

International Cable Protection Committee (ICPC)

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**1982 UNCLOS : A legal framework
for cooperation between cable
companies and coastal States**

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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 Convention on High Seas**
 - recognized right to lay submarine cables as high seas freedom
 - incorporated some provisions of 1884 Convention
 - 1982 UNCLOS provisions based on those in 1958 Conventions

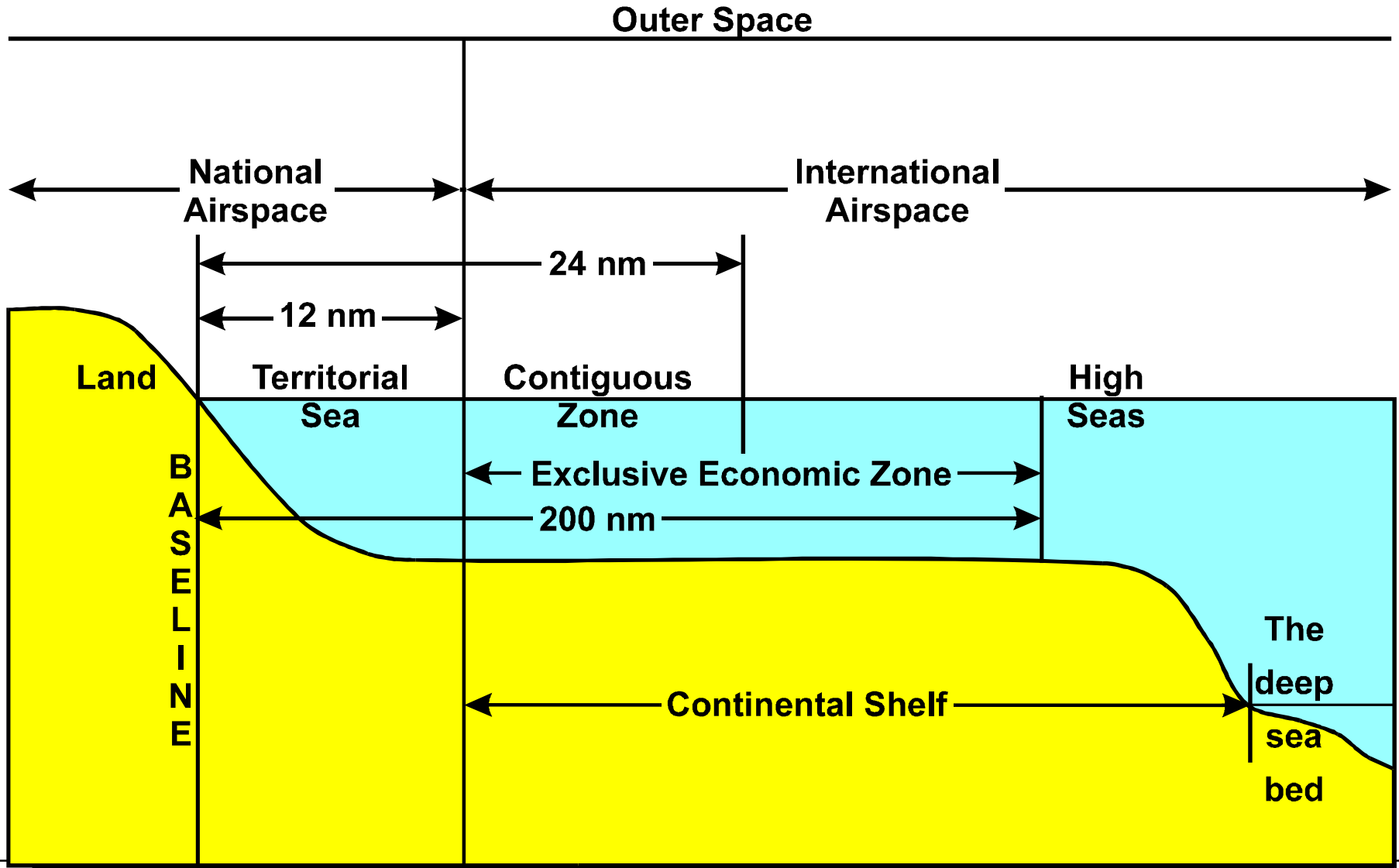
1982 UNCLOS

- The 1982 United Nations Convention on the Law of the Sea (UNCLOS) establishes a “constitution for the oceans”
- UNCLOS is widely ratified and most its provisions are accepted as binding under customary international law on States that are not parties
- 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

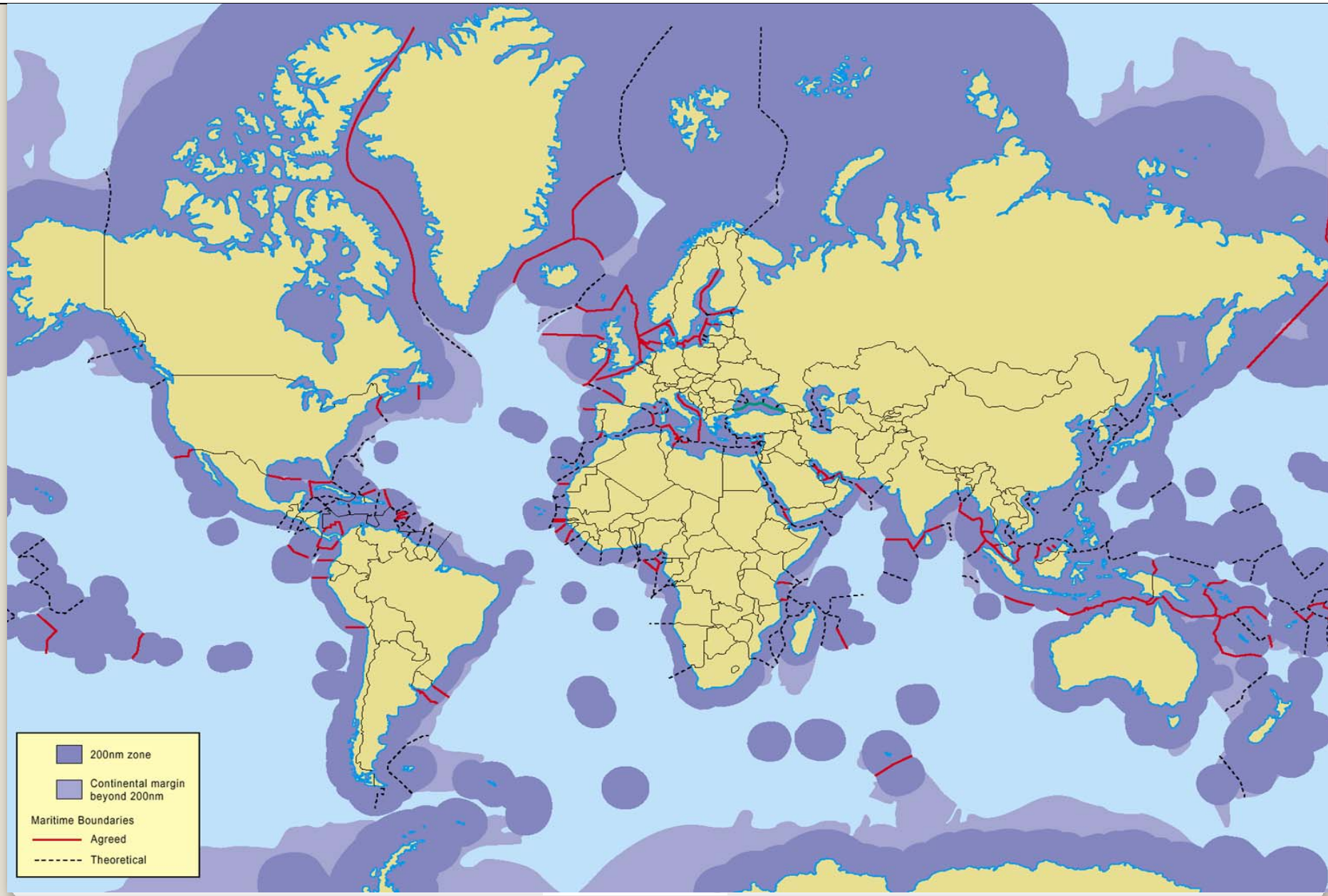
Maritime Zones under UNCLOS

- **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]
 - 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



World EEZ & Continental Shelf Limits



Innocent Passage in Territorial Sea

- Coastal States have the power to adopt laws and regulations on activities in the territorial sea
- However, vessels of all States enjoy the right of innocent passage through these waters [Art 17]
- Innocent passage is passage solely for the purpose of continuous and expeditious transit [Art 18]
- The laying and repair of submarine cables is NOT innocent passage because involves more than transit
- Coastal States can regulate innocent passage in order to protect submarine cables [Art 21]

Cables in the Territorial Sea

- Laying and repair cables
 - No provision in UNCLOS gives States the right to lay cables in the territorial sea of another State
 - Coastal States have wide discretion to adopt laws and regulations on the laying and repair of cables in their territorial sea
- Protection of cables
 - Coastal States have the right to protect cables in their territorial sea from other activities
 - Coastal States have no obligation to adopt laws and regulations to protect cables in the territorial sea

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 no legal obligation to protect cables

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

- 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 to coordinate the permit process
 2. Standardizing forms for information about the cable ship and its crew members
 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 ensure 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

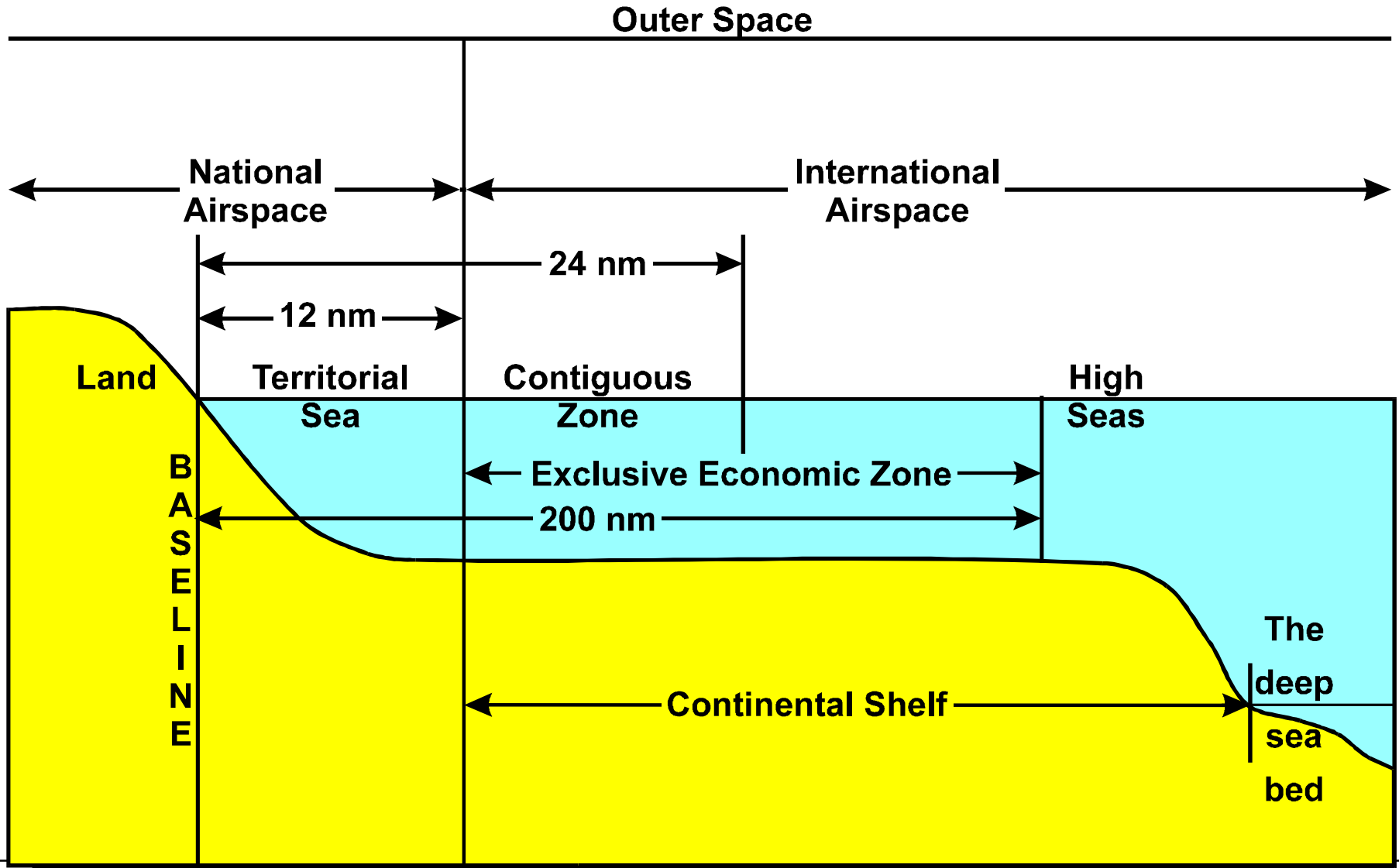
Best Practices on Protection of Cables

- Industry should work with Governments to develop best practices for the protection of cables, including:
 - Need for laws and regulations to protect cables
 - 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

Maritime zones outside sovereignty

- Exclusive economic zone (EEZ) – from outer limit of 12 nm territorial sea out to 200 nm
- Continental Shelf – from outer limit of 12 nm territorial sea out to 200 nm, or in some cases, to 350 nm or even further
- The Area – the sea-bed and ocean floor beyond the limit of the continental shelf
- High Seas – in effect, the water column beyond the outer limit of the EEZ

LEGAL REGIMES OF THE OCEANS AND AIRSPACE



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)]
- 5. When laying submarine cables, States shall 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)]

Specific legal regime of EEZ

- EEZ is not under the sovereignty of coastal States nor part of the high seas
- EEZ is a Specific Legal Regime in which sets out:
 - The rights, jurisdiction & duties of coastal States
 - The rights and duties of other States [Art 55]
- 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 on navigation and freedom to lay cables [Art 58]

EEZ Regime

- Coastal States must give 'due regard' to rights of other States when exercising their sovereign rights over the natural resources [Art 56(2)]
- Other States must give 'due regard' to the rights and duties of the coastal State when exercising their rights such as the freedom to lay cables [Art 58(3)]
- The sovereign rights of the coastal State in the EEZ with respect to the seabed and subsoil shall be exercised in accordance with Part VI of UNCLOS on the continental shelf. [Art 56(3)]
- Therefore, rules on cables in EEZ and on Continental Shelf are essentially the same

Continental Shelf Regime

- The 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 nm [Art 76]
- Coastal States have sovereign rights for the purpose of exploring it and exploiting its natural resources [Art 77]
- The 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]

Cables on the Continental Shelf

- All States have a right to lay submarine cables on the continental shelf [Art 79(1)]
- As on high seas, 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)]
- Unlike pipelines, the delineation of the course for the laying of cables on the continental shelf is NOT subject to the consent of the coastal State [Art 79(3)]

Cables in EEZ and on CS

- Same rules apply to laying of cables in the EEZ and on the continental shelf
- 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

Cables on HS, CS and in EEZ

- Article 58(2) provides that the following articles on submarine cables on the high seas also apply to submarine cables in the EEZ:
 1. Article 112. Right to lay submarine cables
 2. Article 113. Breaking or injury of a submarine cable
 3. Article 114. Breaking or injury by owners of a submarine cable of another submarine cable
 4. Article 115. Indemnity for loss incurred in avoiding injury to a submarine cable

Cables on Continental Shelf

- Major interests of Coastal States are to ensure that other States do not infringe its sovereign right to the natural resources or conduct marine scientific research without its consent [Art 246]
- Some states are also concerned with activities on the shelf which infringe their security interests
- Since the coastal State can take reasonable measures for the exploration of the shelf, it arguably can regulate cable ships in order to ensure that they do not infringe their sovereign rights to the natural resources (e.g., that they are not in fact surveying or doing research on the natural resources of the shelf)

Cables in EEZ

- In recent years coastal States have adopted measures to protect the living resources in their EEZ
- Some States acknowledge the right to lay and repair cables, but demand compensation for the temporary interference with fishing activities
- There is also a trend for States to create “Marine Protected Areas” (MPAs) to protect vulnerable ecosystems, marine biodiversity and underwater cultural heritage
- These trends will lead to “conflict of uses” that will be subject to the ‘due regard’ provisions applicable in the exclusive economic zone

Limits on freedom to lay cables

- The obligation in Part V to give 'due regard' to the rights and duties of coastal States in the EEZ, including
 - the right to take measures to protect and preserve the marine environment
 - the right to preserve and protect marine biodiversity
 - the right to consent to marine scientific research
- Right of coastal States to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources [Art 79(2)]

Challenging coastal State regulations

- It is very difficult for industry to challenge the regulations of coastal States because UNCLOS rights and obligations are with States, not private companies
- If a dispute arises on whether the laws and regulations 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 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

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]
 - 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

Breaking or injury of cables

- Article 113 applies to the breaking or injury of cables only outside the outer limit of the territorial sea, and only to acts by its nationals or ships flying its flag
- Article 113 does not require States to make the breaking or injury of a cable a criminal offence if it is committed by foreign nationals or foreign ships
- In any case, very few States have passed legislation implementing their obligation under Article 113
- Also, very few States also have legislation making the breaking or injury of cables in their territorial sea a criminal offence

Need for extraterritorial jurisdiction for intentional acts against cables

- A new international instrument is required to place an obligation on all States to make it a criminal offence under their laws:
 - for anyone (whatever nationality)
 - to intentionally injure or break a submarine cable which lands in their territory
 - wherever the act takes place
- States will be very reluctant to extend their laws to cover acts of foreigners outside their territory for negligent or reckless acts

Piracy and cables on high seas or in EEZ

- If a “creative” interpretation is given to the definition of piracy in UNCLOS, it could be applied to the intentional taking of cables on the high seas or in the EEZ for personal gain
- The experience of Somali piracy shows that many States do not have domestic legislation on piracy, and that many Governments are very reluctant to exercise their rights under UNCLOS to arrest pirates
- Very few Governments would be willing to apply the piracy provisions of UNCLOS to the taking of submarine cables

Need for International Instrument

- The common method for dealing with intentional acts against vital infrastructure such as air navigation facilities and ship navigation facilities is for the international community to adopt an International Treaty making such acts an “international crime” among contracting parties to the treaty
- Submarine cables are as important to the international community as civil aviation and maritime navigation
- Issue is how to get the international community to recognize the need to adopt such a treaty to protect cables

Working with Governments

- The cable industry should work with Governments to develop a code of best practice for industry and government on the laying and repair of cables
- Delays in the granting of permits for the repair of cables is the most urgent problem
- Common reasons for delays in permits:
 1. No lead agency in government responsible for cables
 2. Governments do not review procedures to determine if expedited procedure is in national interest

Working with Governments

- One problem is that there is no focal point that deals with Governments on behalf of industry
- The lack of communication between industry and government means that policies are not reviewed:
 1. Governments sometimes do not consider that the rapid repair of cables is in the common interest
 2. Some Governments do not understand that cable repair ships represent no threat to their economic or security interests

Working with Governments

- When approaching governments to ask them to cooperate to develop best practice guidelines, industry should:
 1. Appoint a focal point or committee to represent the cable industry
 2. Propose that any differences of interpretation of rights and obligations under UNCLOS be set aside
 3. Assure Governments that the adoption of an expedited or pre-clearance procedure for the repair of cables will not prejudice their economic or security interests or require them to amend their national legislation

Working with Regional Organizations

- In some cases it may be more efficient for industry to attempt to get cooperation at the regional level
- If a regional body endorses best practices on the repair of cables Governments within the region are more likely to adopt the best practices
- Industry could also ask regional bodies to address the issue of security of cables, including the need for to make the intentional damage of cables a criminal offence

Working with International Organizations

- Industry should also work with sympathetic States to bring certain issues before the relevant international organization
- The International Maritime Organization (IMO) in London should be asked to examine two issues:
 1. The establishment of non-anchorage areas in straits used for international navigation and other major sea lanes
 2. A review of the 1972 Collision Regulations on the distance other vessels should keep from cable ships

Conclusions

- States have the right to lay and repair cables outside the territorial sea, subject to the duty to give due regard to the rights and obligations of coastal States
- There are 'grey areas' in UNCLOS, and the trend is for coastal States to attempt to regulate more activities in their EEZ
- It should be possible for States and industry to put the legal issues aside and agree on 'best practices' to ensure the rapid repair of cables in the EEZ

Conclusions

- **Industry should pursue cooperation at the regional level on**
 - (1) best practices for laying and repair of cables and**
 - (2) cooperation to make the intentional breaking or injuring of cables an offence**
- **In order to create a dialogue with governments, regional organizations and international organizations, the cable industry should appoint focal points and representatives to work with sympathetic governments**

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/>

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