Balancing Connectivity and Conservation: Exploring the Link Between the UNCLOS Regime for Submarine Cables and the BBNJ Agreement

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This article by **Elena Sissons** was originally submitted as an assignment whilst the author was abroad for ERASMUS+ at the University of Gothenburg and is being published with her permission. She examines how the Biodiversity Beyond National Jurisdiction (BBNJ) Agreement interacts with the UNCLOS regime governing submarine cables. Although UNCLOS protects the freedom to lay cables on the high seas, that freedom is qualified by the duty to protect the marine environment and by the principle of due regard. The article focuses on two features of the BBNJ Agreement that worry the cable industry: Area-Based Management Tools, particularly Marine Protected Areas, and the new framework for Environmental Impact Assessments. It shows how states and stakeholders differ on whether cables should be exempt from these requirements, with some relying on the precautionary approach and others on the best available science. The article concludes that a cooperative approach, in which the cable industry engages with the BBNJ framework and is presumed compliant with its environmental protections except where significant harm may occur, offers the most balanced way to reconcile connectivity with conservation.

TAGS: International Law, Maritime Law, Environmental Law, International Environmental Law, UNCLOS, BBNJ Agreement

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NOTE

This article was written before the Agreement 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 (the BBNJ Agreement) entered into force. Its analysis therefore proceeds on the footing that the Agreement was not yet in force, and many of its arguments are framed accordingly. The BBNJ Agreement has since entered into force, and certain developments, including its institutional arrangements and the decisions of its Conference of the Parties, are not reflected in the text. The article should accordingly be read as a hypothetical consideration of the interrelationship between submarine cables and the provisions of the BBNJ Agreement, rather than as an assessment of the Agreement as currently implemented and enforced. The author has chosen to preserve the original analysis in the interest of academic integrity, and readers are encouraged to consult subsequent developments in the practice of States Parties and the Agreement's governing bodies.

I. Introduction

In late 2004, the United Nations General Assembly adopted Resolution 59/24, initiating an ad *hoc* information working group[1] tasked with focusing on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (ABNJ). In light of the group's recommendations, the General Assembly resolved to create an international legally binding instrument (ILBI) under the United Nations Convention on the Law of the Sea (UNCLOS), addressing the conservation and sustainable use of marine biodiversity in ABNJ.

In 2023, nearly two decades of diplomatic efforts culminated in the successful adoption of the Biodiversity Beyond National Jurisdiction (BBNJ) Agreement at an Intergovernmental Conference that had been ongoing since 2018.[2] The BBNJ Agreement aims to build upon existing legal frameworks and the mandates of various regional, sub-regional, and international regulatory bodies without intending to supersede UNCLOS provisions but rather to build on the strong-working pediment it has created as implied within Article 5 of the BBNJ Agreement in which '*nothing in this Agreement shall prejudice the rights, jurisdiction, and duties of States under the Convention*'.[3]

Nevertheless, despite such efforts, the BBNJ Agreement's potential impact on the rights established under UNCLOS has raised concerns among legal scholars and stakeholders, who foresee possible challenges in balancing existing rights with the environmental commitments codified in the BBNJ Agreement. A key point of contention involves the freedom of States to lay submarine cables and pipelines in the high seas under Article 87(1)(c) of UNCLOS.[4] Central

[1] United Nations, 'Agreement on Marine Biodiversity of Areas beyond National Jurisdiction' (United Nations Website, undated) <https://www.un.org/bbnjagreement/en> accessed 16 October 2024.
[2] ibid.
[3] Agreement 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 (adopted 19 June 2023), Article 5.
[4] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, Article 87(1)(c).

concerns relate to two significant aspects introduced by the BBNJ Agreement:

(a) the new regime for establishing Area-Based Management Tools (ABMTs), particularly Marine Protected Areas (MPAs), and

(b) enhanced procedures for Environmental Impact Assessments (EIAs)[5] aimed at further reinforcing the protection of the marine environment under Part XII of UNCLOS.

Given the global dependency on submarine cables for data transmission and the heightened imperative to protect marine environments[6], particularly in ABNJ, the BBNJ Agreement's introduction of ABMTs and its EIA mandates represent substantial shifts. This article examines the legal frameworks governing submarine cables under UNCLOS and evaluates their alignment with environmental protections introduced under the BBNJ Agreement.

II. Protection of the Marine Environment and Submarine Cable Rights: A Delicate Balance Beyond State Jurisdiction

The principal challenge in marine governance, especially regarding high seas governance under UNCLOS and the BBNJ Agreement, resides in striking a balance between two competing yet equally essential international interests: the obligation to protect and preserve the marine environment and the right to exercise freedoms on the high seas, including the facilitation of international communication.[7] In this segment, the rights and obligations provided for by the UNCLOS on the protection of the marine environment and the freedom to lay submarine cables shall be discussed.

II.I The Regime to Protect and Preserve the Marine Environment in Light of Submarine Cables Usage

II.I.I Introduction

The obligation to protect and preserve the marine environment under international law has become increasingly vital in an era marked by rapid environmental degradation and the urgent need for sustainable development. Within the UNCLOS, states are not only granted rights to exploit marine resources but are also bound by obligations to safeguard the marine environment for present and future generations.

[5] The International Cable Protection Committee, *Submarine Cables and BBNJ* (ICPC Limited, 1 August 2016) <https://www.un.org/depts/los/biodiversity/prepcom_files/ICC_Submarine_Cables_%26_BBNJ_August_2016. pdf> accessed 16 October 2024.

[6] Daria Shvets, 'Submarine Cables as an Object of Legal Regulation under International Law' (2021) 25 Spanish Yearbook on International Law <https://www.sybil.es/sybil/en/article/view/127> accessed 16 October 2024.

[7] UNCLOS (n 4), Preamble, para. 5.

II.I.II The General Obligation to Protect and Preserve the Marine Environment under the United Nations Convention on the Law of the Sea

The UNCLOS regime for the protection and preservation of the marine environment establishes a foundational obligation under Article 192[8], which provides that '*States have the obligation to protect and preserve the marine environment.*' Legal scholars have interpreted this provision as imposing both positive and negative obligations on States, requiring not only active implementation of measures to protect and preserve the marine environment but also to refrain from actions that may degrade it.[9]

In the case of *Nicaragua v. Colombia*, the ICJ affirmed that Article 192 reflects a customary international law duty, in which '*all States have the obligation under customary international law to protect and preserve the marine environment*'.[10] Furthermore, in connection with the BBNJ Agreement, the International Tribunal for the Law of the Sea (ITLOS) in the *Southern Bluefin Tuna Cases* stated that '*the conservation of living resources*'[11] is an important aspect of the obligation under Article 192[12], and since biological diversity is an aspect of such a marine environment, it can thus be considered that biodiversity and the protection thereof, are included within the *erga omnes* obligation.[13]

II.I.III Effective Protection of Activities in the Area under the United Nations Convention on the Law of the Sea

Apart from the general obligation as discussed above, the UNCLOS under Article 145 also mandates that '*necessary measures shall be taken [by States] in accordance with this Convention with respect to activities in the Area*'.[14] As provided under the definitions of Article 1 of UNCLOS '*the Area*' is defined to include '*the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction*'.[15] In light of this definition and the protection afforded under Article 145, the provision seems to suggest that activities such as the laying of submarine cables and pipelines upon the seabed and ocean floor are to be included in order to '*ensure effective protection from harmful effects which may arise from such activities*'.[16]

Despite the absence of a specific reference to submarine cables in the activities listed under Article 145, it has been contended that the operation and maintenance of installations, including the repair of submarine cables, should fall under this regime. To this end, the International Seabed Authority (ISA) is tasked with adopting rules and regulations aimed at

[8] ibid Article 192.
[9] Yoshifumi Tanaka, The International Law of the Sea (4th ed, Cambridge University Press 2023) 362.
[10] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia),* (2022) ICJ Reports 2022*,* 267, 311, para. 95.
[11] *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan*), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, 280, 295, para. 70
[12] ibid 11.
[13] *Responsibilities and obligations of States with respect to activities in the Area,* Advisory Opinion, 1 February 2011, ITLOS Reports 2011, 10, 59, para. 180.
[14] UNCLOS (n 4), Article 145.
[15] ibid Article 1.
[16] ibid Article 17.

protecting and conserving the natural resources of the area, as well as preventing damage to the marine environment's flora and fauna.[17] The ISA has conducted numerous technical studies concerning the coordination of seabed mining operations alongside cable installations. This work is undertaken in collaboration with the International Cable Protection Committee (ICPC), emphasising the importance of coordinated efforts in regard to submarine cables in ABNJs.

II.I.IV The Measures to Prevent, Reduce, and Control Pollution of the Marine Environment under the United Nations Convention on the Law of the Sea

Article 194(1) UNCLOS requires states to implement all measures consistent with the Convention necessary to prevent, reduce, and control pollution in the marine environment from any source.[18] This obligation on States to protect and preserve the marine environment, alongside their commitments under the Paris Agreement[19], was further clarified in the *ITLOS Advisory Opinion on Climate Change*.[20] This opinion confirmed that states' obligations include conducting EIAs to monitor the environmental effects of both public and private activities and underscored the necessity of establishing MPAs as a means of safeguarding biodiversity.

Article 206 UNCLOS mandates that states assess the potential environmental impacts of activities under their jurisdiction that may harm the marine environment.[21] This includes evaluating risks associated with ship-sourced pollution, fishing practices, and the overexploitation of natural resources. The application of this provision inherently presupposes a precautionary approach to activities, particularly in ABNJ. The importance of EIAs in the field of environmental protection was highlighted in the *Gabcíkovo-Nagymaros Project Case* in which the Court provided that '*in the field of environmental protection, vigilance, and prevention are required on account of the often irreversible character of damage to the environment*'.[22]

However, despite the international legal obligation to conduct EIAs under UNCLOS, a significant gap exists due to the lack of a global coordination. Consequently, measures designed to prevent environmental damage in ABNJ remain fragmented and inconsistent across states. This deficiency in the framework for EIAs has been identified as a critical area requiring action by international stakeholders and non-governmental organisations (NGOs). They have called for the establishment of minimum requirements for EIAs, as well as follow-up mechanisms and a comprehensive list of designated activities that would necessitate EIA implementation by States.[23]

The importance of MPAs as a tool for marine conservation was emphasised in discussions held

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[17] ibid 145(b).

[18] ibid Article 194(1).

[19] The Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016).

[20] *Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law,* Advisory Opinion, 21 May 2024, ITLOS Reports 2024, 4.

[21] UNCLOS (n 4), Article 206.

[22] *The Case Concerning the Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)* (1997), ICJ Reports 1997, 7, 78, para. 140

[23] The Pew Charitable Fund, 'High Seas Environmental Impact Assessments' (2016) <https://www.un.org/depts/los/biodiversity/prepcom_files/PEW_High_Seas_polbrief.pdf> accessed 18 October 2024.

during the 2003 United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS).[24] The establishment of MPAs as an ABMT falls within the scope of measures outlined in Article 194(5) UNCLOS, which mandates that states take measures to '*protect and preserve rare or fragile ecosystems, as well as the habitat of depleted, threatened, or endangered species and other forms of marine life.*'[25] This is particularly relevant to biodiversity-specific regimes as emphasised in the BBNJ Agreement. However, it is important to keep in mind that in taking such measures to prevent, reduce, and control pollution of the marine environments, States are to refrain from '*unjustifiable interference with activities carried out by States in the exercise of their rights and pursuance of their duties on conformity with this Convention*'.[26]

II.I.V The Right to Lay Submarine Cables under the United Nations Convention on the Law of the Sea

Article 87(1)(c) UNCLOS[27] expressly grants all State parties the right to establish and maintain submarine cables within the high seas, thereby facilitating global communications and enhancing connectivity among nations. Notably, the rights enshrined in UNCLOS are not limited solely to its State parties; non-State actors also benefit from these rights through the principles and applications of customary international law, which play a crucial role in fulfilling the requirements of international communication.

The freedom to lay submarine cables under the high seas is further supported by Article 112 UNCLOS[28], which specifically addresses the right of all States to lay submarine cables and pipelines on the seabed of the high seas beyond the limits of the continental shelf, referred to as the Area. This provision and the rights it confers are subject to Article 79(5) UNCLOS, which requires States exercising this freedom to demonstrate due regard for existing cables, ensuring that maintenance and repair activities are not hindered.[29] Furthermore, States must consider the interests of other States exercising their high seas freedoms and respect activities conducted within the Area.[30]

In examining the above provisions, attention is to be drawn to the principle of due regard, as displayed within the *Arbitral Award of Mauritius v. The United Kingdom* concerning the Chagos Marine Protected Area. In this case, the United Kingdom was found to have violated its obligations under UNCLOS by failing to act in good faith, as required by Article 2(3)[31], and to provide due regard when establishing the MPA surrounding the Chagos Archipelago. The Tribunal clarified that due regard calls for a party '*to have such regard for the rights of [the other*

[24] Tullio Scovazzi, 'Marine Protected Areas on the High Seas: Some Legal and Policy Considerations' (2004) 19(1) The International Journal of Maritime and Coastal Law 1.
[25] UNCLOS (n 4), Article 194(5).
[26] ibid Article 194(4).
[27] ibid Article 4.
[28] ibid Article 112.
[29] ibid Article 79(5).
[30] Tara Davenport, 'The High Seas Freedom to Lay Submarine Cables and the Protection of the Marine Environment: Challenges in High Seas Governance' (2018) 112 American Journal of International Law Unbound 139.
[31] UNCLOS (n 4), Article 2(3).

party] as is called for by the circumstances and by the nature of those rights. The Tribunal declines to find in this formulation any universal rule of conduct'.[32] Therefore, it is such due regard that is to be determined on a case-by-case basis depending on the circumstances.

Such rights as provided for under the Convention include the right and freedom to lay submarine cables and pipelines on the High Seas pursuant to Article 87 UNCLOS.[33] The rights and freedoms outlined in the aforementioned provision can be viewed as inherently qualified. This paper will further explore these qualifications in subsequent sections, providing a detailed analysis of their implications and contexts. In its *Advisory Opinion on Climate Change*, the ITLOS highlighted that, while the precautionary approach is not explicitly mentioned in the UNCLOS, it is implicitly required when addressing potential harmful effects on the marine environment.[34] To eliminate any ambiguity regarding its application, the BBNJ Agreement expressly incorporates the precautionary approach, thereby ensuring both transparency and legal certainty in its implementation.

In his paper '*Marine Protected Areas on the High Seas: Some Legal and Policy Considerations*', Professor Tulio Scovazzi discusses the principle of freedom of the seas, highlighting that this principle must be understood within the context of evolving legal frameworks and the specific circumstances in which it is applied. Scovazzi argues that high seas freedoms must be balanced with other interests, particularly those concerning the international community as a whole, such as the protection of the marine environment. He argues that, in today's context, it is untenable for a State to claim the right to engage in a specific marine activity based solely on the principle of freedom of the seas. Rather, it is essential to take into account the varying perspectives of other interested States and to be open to negotiations that address any conflicting interests.[35] Accordingly, the exercise of high seas freedoms such as the laying of submarine cables and pipelines must account for the broader interests and concerns of the international community, avoiding an unregulated or wild west approach to ABNJ.

III. Implications of the BBNJ Agreement on Submarine Cables: Issues and Insights

III.I Introduction

Following the analysis of the UNCLOS provisions related to the laying of submarine cables and the protection and preservation of the marine environment, we now transition to an examination of the BBNJ Agreement. This analysis will address the implications and potential impacts of the Agreement on the framework established by UNCLOS, with a particular focus on concerns raised by stakeholders, institutions, and relevant bodies regarding the integration of this new ILBI with existing regulations.

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[32] *In the Matter of the Chagos Marine Protected Area Arbitration (The Republic of Mauritius v. The United Kingdom of Great Britain and Northern Ireland)* Arbitral Tribunal, 18 March 2015, 202, para. 519.
[33] UNCLOS (n 4), Article 87.
[34] ibid Article 23.
[35] ibid Article 27.

As aforementioned in the introduction to this paper, the central concerns of the application of the Agreement relate to two separate areas within the newly introduced ILBI. These concerns are the following:

(a) the application and effects of the regime for establishing ABMTs in particular MPAs and the relationship and limitations of such regime on the high seas freedom of laying submarine cables, and

(b) the enhancement and enforceability of EIAs in ABNJs, and the effect of such procedures to the existing regime for EIAs in regards to submarine cables.[36]

III.II Exploring Area-Based Management Tools (ABMTs): Impacts and Restrictions on Laying of Submarine Cables under the BBNJ Agreement

The Agreement introduces ABMTs as a central mechanism for conserving and sustainably using marine biodiversity in ABNJ. As provided for under Article 17 of the BBNJ Agreement,[37] such ABMTs aim to regulate activities within designated regions of the high seas to prevent biodiversity loss and ensure the long-term health of marine ecosystems. The precise implications of the ILBI concerning its ABMT provisions will largely depend on how this framework is integrated into both international environmental law and the law of the sea. However, there are concerns regarding the incorporation of this Agreement within the existing legal framework.

Stakeholders, including States, have raised concerns that geographic restrictions on specific sectors or activities, such as submarine cable laying, could drive up operational costs, potentially undermining the sector's sustainability and broader objectives.[38] For example, the ICPC has noted in its report on the BBNJ Agreement's relationship to submarine cables that restrictions like "no-go" zones could complicate access to existing cables for essential maintenance and repairs.[39] Furthermore, such restrictions could necessitate alternative routes for new cables, which may compromise the efficiency and resilience of the global commercial and communication network.

Analysis of various legal instruments on MPA application indicates that, in certain cases, MPAs could impose restrictions on submarine cables if the MPA's foundational objective includes mitigating risks associated with cable-laying activities.[40] Article 19 of the BBNJ Agreement[41], which outlines the MPA proposal process, already requires detailed information about an area under consideration, including whether it should be designated as an MPA. Within this process, the Conference of the Parties (COP) may evaluate whether an MPA's conservation objectives necessitate the application of specific regulations to submarine cables.

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[36] ibid Article 5.

[37] Agreement under the UNCLOS (n 2), Article 17.

[38] ibid Article 33.

[39] Ibid Article 5.

[40] Andrew Friedman, 'Submarine Telecommunication Cables and a Biodiversity Agreement in ABNJ: Finding New Routes for Cooperation' (2017) 32(1) The International Journal of Marine and Coastal Law 1.

[41] Agreement under the UNCLOS (n 2) Article 19.

This objective-driven approach is exemplified by the OSPAR Convention's Regulatory Regime for establishing MPAs in ABNJ within the OSPAR Maritime Area.[42] Paragraph 2.6 of this regime allows contracting parties to adopt measures aligned with an MPA's goals, which may include restrictions on submarine cable installation. However, whether such restrictions will apply depends on how the COP applies the agreement, and whether it adopts a narrower or broader approach to environmental protection.

The comprehensive framework for ABMTs and the establishment of MPAs under the Agreement has significantly advanced state obligations under Article 206 UNCLOS.[43] Prior to the Agreement, such protections were largely limited to agreements between specific parties such as the OSPAR Convention[44] and the Barcelona Convention[45], which lacked an international scope, constrained by the *pacta tertiis* principle of treaty law[46], which limits treaty obligations to signatory states. By providing a universal approach, the BBNJ Agreement now enables broader participation and cooperation, setting a stronger foundation for global biodiversity protection in ABNJ.

III.III Evaluating Environmental Impact Assessments under the BBNJ Agreement: Key Insights and Consequences

III.III.I An Introduction to the Regime of EIAs under the BBNJ Agreement

The Agreement also establishes a comprehensive framework for conducting EIAs in ABNJ. This framework is essential for understanding and mitigating the environmental impacts of human activities on marine biodiversity as highlighted in the objectives under Article 27 BBNJ Agreement.[47] The Agreement provides an obligation under Article 28 for parties to ensure that the *'potential impacts on the marine environment of planned activities that take place in ABNJ are assessed prior to authorisation'*[48], such assessment is to be taken by the party who has jurisdiction or control over such planned activity. Despite efforts, the participants of the agreement have identified even greater uncertainty around the implementation of the EIA regime than they do around that of ABMTs.[49]

The process under the Agreement is as follows; the Party with jurisdiction is to screen the activity under consideration to determine whether a full EIA is required under Article 30(1) which provides that '*when a planned activity may have more than a minor or transitory effect*

[42] OSPAR Commission, *OSPAR's Regulatory Regime for Establishing Marine Protected Areas (MPAs) in Areas Beyond National Jurisdiction (ABNJ) of the OSPAR Maritime Area* (OSPAR 09/22/1-E, Summary Record, Annex 6, 2009).
[43] ibid Article 24.
[44] The Convention for the Protection of the Marine Environment of the North-East Atlantic (adopted 22 September 1992, entered into force 25 March 1998).
[45] The Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (adopted 16 February 1976, entered into force 15 April 1978).
[46] The Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), Article 34.
[47] Agreement under the UNCLOS (n 2), Article 27.
[48] ibid Article 28.
[49] ibid Article 5.

on the marine environment, or the effects of the activity are unknown or poorly understood, the Party with jurisdiction or control of the activity, shall conduct a screening of the activity'.[50] Based on this initial screening and the results thereof, a full EIA may be required as per Article 30(1)(b).

III.III.II Divergence in Stakeholder Perspectives of EIA Application

During the sessions of the Preparatory Committee, State delegates voiced concerns about the implications of the Agreement's EIA provisions on submarine cables and pipelines.[51] Notably, Papua New Guinea and the African Group advocated for mandatory EIAs for high-seas activities, including cable-laying, deep-sea mining, fishing, and bioprospecting. In contrast, Japan and the United States argued for exemptions from EIA requirements for low-impact activities, such as the installation of submarine cables and pipelines, suggesting that certain operations could be pre-categorised as non-impactful to facilitate their approval.[52] In this context, environmental NGOs have also played a significant role in the conversation by emphasising the necessity for a no-exceptions approach that advocates for the implementation of EIA mandates under the BBNJ Agreement across all industry sectors impacting the ABNJ, including those related to telecommunications and infrastructure.[53]

In assessing the discussed approach, two key considerations must be taken into account: (a) the precautionary approach and (b) the best available science principle. The precautionary approach is a widely accepted risk management principle in international environmental law, which mandates that if a proposed action poses a potential threat to public or environmental health, and scientific consensus on the matter is insufficient, the action should either be halted or subject to rigorous review. This principle is intended to uphold caution before action, prioritising protection where uncertainty exists.

States, including Japan and the U.S., have voiced perspectives that seem to diverge from this precautionary stance with a view that aligns with the principle of using the best available science, which, while repeatedly referenced in the BBNJ Agreement, also implies a reliance on concrete scientific findings. The presence of submarine cables in the marine environment scientifically seems to have a very small or even neutral effect as demonstrated by reports on the matter. Such reports include the Oceans and the Law of the Sea Report of the Secretary-General[54] as well as the International Seabed Authority Technical Study No.14.[55] Furthermore, the World Conservation Monitoring Centre has highlighted that; '*EIAs for cable operations are rare and are generally limited to a coastal state's territorial sea. The European Union EIA*

[50] ibid Article 30(1).
[51] ibid Article 5.
[52] World Economic Forum, Governing Marine Biodiversity Beyond National Jurisdiction: Roles and Opportunities for the Private Sector (White Paper, 2024). <https://www.weforum.org/publications/governing-marine-biodiversity-beyond-national-jurisdiction-roles-and-opportunities-for-the-private-sector/> accessed on 15 October 2024.
[53] ibid 33.
[54] UNHCR, 'Oceans and the law of the sea: report of the Secretary-General' (March 2015) <https://www.refworld.org/reference/themreport/unga/2015/en/105588> accessed 22 October 2024.
[55] ibid 5.

Directive currently does not explicitly impose an EIA requirement on cable-laying projects.'[56] Therefore, given the best available scientific evidence in regard to the interaction of submarine cables with the marine environment, it seems unlikely that the new ILBI should impose a regulatory burden upon cable operations on the high seas, however, it is impossible to know how such will be applied in practice.[57]

Another concern that has surfaced is regarding the expeditious nature of the cable regime and whether the BBNJ regime may create new delays for EIAs and threaten the viability of telecommunications projects due to financing issues and project timelines. This issue has been brought up previously within the Sargasso Sea workshops where the Commission had come into agreement that an EIA '*should not be required before cable repairs take place within the Sargasso Sea given the importance of ensuring that repairs are done as expeditiously as possible*'[58]. Seeing as the Sargasso Sea seems to be on the cards as being one of the first proposed MPAs under the new BBNJ regime, it will be interesting to see how the interplay between the Commission's consideration and opinion on seabed activities are taken into account when deciding on whether or not an EIA is needed for such activities.

Overall, the industry's concern is that onerous EIA requirements and restrictive ABMT measures would increase the costs and time incurred with cable operations, with such considerations being of importance, especially when dealing with cable repairs, which ought to be completed expeditiously for security and communication purposes.[59] Therefore, the newly established environmental standards would be an additional and unnecessary burden to cable operators.

The question here is whether based on this analysis will the obligation to give due regard under the UNCLOS and the Agreement be sufficient to uphold the relationship between submarine cables and any high-seas MPAs that may come into existence through the new ILBI. So far these considerations have existed harmoniously under the UNCLOS with the balancing of rights as discussed previously. The World Economic Forum in their White Paper on '*Governing Marine Biodiversity Beyond National Jurisdiction: Roles and Opportunities for the Private Sector*'[60] recommended that the BBNJ process should not change or condition the existing provisions in UNCLOS that deal with submarine cables and does not impose any new or additional EIA or MPA requirements. For the most part, this practice seems to be the legal trend with the Convention on the Protection of Underwater Cultural Heritage[61] exempting submarine cables from its treaty application, taking into account the long and positive track record of submarine cables as well as the importance of such within the international infrastructure, an exemption was merited. However, it will be interesting to see how the newly implemented Agreement will

[56] UNEP WCMC, Submarine Cables and the Oceans: Connecting the World (UNEP, 2009) <https://resources.unep-wcmc.org/products/WCMC_RT059> accessed 21 October 2024.
[57] ibid 43.
[58] Sargasso Sea Commission, Submarine Cables Workshop (Sargasso Sea Commission Website, October 2014) <https://www.sargassoseacommission.org/our-work/workshops/submarine-cables-workshop> accessed 16 October 2024.
[59] ibid 33.
[60] ibid 55.
[61] The Convention on the Protection of Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009)

apply such exemptions in practice.

III.IV The BBNJ Agreement and the Road to Interpretation

As emphasised, the BBNJ Agreement may lead to various interpretations in its application. *Friedman* suggests that a nuanced understanding of the BBNJ Agreement's implications for submarine cables necessitates analysis of three alternatives, these being the following:

(a) explicit exclusion from the scope of the ILBI;

(b) silence within the instrument with regards to cables; and

(c) a cooperative approach whereby cables are to be considered as compliant with environmental protections.[62]

III.IV.I Explicit Exclusion from the Scope of the BBNJ Agreement

Ultimately, a cooperative approach highlights the importance of engaging the submarine cable industry within the framework of the new instrument while supporting its growth. This model is reinforced by the BBNJ Agreement's emphasis on international collaboration with stakeholders and regulatory bodies concerning submarine cables.

In order for the effective implementation of the strategy to take place at a national level, industry representatives are to actively engage with the Committee and salient international organisations. Rather than seeking exclusion from the instrument, the focus should be on recognising that submarine cable activities generally comply with the instrument's environmental protections, with specific exceptions for cases where significant harm may occur. This aligns with the positions expressed by Japan and the U.S. during Preparatory Committee discussions.

III.IV.II Omission and Silence from the BBNJ Agreement

The second route is for the instrument to remain silent on submarine cables. This would prevent unnecessary regulation from the outset and allow policymakers to avoid immediate action. However, this option has notable drawbacks. It would not address the *lacuna* regarding cables in ABNJ. Although current data suggest limited impacts from cables, our understanding of deep-sea ecosystems is still developing. Delaying action until potential harm becomes evident could expose both ecosystems and the cable industry to risks, including unforeseen environmental impacts and regulatory backlash. Additionally, this approach would neglect obligations under the UNCLOS to proactively assess and mitigate potential harm as provided under Article 206[63] as well as the *erga omnes* obligation of states under Article 192.[64]

[62] ibid 43.
[63] ibid 24.
[64] ibid 11.

III.IV.III A Cooperative Approach for Compliance within the BBNJ Agreement

Finally, the cooperative approach emphasises the importance of engaging the submarine cable industry within the framework of the new instrument while facilitating its continued growth. The cooperative model is further enhanced by the existing regime in the BBNJ Agreement, which prioritises international collaboration with stakeholders, as well as regional and international bodies on relevant matters such as the regulation of submarine cables.

Rather than pursuing exclusion from the instrument, the focus should be on acknowledging that submarine cable activities generally comply with the instrument's environmental protections, with specific exceptions for cases where significant harm may occur. This approach would align itself with that requested by Japan and the U.S. during the Preparatory Committee discussions.

IV. Conclusion - The Future of the BBNJ Agreement and the Submarine Cable Regime

In conclusion, balancing connectivity and conservation is crucial for submarine cables and marine environmental protection under UNCLOS and the BBNJ Agreement. While the BBNJ Agreement aims to enhance marine biodiversity conservation, it raises potential challenges for the submarine cable industry, as ongoing dialogue and interpretation continue to shape the discourse. Ultimately, the true impact of the BBNJ Agreement will depend on its practical implementation following adoption by States. Monitoring the framework's adaptability will be essential to uphold its dual goals, revealing the effectiveness of these measures and the potential for sustainable coexistence between infrastructure and marine ecosystems.



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