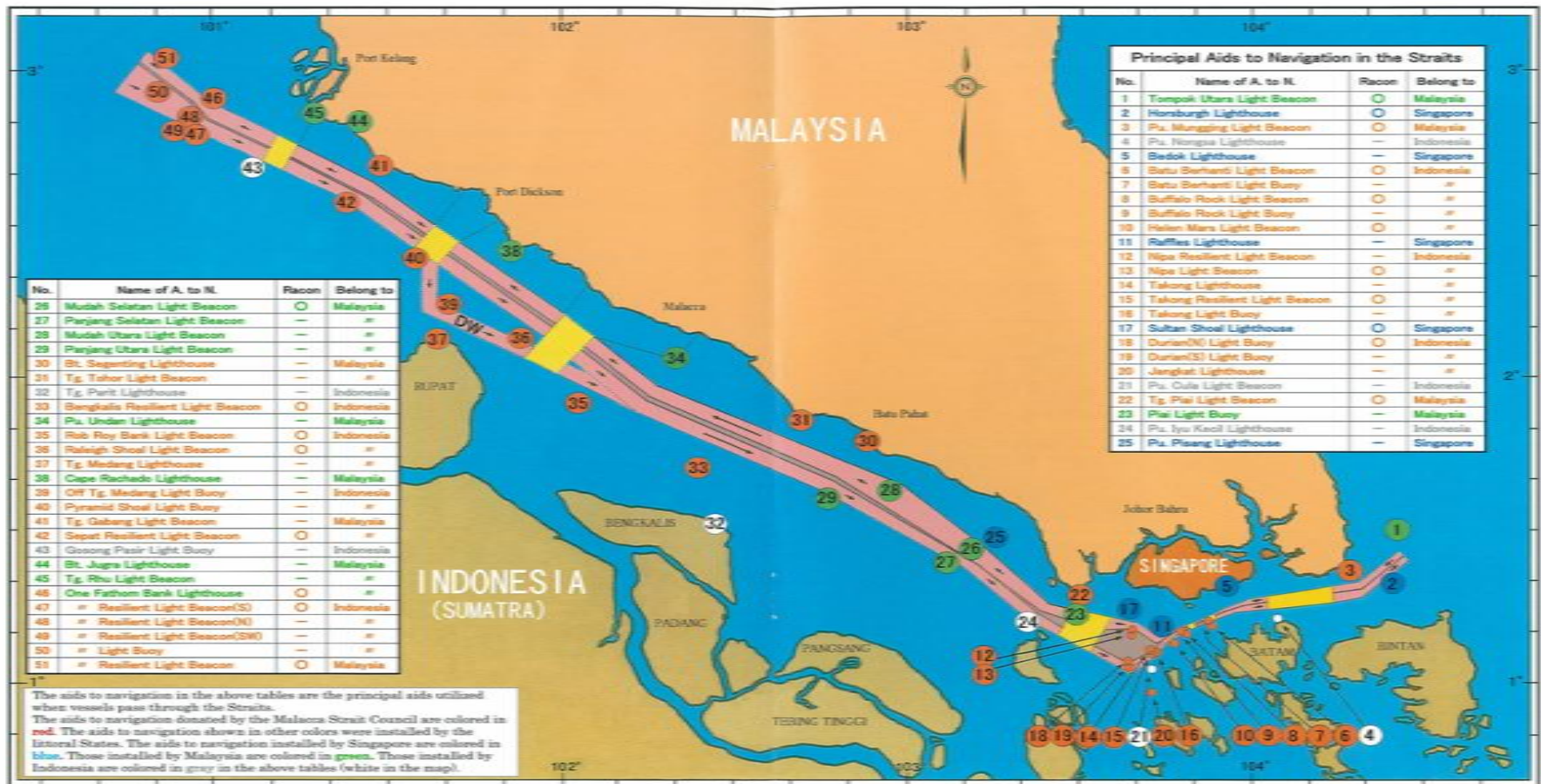
LEGAL REGIMES OF THE OCEANS AND AIRSPACE



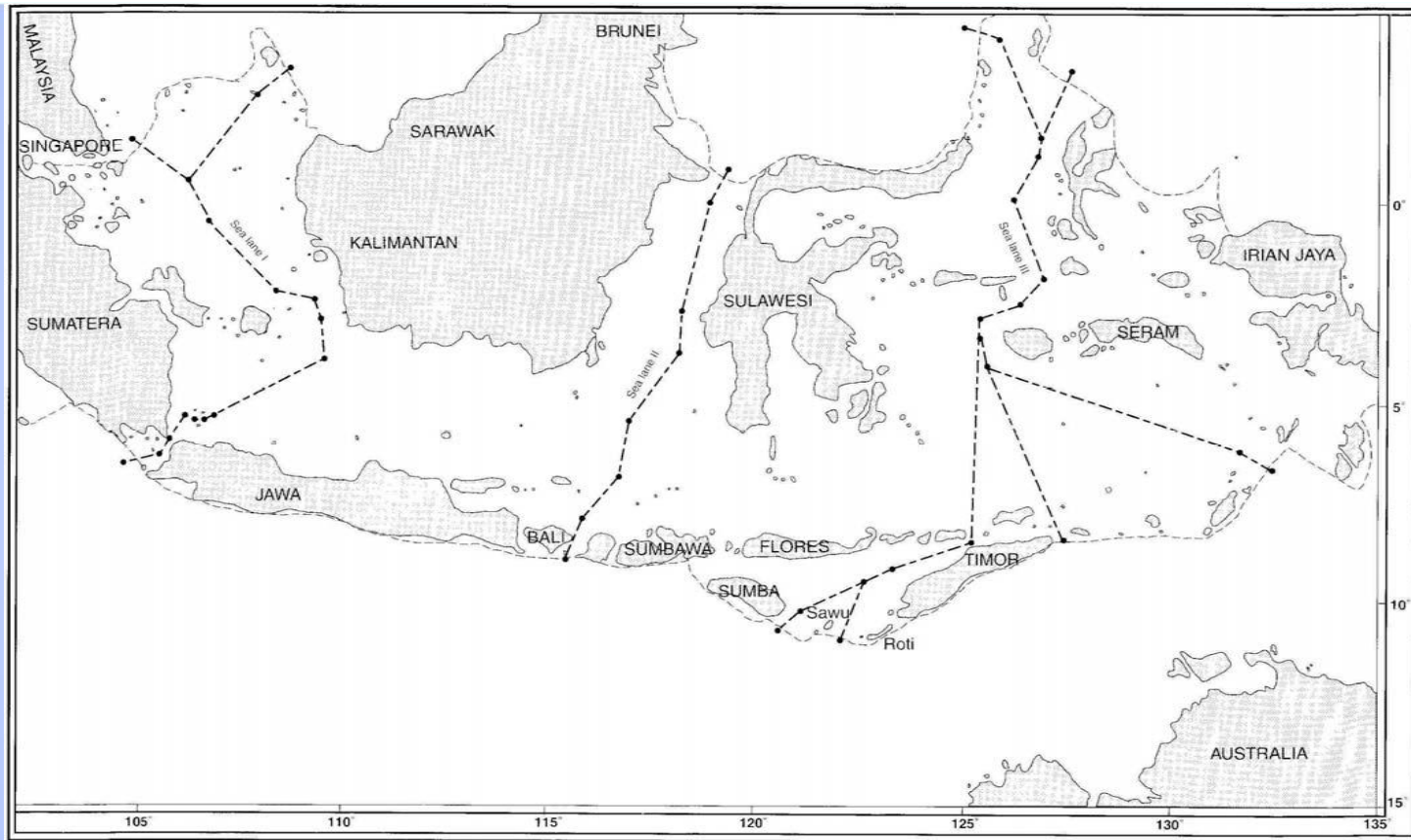
Part 2

Regulation in Areas under Sovereignty of coastal State

Straits of Malacca & Singapore



Indonesia's Archipelagic Waters



INDONESIAN ARCHIPELAGIC SEA LANES I, II AND III

Cables in Areas Subject to Sovereignty

- **Surveys**
 - No surveys may be conducted without the express consent of the coastal State
- **Laying and Repair**
 - Coastal States may adopt laws and regulations on the laying and repair of cables in territorial sea
- **Protection**
 - Coastal States have the right to adopt laws to protect cables in territorial sea from shipping, fishing and other activities
 - Coastal States have the right to regulate ships exercising the right of innocent passage through the territorial sea in order to protect cables

Cables in Archipelagic Waters

- **Existing cables**
 - Archipelagic States must respect existing cables laid by other States which pass through its archipelagic waters, and must permit the maintenance and replacement of such cables [Art 51]
- **Laying and repair of new cables**
 - The laying and repair of new cables is subject to consent regulation of the archipelagic State
- **Protection of cables**
 - As in territorial sea, there is a right to protect cables in archipelagic waters

Need to develop “Best Practices”

- Coastal States have wide discretion to regulate the laying and repair of cables in waters under their sovereignty
- Coastal States have no **obligation** under UNCLOS to protect cables in waters under their sovereignty, but it is in their interests to do so
- **Recommendation:** Industry should work with coastal States to develop a code of best practices for the laying, repair and protection of cables in the territorial sea and archipelagic waters

Best Practices – Coastal State Interests

In developing best practices, cable companies should be mindful of the interests of the coastal States in regulating activities waters under their sovereignty:

- Security concerns, including terrorist activities, illegal immigration, smuggling, etc
- Resource concerns, including prevention of illegal fishing, surveys of natural resources, etc
- Environmental concerns, including prevention of pollution of the marine and coastal environment, respect for marine protected areas, etc
- Competing activities, such as fishing, anchoring and other shipping activities, dredging, etc.

Repair - Best Practices for Governments

- Governments should establish procedures to expedite Permits for cable ships to repair cables:
 1. Appointing a lead agency
 2. Standardizing forms
 3. Giving prior clearance to licensed cable repair ships that operate from ports within its territory
 4. Consulting industry on fees and procedures, including compensation to other users

Repair – Best Practices for Industry

- **Appoint representatives to serve as the focal point for industry in developing best practices with governments**
- **Invite Government agencies to briefings on the repair of cables and the operation of cable ships to assure them that cable ships are not a threat to their interests**
- **Meet Government agencies to discuss the common interest of all States in repairing cables as quickly as possible**

Best Practices on Protection of Cables

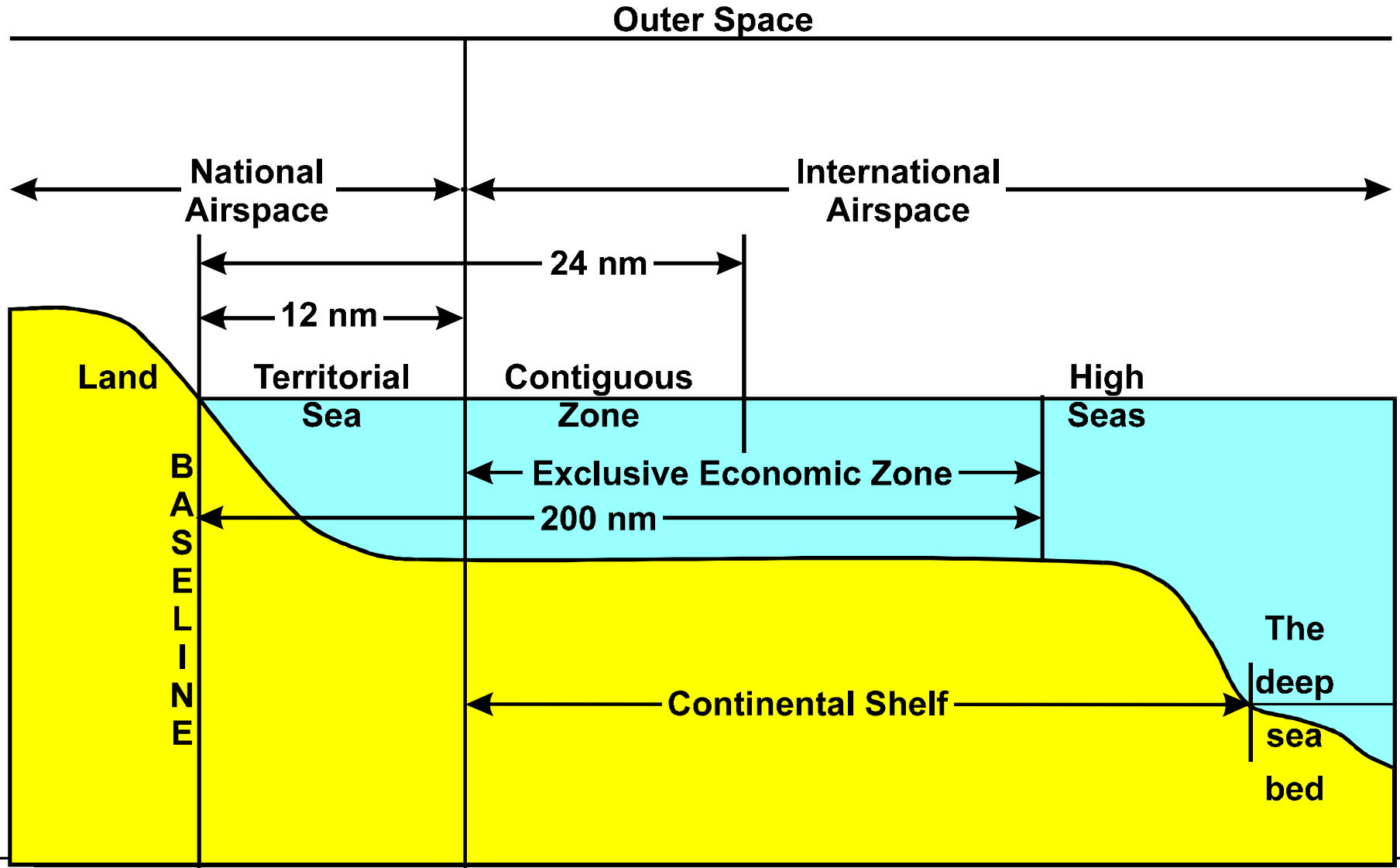
Industry should work with Governments to develop best practices for the protection of cables, including:

- **Need for laws and regulations to protect cables in their territorial waters**
- **Feasibility of cable protection zones**
- **Regulation of competing uses of territorial sea, including fishing activities, shipping activities, etc**
- **Minimizing any damage to the coastal and marine environment from the laying of cables, including burying of cables**

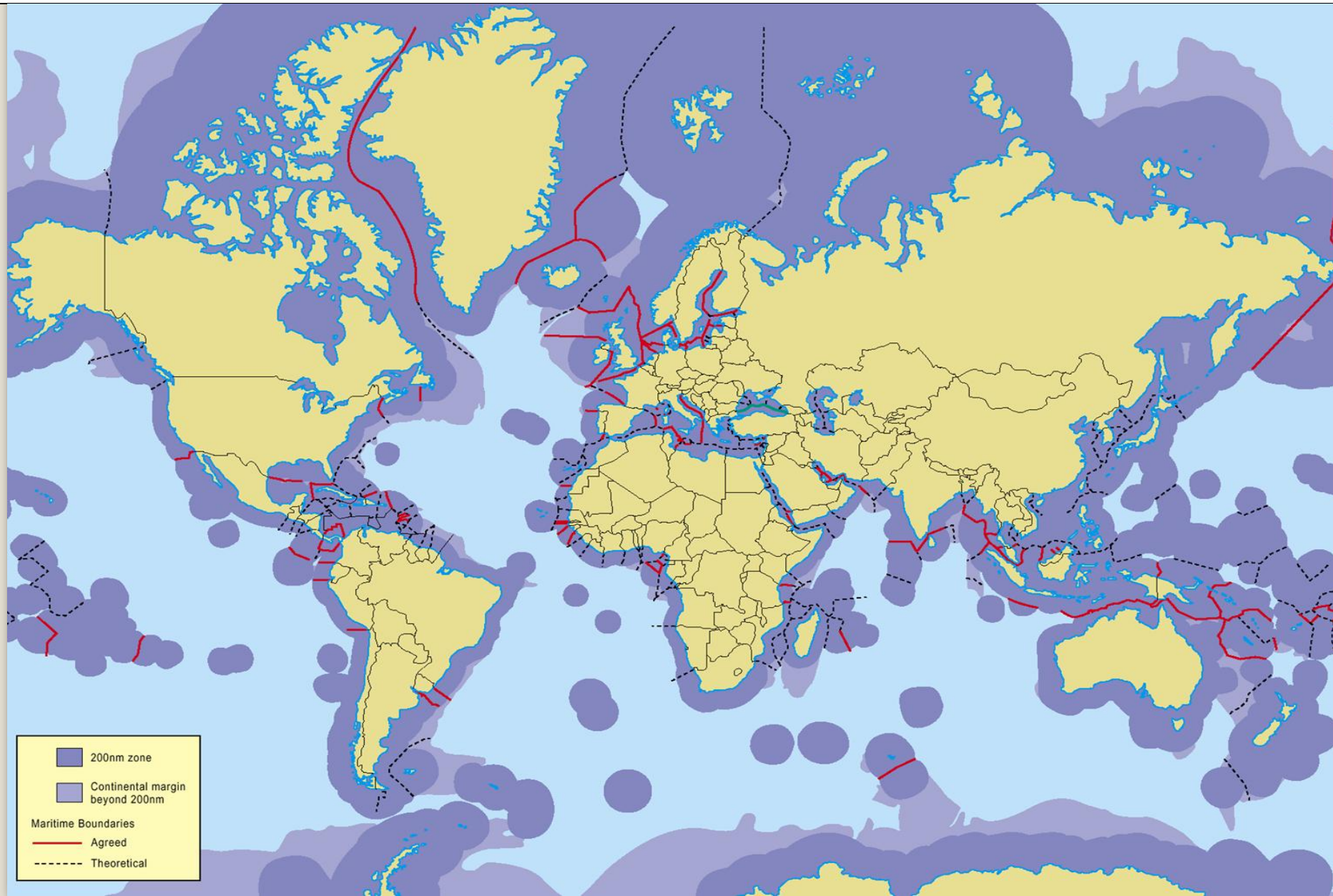
Part 3

Regulation of Cables in Areas Outside the Sovereignty of any coastal State

LEGAL REGIMES OF THE OCEANS AND AIRSPACE



World EEZ & Continental Shelf Limits



Principles Governing Ships outside of territorial sovereignty

- Areas outside the territorial sovereignty of any State include the **high seas** (as well as outer space and Antarctica)
- Principle governing high seas is **freedom of use** by all States
- Ships which exercise high seas freedoms must be **registered** in a State (flag State)
- The flag State has the responsibility to maintain **jurisdiction and control** over ships flying its flag on the high seas
- With certain exceptions, ships on the high seas are subject to the **exclusive jurisdiction of the flag State**
- If another State infringes the rights of a ship on the high seas the flag State may provide **diplomatic protection** on behalf of the ship flying its flag

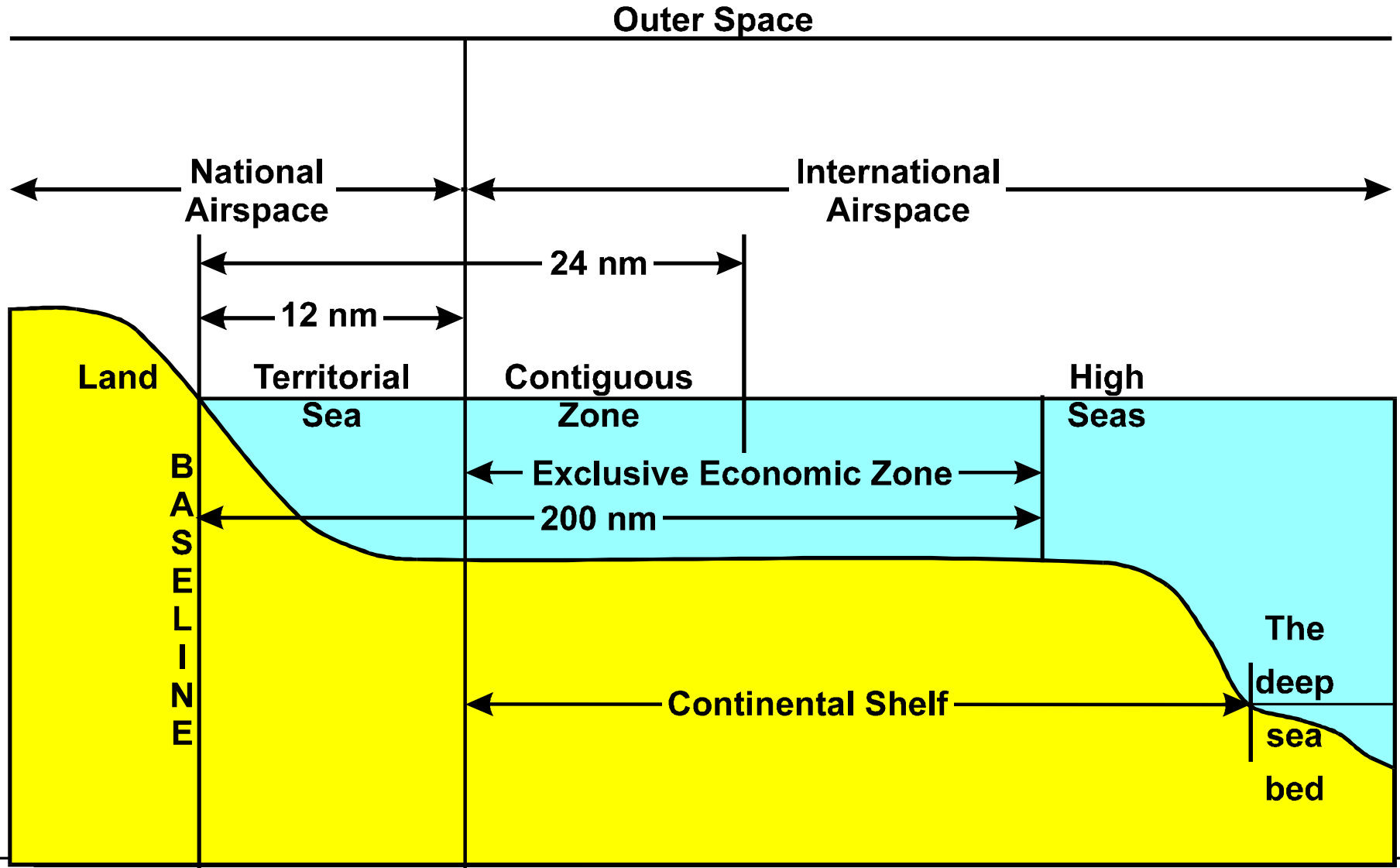
High Seas and Submarine Cables

- The right to lay submarine cables is a **high seas freedom** that may be exercised by all States [Art 87]
- The **right to lay cables** must be exercised with due regard to the rights of other States, such as the freedom of navigation [Art 87(2)]
- States must have due regard to cables or pipelines already in position. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced. [Art 112, 79(5)]
- The right to conduct **surveys** on the high seas is a freedom of the seas

Contiguous Zone

- A coastal State can normally enforce its laws (arrest ships) only in areas under its sovereignty
- The **contiguous zone** is belt of sea adjacent to the territorial sea where the coastal State has powers to enforce 4 types of national laws – customs, fiscal, immigration and sanitation
- The Contiguous Zone begins at the outer limit of the 12 nm territorial sea and extends out to 24 nm
- The Contiguous Zone overlaps with the Exclusive Economic Zone (EEZ) in the area between 12 & 24 nm
- The rights of the coastal State in the Contiguous Zone should not affect the laying or repair of cables

LEGAL REGIMES OF THE OCEANS AND AIRSPACE



EEZ - Specific Legal Regime

- EEZ is a *sui generis* regime - not under the sovereignty of coastal States and not part of the high seas
- EEZ is a **Specific Legal Regime** in which UNCLOS sets out:
 - Rights, jurisdiction & duties of coastal States [Art 56]
 - The rights and duties of other States [Art 58]
- Coastal States have the sovereign right to explore and exploit the **natural resources**, including the resources of the sea-bed and subsoil [Art 56]
- Other States have the right to exercise high seas freedoms including freedom of navigation and **freedom to lay cables and pipelines**[Art 58]

Regime of Continental Shelf (CS)

- **Continental shelf** comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles
- Coastal State can extend continental shelf beyond 200 nm by submitting information to Commission on the Limits of the Continental Shelf
- Coastal State exercises over the continental shelf **sovereign rights** for the purpose of **exploring it and exploiting its natural resources**

Overlap in EEZ and CS Regimes

- Within 200 nm coastal State has sovereign rights to explore and exploit the natural resources of seabed and subsoil under both the EEZ and CS Regimes
- Beyond 200 nm, it has such right only under the Continental Shelf regime
- Sovereign rights of the coastal State in the EEZ with respect to the seabed and subsoil **shall be exercised in accordance with Part VI on CS** [Art 56(3)]
- Therefore, rules on cables in EEZ and on Continental Shelf are almost exactly the same

Right to Lay Cables on Shelf

- All States have a **right to lay submarine cables on the continental shelf** [Art 79(1)]
- As on high seas, when exercising their right to lay cables, States shall have **due regard** to cables or pipelines already in position, and the repair of existing cables shall not be prejudiced [Art 79(5)]
- The **delineation of the course** for the laying of cables **[unlike pipelines]** on the continental shelf is **NOT** subject to the consent of the coastal State [Art 79(3)]

Coastal State & Cables on CS

- Exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and **other rights** and freedoms of other States as provided for in this Convention [Art 78]
- Article 79(2): The coastal State may not impede the laying or maintenance of cables subject to its right to take reasonable measures for:
 - 1.the exploration of the continental shelf;
 - 2.the exploitation of its natural resources; and
 - 3.the prevention, reduction and control of **pollution from pipelines** [**but not pollution from cables**]

Surveys: EEZ & Continental Shelf

Differing views on legality of Surveys on shelf or in EEZ

- 1. USA and many other States: surveys are a lawful use of the sea associated with the freedom to lay cables in EEZ**
- 2. China and some other States: surveys, like marine scientific research, cannot be carried out in the EEZ or on CS without the express consent of the coastal State**
- 3. Coastal States can argue that regulation of surveys is legal because they can adopt reasonable measures to regulate exploration of the shelf & its natural resources**
- 4. Coastal State has interest in ensuring that foreign ships do not survey the natural resources of the EEZ and CS**

Limits on freedom to lay cables

- State exercising right to lay cables has obligation to give 'due regard' to the rights and duties of coastal States in the EEZ, including their rights to:
 1. manage & conserve living resources
 2. exploit hydrocarbon resources
 3. use energy from winds & waves
 4. consent to marine scientific research
- State exercising right to lay cables also has obligation to comply with laws of coastal State adopted in conformity with UNCLOS

“Due Regard” obligations of flag State

- In order to give “due regard” the flag State intending to **repair cables** should give **notice** to the coastal State of their location and intended activities
- When intending to **lay cables**, due regard should include **notice and consultation**
- When intending to conduct **cable surveys**, due regard should include **notice and consultation**
- Although the obligation is technically on the flag State it is the operator of the cable ship or the cable owner which in effect has the obligation

Competing uses and “Due Regard”

- Coastal States exercising their rights to the natural resources of the EEZ and continental shelf have an obligation to give “due regard” to the right of other States to lay cables
- A case of “competing uses” arises when the laying or repair of cables may interfere with other legitimate activities such as fishing and navigation
- The case of “competing uses” can trigger “due regard” obligations of both the flag State and coastal State
- In such case, there is an obligation on both States to consult with each other and negotiate in good faith

Challenging coastal State regulations

- It is very difficult for industry to exercise the rights set out in UNCLOS or challenge the regulations of coastal States because UNCLOS rights and obligations belong to States, not private companies
- If a dispute arises on whether the laws of a coastal State (1) infringe or unjustifiably interfere with the right to lay cables or (2) fail to give due regard to the right to lay cables, such a dispute would be subject to **compulsory binding dispute settlement** under Part XV of UNCLOS
- However, the dispute must be a dispute between States, and the State whose right to lay cables has been interfered with would have to bring the case

Challenging coastal State regulations

- If the laws or policies of a coastal State on permits to lay or repair cables or conduct cable surveys are not consistent with UNCLOS, the flag State of the cable ship is the State whose rights are violated
- If industry wishes to have the option of challenging the laws and policies of a coastal State on the laying or repair of cables, it should register its cable ships in a State which may be willing to take up its case with the coastal State
- However, most flag States would not be very interested in bringing a case against a coastal State

Part 4

Measures to Protect Cables

Cables on HS, CS and in EEZ

UNCLOS Provisions to protect cables on High Seas

- **Article 113. Breaking or injury of a submarine cable**
- **Article 114. Breaking or injury by owners of a submarine cable of another submarine cable**
- **Article 115. Indemnity for loss incurred in avoiding injury to a submarine cable**

These provisions also apply to cables in the EEZ and on the Continental Shelf

Art 113. Breaking or injury of cables

- Article 113 provides that every State shall adopt the laws and regulations providing that the following is a criminal offence under their laws:
 - breaking or injury a submarine cable
 - beneath the high seas [or EEZ or continental shelf]
 - by a ship flying its flag or by a person subject to its jurisdiction
 - done wilfully or through culpable negligence,
 - in such a manner as to be liable to interrupt or obstruct . . . communications

Protection of Cables

- Article 113 is inadequate for two reasons:
 1. Most States have not enacted legislation implementing this provision in their national laws
 2. It does not deal with acts by foreign nationals outside the territorial sea
- As practical matter, in most cases if foreign nationals intentionally destroy or damage cables in the EEZ or the high seas, such acts may not be a criminal offence under any States laws

Part 5

Recommendations

Recommendations

- 1. In areas under sovereignty, the cable industry should work with interested governments to develop “best practices” for the laying and repair of cables and for cable surveys**
- 2. In areas outside sovereignty, the cable industry should develop “best practices” regarding their obligations to give “due regard” to the rights and duties of coastal States and to comply with the laws of the coastal State**
- 3. The best practices should include practices relating to notice and consultation when there are conflicting uses**

Recommendations

- 4. The cable industry should examine whether:
(1) they should register cable ships in States willing to protect their interests and
(2) the feasibility of establishing a registry of cables**
- 5. The cable industry should consider appointing a committee or focal point to communicate with Governments at the regional level**
- 6. The cable industry should work at the regional level to encourage Governments to review their laws relating to the protection of cables, especially their obligation under UNCLOS Article 113 relating to criminal offences**

Thanks for Your Attention

**For more information on Submarine Cables
and Law of the Sea, see the CIL web site:**

**[http://cil.nus.edu.sg/research-
projects/submarine-cables/](http://cil.nus.edu.sg/research-projects/submarine-cables/)**

Prof Robert Beckman

Director, Centre for International Law (CIL)

National University of Singapore

Email: CILDIR@NUS.EDU.SG

Website: WWW.CIL.NUS.EDU.SG