



June 6 2013

Mr. Douglas Bell
Chair, Trade Policy Staff Committee
Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508

Re: International Service Agreement, Docket USTR-2013-001

Dear Chairman Bell,

Please find attached the comments by NASCA dated June 6, 2013 for your consideration. Please do not hesitate to raise any questions you may have on this submittal.

Sincerely,

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Association

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Columbus Networks
Global Marine
Systems Limited
Hibernia Atlantic
Level (3)
Communications,
LLC
PC Landing Corp
Reliance GlobalCom
Southern Cross
Cable Network
Sprint
Communications
Corporation
TATA
Communications
Tyco Electronics
Subsea
Communications
Verizon Business

Comment to United States Trade Representative on the International Services Agreement ("ISA")

Market Access Barriers To The Provision and Maintenance of International Communication Services on Submarine Cables

The purpose of this comment is to address the many government activities with regard to submarine cables that can act as barriers to trade in information services and telecommunications. Precisely how nations deal with submarine cables can impact the free flow of information. The goal of these comments is to allow for the efficient and prompt repair of international submarine cables and other measures to strengthen their reliability and protection from external aggression. This comment sits in the wider context of the recently announced WTO plurilateral agreement. Twenty WTO members have agreed to participate in the negotiations. In addition to the U.S., these include Australia, Canada, the EU, New Zealand, Korea, Mexico, Chile, Colombia, Chinese Taipei, Japan, Hong Kong China, Norway, Switzerland, Pakistan, Israel, Peru, Costa Rica, Turkey, Panama and Iceland (the "Members").

NASCA is a trade association representing the companies that own and maintain submarine cable systems landing in the United States and Canada.¹ NASCA strongly supports the ISA negotiations and are hopeful that more WTO members will accede to it. NASCA believes that government's rules and regulations with regard to submarine cables can restrict the free flow of information in ways that are damaging to both national and global economies. In the last decade or so, there has been a convergence of telecommunications, media and information technology such that the free flow of information is the 21st Century equivalent to the GATT's freedom of movement of goods. There are many impediments to the free flow of information, but rules that apply to submarine cables have a significant effect.

I. Submarine Cables are essential for international trade.

Each day the Society for Worldwide Interbank Financial Telecommunications (SWIFT) transmits 15 million messages over cables to over 8,300 banking organizations, securities

¹ NASCA members are Alaska Communications System, Alaska United Fiber System Partnership, Alcatel-Lucent Submarine Networks, Apollo Submarine Cable Ltd., AT&T Corp, Brasil Telecom of America, Inc/GlobeNet, Columbus Networks, Global Marine System Ltd., Hibernia Atlantic, Level (3) Communications, LLC, Reliance GlobalCom, Southern Cross Cable Network, Sprint Communications Corporation, TATA Communications (Americas), TE Subcom, and Verizon Business.

institutions and corporate customers in 208 countries. The Continuous Linked Settlement (CLS) Bank located in the United Kingdom is just one of the critical market infrastructures that rely on SWIFT as it provides global settlement of 17 currencies with an average daily US dollar equivalent of approximately USD3.9 trillion. The U.S. Clearing House Interbank Payment System (CHIPS) is another structure that processes over USD1 trillion a day to over 22 countries for investment companies, securities and commodities exchange organizations, banks and other financial institutions.²

The common, but obsolete, belief that international communications are largely carried by satellite is false. Until the first transatlantic fiber optic cable was laid in 1988, satellites were used, but the tremendous volume of data carried on lower cost modern fiber optic submarine cables dwarfs the limited capacity of higher cost satellites. Additionally, the technical transmission delays and other quality limitations inherent in satellites make them comparatively marginal for continuous transmission of high speed voice, video, and data traffic.

For example if the approximately 40 garden hose diameter cables connecting the United States to the world are cut, even using every single satellite in the sky, it is estimated that only 7% of the total United States traffic volume could be carried by satellite.³ Referring to the submarine cable networks, the Staff Director for Management of the Federal Reserve observed “when the communication networks go down, the financial sector does not grind to a halt, it snaps to a halt.”⁴ The same can be said for most industries enmeshed in the global economy through the Internet including shipping companies, airlines, banks, supply chain, and manufacturing industries.

Other countries are no different in their reliance. Australia and Singapore for example each rely on several cables landing in each nation for over 99% of their international communications. Japan does the same with about 20 international cable systems. And the list goes on. With the laying of submarine cables along the east coast of Africa in 2009-2010, this

² Malphrus, S., “Undersea Cables and International Telecommunications Resiliency,” 34th Annual Law of the Sea Conference, Center for Ocean Law and Policy, University of Virginia, 20 May 2010.

³ The testimony of D. Burnett before the Senate Foreign Relations Committee on the United Nations Law of the Sea Convention, 4 October 2007.

⁴ Malphrus, S., Board of Governors of the Federal Reserve System, First Worldwide Cyber Security Summit, East-West Institute, Dallas, Texas, 3-5 May 2010.

last major group of nations now has access to the world's submarine cable network. As of mid-2012, only 21 nations and territories remain isolated from fiber connectivity and many of these have connecting cable projects underway.⁵ These cables are the arteries through which the lifeblood of the digital global economy flows.

Submarine cable activities have broad implications for the international community. There is a growing awareness among nations, coastal States in particular, that submarine cables on their continental shelves are important; they are taking actions. But in several cases, these actions are not consistent with the United Nations Law of the Sea Convention (UNCLOS).⁶ Four actual ongoing examples are discussed in section IV. These actions are harmful examples of coastal State encroachment on the traditional freedoms to lay and maintain submarine cables in international waters that deserve scrutiny by diplomats, and trade policy makers. They constitute harmful barriers to trade because they disrupt international communications and degrade the reliability of international submarine cables.

II. Evaluating the essential utility of submarine cables in international trade.

To understand why these actions are barriers to trade in the context of international law, it is useful to consider basic cable industry characteristics in summary form.

- There is no single global submarine cable network any more than there is a single world airline network. Rather, the global cable network is composed of approximately 198 or so separate, diverse, and independent cable systems totaling about 1.25 million kilometers of fiber optic cables.⁷ These systems are typically built by private businesses without any government subsidies in direct response to market

⁵ Submarine Telecoms Forum, Inc, *Telecoms Industry Report 2013* at 18. Inhabited sovereign States and territories without fiber optic connectivity include: Somalia, Saint Helena, Ascension, and Tristan da Cunha (British Overseas Territory); Christmas Island (Australian External Territory), Montserrat (British Overseas Territory); Saint Pierre and Miquelon (French Collectivité d' Outre-mer); Easter Island (Chilean Special Territory), Falkland (Malvinas) Islands (British Overseas Territory), Cook Islands (Self-Governing State in Free Association with New Zealand), Kiribati, Nauru, Niue (Self-Governing State in Free Association with New Zealand, Norfolk Island (Australian External Territory), Palau, Pitcairn Islands (British Overseas Territory), Solomon Islands, Tokelau (New Zealand Dependent Territory), Tonga, Vanuatu, Wallis and Futuna (French Collectivité d' Outre-mer).

⁶ 1833 UNTS 397 (entered into force 16 November 1994).

⁷ International Cable Protection Committee Ltd ("ICPC" International Telecom Cables data base (Oct 2011). An interactive world submarine cable map showing these systems can be viewed at www.iscpc.org by accessing the Cable Data Base button on the website.

demands, technical developments and innovations, and competitive pressures to deliver low cost reliable international communications for voice, data, and video applications.

- During 2008 to mid-year 2012 there has been approximately USD10 billion worth of investments in new systems. Of the billions of dollars spent to finance cable systems, currently about 1% is provided by governments or international agencies. The 99% balance is provided by private consortiums and carriers (71%), non-government investors (22%), and suppliers (5%).⁸
- International cables are frequently co-owned by many different companies from different nations. Generally, an international cable belongs to no single State. A consortium of cable co-owners typically consists of about 4 to 30 or more telecom or content companies from multiple nations that co-own an international cable system's capacity and operate the cable system together pursuant to a cable construction & maintenance agreement ("C&MA").
- Cable systems are geographically organized into cable maintenance agreements whereby groups of separate cable systems collectively contract with the operator(s) of cable ships which are strategically based in ports to serve all of the cable systems in a region or zone. These purpose built ships with their specialist crews are contractually obligated to sail within 24 hours of a fault notification to promptly carry out repairs at sea. For example, the Atlantic Cable Maintenance Agreement ("ACMA") consists of approximately 80 or so cable owners of separate cable systems which have under contract four cable ships located at base ports in Europe and the Americas that serve cables located the Atlantic Ocean and the West coast of South America.⁹ The important point for policy makers is that cable repair is paid privately by the cable owners and is carried out not by government mandates but by contract.

⁸ Submarine Telecoms Forum, Inc, *Telecoms Industry Report 2013* at 28.

⁹ http://www.acma-mc.org/Home_tcnGeneralDestacado/seccion=224&idioma=en_GB&id=2010072015200001&activo=3.do A description of cable repair agreements worldwide with maps and the costs associated with them can be found at Burnett, D., "Recovery of Cable Ship Repair Cost Damages from Third Parties That Injure Submarine Cables," 35 Tulane L.J., Vol. 35, Winter 2010 at 105-111.

- Cable ships are custom built for the sole purpose of laying and repairing cables. They have no other uses. Cable ships are manned by specially trained crews. These ships are conspicuous by their special appearance. Their navigational movements are transparent and easily tracked by the Automatic Ship Identification System (AIS). Normal procedure is for the cable ship to notify for navigational safety reasons the local coast guard or naval authorities of cable operations in a nation's territorial sea and EEZ. The daily cost of a cable ship can vary between USD45,000 and USD70,000 per day.
- All repairs are carefully documented and the information is available to coastal States through their companies that co-own the cable or upon request of the coastal State. The average cost of a repair is between USD1M and USD3M, depending upon the location of the fault, the cable ship, the cable ship costs, weather and other factors.¹⁰
- There are only about 38-42 cable ships in the world. Approximately half of these ships are assigned to maintenance agreements at any one time where the ships are strategically based in ports around the world ready to sail to a cable fault on 24/7 notice. The balance of the fleet is deployed laying new cables or other cable operations. The cable ships are flagged in various countries: United Kingdom, France, Singapore, South Korea, China, Japan, the United Arab Emirates and the Marshall Islands. Ownership of cable ships is diverse and competition between shipowners for the cable owners' work is keen.
- Prompt repair of cables is essential not only for business reasons, but also because every cable is in effect a backup cable for a damaged cable awaiting repair, and can be used to immediately restore communication traffic by rerouting it from the damaged cable to an undamaged cable in a process that can often be measured in seconds. It is this feature that allows for the resiliency of modern cable systems that generally allows for continuous global communication by cables notwithstanding the 200 or so cable faults that occur worldwide annually from contact by fishing gear,

¹⁰ Burnett, D., "Recovery of Cable Ship Repair Cost Damages from Third Parties That Injure Submarine Cables," 35 Tulane L.J., Vol. 35, Winter 2010 at 108.

anchors, or natural hazards like earthquakes.¹¹ It is the reliability of international cable systems in the secure transmission of voice, data, and video that underpins the digital economy.

- Submarine cables have a tiny footprint on the seabed. The diameter of a modern submarine fiber optic cable is about the diameter of garden hose¹² and is in the marine environment benign.¹³

III. International law and submarine cables

The economies contemplated as Members to the ISA on electronic communication services have one very important common factor. They are all parties or signatories to UNCLOS and/or they are on record as recognizing UNCLOS as customary international law to which they adhere.¹⁴ The trade proposals addressed in these comments are based on the bedrock of UNCLOS accepted by all. The 10 articles in UNCLOS that address submarine cables are set out in the Appendix for ease of reference. From this mutual foundation, all of the necessary elements for sound trade policy flow.

Without relying on UNCLOS in the ISA, it is a useful source of definitions and principles for maritime zones such as territorial seas, archipelagic waters, the Exclusive Economic Zone, and the Continental Shelf that are accepted as customary international law.

1. Territorial Seas and Archipelagic Waters

Under UNCLOS, a coastal State has sovereignty over a 12 nautical miles (nm)¹⁵ belt of sea known as its territorial seas, including the air space above and the seabed and subsoil

¹¹ *Id.* at 108.

¹² A description of the physical characteristics of modern submarine cables can be viewed in the power point presentation "About Submarine Cables" and a video which can be viewed at www.iscpc.org by accessing the Publications button on the website.

¹³ Carter, L., Burnett, D., Drew, S., Marle, G., Hadadorn, L., Bartlett-McNeil, D., Irvine, N. (2009) ICPC/UNEP/UNEP-WCMC. This report compiles and analyzes the environmental experience with cables in the marine environment since submarine cables were introduced into the ocean in 1850 and underscores the benign impact of a modern fiber optic cable on the marine environment.

¹⁴ 164 States and the EU are parties to UNCLOS. The United States position is that UNCLOS is customary international law to which it adheres. 19 Weekly Comp. Pres. Doc. 383 (Mar. 10, 1983).

¹⁵ Article 3, UNCLOS, *supra* note 1.

below.¹⁶ However, such sovereignty must be exercised “subject to this Convention and to other rules of international law.”¹⁷ This power however should ideally be utilized in a manner that lessens unnecessary trade barriers.

Similarly, an archipelagic State¹⁸ has sovereignty over the waters enclosed by its archipelagic baselines known as archipelagic waters.¹⁹ There is an express obligation on archipelagic States to respect existing submarine cables laid by other States in its waters and passing through its waters without making a landfall” and to permit maintenance and replacement of such cables upon receiving due notice.²⁰ This provision has little practical utility since cables existing at the time UNCLOS entered into force have likely been retired and not replaced. But the useful concept of notification as opposed to coastal State permission suggests a balanced approach to reducing unnecessary trade barriers. New cables that transit archipelagic waters should obtain permission of the archipelagic State.

2. The Exclusive Economic Zone and Continental Shelf

UNCLOS allows coastal States to claim an EEZ and continental shelf beyond their territorial seas, where they enjoy certain sovereign rights over the exploration and exploitation of natural resources but where other States enjoy the rights of navigation and the freedom to lay and maintain submarine cables. These are considered areas outside the sovereignty of coastal States but areas in which coastal States have certain specified rights and jurisdiction.

The EEZ may extend up to 200 nm from the coastal baseline. The EEZ is a sui generis regime which is neither high seas nor territorial seas.²¹

¹⁶ Article 2, UNCLOS, *ibid.*

¹⁷ Article 2 (3), UNCLOS, *ibid.*

¹⁸ As defined in Article 46, UNCLOS, *supra* note 1.

¹⁹ Article 49, UNCLOS, *ibid.*

²⁰ Article 51 (2), UNCLOS, *ibid.* This provision was first introduced at the negotiations of UNCLOS III to take into consideration the concerns of States that the introduction of the concept of an archipelagic State would unduly hinder access to existing submarine cables in waters previously not under the sovereignty of States: See Myron Nordquist, Satya Nandan and Shabtai Rosenne, eds., *The United Nations Convention on the Law of the Sea 1982: A Commentary, Volume II* (Netherlands: Martinus Nijhoff Publishers, 1993), 449 (Nordquist et al, Volume II). It only applies to existing cables and the laying of new cables is dependent on the consent of the archipelagic State: See Churchill and Lowe, *supra* note 39, at 126.

²¹ UNCLOS, Article 55,

With regards to the continental shelf, a coastal State has “sovereign rights for the purpose of exploring it and exploiting its natural resources,”²² which includes “mineral and other non-living resources of the seabed and subsoil.” The continental shelf is defined as “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.”²³ A coastal State is allowed to claim a continental shelf up to a distance of 200 nm or if the outer edge of its continental margin extends beyond 200 nm,²⁴ it can claim what is known as an extended continental shelf.²⁵ Cable ships are not designed or used for exploration and exploitation of natural resources.

3. Freedom to lay and maintain submarine cables in the EEZ and on the Continental Shelf

As part of the compromise during the negotiations of UNCLOS, which granted coastal States extensive rights over economic resources and specific jurisdictional competences, other States were granted rights (as well as duties) in the EEZ:

Article 58. Rights and duties of other States in the exclusive economic zone

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of *navigation* and *overflight* and of *the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.*

[Emphasis added.]

Article 87 (1) provides that freedoms of the high seas include the “freedom to lay submarine cables and pipelines, subject to Part VI [on the continental shelf]. Paragraph 1 of Article 58 is explicit that the freedoms listed in Article 87, including navigation (including the navigation of cable ships), and “the laying of cables including the internationally lawful uses of the sea related

²² Article 77 (1),

²³ Article 76 (1), UNCLOS, *ibid.*

²⁴ The outer limit of the continental margin is to be determined in accordance with the formula set out in Article 76 (4), UNCLOS, *ibid.*

²⁵ A coastal State can claim an extended continental shelf up to 350 nautical miles from the baseline from which the territorial sea is measured or 100 nm from the 2,500 metre isobaths: Article 76 (5), UNCLOS, *ibid.*

to these freedoms, such as those associated with the operation of . . . submarine cables,” are recognized in the EEZ.²⁶

The maintenance and repair of cables by cable ships and cable route surveys are considered to fall under “other internationally lawful uses of the sea related to these freedoms...such as those associated with the operation of...submarine cables” in the EEZ as stated in Article 58.²⁷

Article 79(2) of UNCLOS states:

Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines.

Article 79(2) suggests that a coastal State may only subject cable operations to reasonable measures for (1) the exploration of the continental shelf and (2) the exploitation of its natural resources. Article 79(2) draws a distinction between submarine cables and *pipelines*. A coastal State cannot subject the laying, maintenance and repair of submarine cables to such measures. This is in recognition of the fact that submarine telecommunications cables do not cause pollution.²⁸

Regulations which may **not** be adopted by coastal States are regulations on the delineation of the cable route. Article 79(3) of UNCLOS provides that “[t]he delineation of the course for the laying of such *pipelines* on the continental shelf is subject to the consent of the coastal State” (emphasis added). The delineation of the course for *submarine cables* is **not** subject to the consent of the coastal State and this interpretation is supported by the legislative history of this provision.²⁹

²⁶ Nordquist, *supra* note 46 at 872.

²⁷ See Beckman, *supra* note 40 at 5.

²⁸ UNEP/ICPC Report, *supra* note 83. This report compiles and analyzes the environmental experience with cables in the marine environment since submarine cables were introduced into the ocean in 1850 and underscores the benign impact a modern fiber optic cable has on the marine environment.

²⁹ See Nordquist *et al*, Vol II, 1993, *supra* note 64 at 915. Interestingly, it was previously intended that the coastal State should have the right to control the route to be followed. In the commentary to the equivalent article, Art 70 of the 1956 ILC Draft Articles, it is stated:

With this background, specific cases whereby coastal Members have created trade barriers are reviewed. To avoid distraction, the names of the Members are not disclosed. Additionally, besides these actual trade barriers, Member practices with submarine cables that encourage international trade are discussed.

IV. Trade barriers by Member practice.

We now set out the trade barriers that and make recommendations as to how the ISA can deal with these obstacles. Many of the barriers listed are both trade restrictive and constitute anti-competitive market distortions (“ACMDs”).³⁰ The negotiation of the ISA presents a prime opportunity to deal with these types of barriers in a holistic fashion. Many of the trade barriers listed below are examples of ACMDs, which are measures enacted by governments to either promote producers’ interests to the detriment of consumers, or to extend a competitive edge to a particular business at the expense of both fellow market participants and consumers. These practices distort market competition and thus impose deadweight losses on domestic economies.³¹ t

The coastal State is required to permit the laying of submarine cables on the seabed of its continental shelf but in order to avoid unjustified interference with the exploitation of the natural resources of the seabed and subsoil, it may impose conditions concerning the route to be followed.

See Articles concerning the Law of the Sea with commentaries, in *Yearbook of the International Law Commission, Volume II*, UN Doc. A/3159 (1956) at 299. However, Art 79(3) now makes it clear that the coastal State does not have jurisdiction over the route to be followed. This is also supported by discussions during UNCLOS II and UNCLOS III. During UNCLOS II, a Venezuelan amendment for Art 70 of the 1956 ILC Draft Articles would have expressly provided the coastal State with the right to regulate with respect to the routes to be followed but this was rejected on the basis that it failed to provide any standards for the regulations to be made. See Marjorie Whiteman, “Conference on the Law of the Sea: Convention on the Continental Shelf” *American Journal of International Law* 52 (1958): at 643. At UNCLOS III, the proposal by China that the delineation of the course for laying submarine cables on the continental shelf by a foreign State be subject to the consent of the coastal State was also eventually rejected: see Nordquist *et al*, Vol II, 1993, *supra* note 64 at 911.

³⁰ *Infra* note 48.

³¹ Anti-competitive market distortions are also known as “ACMDs.” SHANKER SINGHAM, COUNCIL ON FOREIGN RELATIONS, FREEING THE GLOBAL MARKET: HOW TO BOOST THE ECONOMY BY CURBING REGULATORY DISTORTIONS 1 (2012), available at <http://www.cfr.org/economics/freeing-global-market-boost-economy-curb-regulatory-distortions/p29123>. See also SHANKER SINGHAM, A GENERAL THEORY OF TRADE AND COMPETITION: TRADE LIBERALIZATION AND COMPETITIVE MARKETS (2007); Shanker A. Singham, *Is It Time for an International Agreement on Uncompetitive Public Sector Practices?*, 27:1 BROOK. J. INT’L L. (2001); SHANKER SINGHAM, INT’L ROUNDTABLE ON TRADE AND COMPETITION POLICY, IMPROVING U.S. COMPETITIVENESS; ELIMINATING ANTI-COMPETITIVE MARKET DISTORTIONS (2011), available at http://tradecompetition.org/images/Paper_on_Improving_US_Competitiveness_Eliminating_ACMDs_15NOV11.pdf; Alden F. Abbott & Shanker Singham, *Enhancing welfare by attacking anticompetitive market distortions*, CONCURRENCES N. 4-2011 (2011).

In addition to specific ISA rules in the areas we set out below, we advocate the development of an ISA Reference Paper document analogous to the document created under the auspices of the WTO Telecom Negotiations³² to prevent Members from imposing ACMDs. A possible draft is attached as Annex A. This is because many of the issues that imperil the ability of submarine cables to deliver international communications and information are not traditional trade barriers in that they do not always implicate National Treatment under a traditional GATT or GATS analysis. An ISA Reference Paper would limit a Member's ACMDs, reducing the risk that Members will adopt policies like localization and other restrictions that lead to distortions and price increases.

- 1. Requirements for permits for repairs to international cables outside of territorial seas**
- 2. Requirements that cable ships must enter port in connection with repairs outside of territorial seas**
- 3. Requirements that cable ships be subject to import fees and duties**
- 4. Requirements that foreign flag cable ships employ a coastal Member's nationals as crewmen on cable ships ["localization"].**

Member A's ministry of defense issues a directive that cable ships navigating in its EEZ must come into port for a naval inspection and to obtain seven permits from various state agencies prior to carrying out a repair, even if the cable ship has no need of port entry to carry out the repair. Ships that do not come into port will be escorted into port by coastal Member A's warships. When the cable ship enters the port, Member A's custom agency deems the vessel to be imported and levies import duties of between \$350,000 and \$500,000. The time to obtain all seven permits can reach 94 days. At a daily hire rate for a cable ship of \$45,000 per day, that delay is a de facto economic penalty of about \$4,230,000. Because the cable ship is in Member A's territorial seas and EEZ for 30 days, the cable ship operator is required to employ one third

³² See WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm (last visited May 30, 2013).

of the crew as national of Member A, increasing to one half of the crew if the ship is in the territorial seas and EEZ for 60 days or more.

The above Member practice harms the owners of international cables by preventing them from carrying out emergency repairs expeditiously. This results in unnecessary and significant economic costs and impedes the repair of international cables by preventing cables from being repaired. During the long waits for permits, not only is the cable with the fault not available for communication service, all other cable systems landing in Member A are more vulnerable and at increased risk since the injured cable is not available to restore these cables should they suffer a fault.

Member A's actions are also not consistent with historical State practice. In the Americas, Europe, Australia, New Zealand, and Japan there are no requirements for permits to carry out repairs to international cables outside of territorial seas. The same is even true for repairs in most nations for repairs in territorial seas. This reflects the common recognition that repairing a cable is analogous to other emergency situations. If there is a fire, the goal is to get the fire truck to the scene and extinguish the fire without delay by waiting for a permit, payment of fees, or deciding the nationality of the firemen. The majority of States understand that the goal when a cable is injured is to repair it and restore communication on the injured cable and spare redundancy for other cable systems as soon as possible.

Localization-type rules characterize a broad range of requirements, including the stipulation that all crew must be of the same nationality as the country in whose EEZ the submarine cable lies. Anti-competitive conditions such as these are particularly problematic when the State imposing the requirement lacks access to an appropriate number of qualified employees to perform the work in question. These types of localization requirements are ACMDs which lead to higher prices, restricted output, and lower aggregate consumer welfare.³³ They are thus bad for the State which imposes them. They also restrict trade and harm the interests of foreign entities and so constitute significant trade barriers.

The ISA should commit the Members not to enact laws or regulations which would prevent repairs to international cable systems in their EEZ or upon their continental shelf. The

³³ *Supra* note 48.

ISA rules would also prevent Members from (1) requiring permits, (2) imposing any requirements for the cable ship to enter port prior to commencement of a repair, (3) requiring the payment of fees, duties, or import charges, (4) imposing technical barriers to trade that are more trade restrictive than necessary to achieve a clearly stated, narrowly tailored and least anti-competitive regulatory goal; and (5) imposing any Member restrictions on the manning of the cable ship.

5. Requirements that only cable ships documented in Coastal Member can carry out repairs in the EEZ and Continental Shelf

Member B requires that any repairs in its territorial seas, archipelagic waters, and EEZ be carried out only by cable ships registered in Member B.

This provision falls under what is commonly known as cabotage laws that normally reserved for the coastal State's flag vessels the transportation of passengers and cargos between ports within the coastal State's jurisdiction. While cabotage laws are common, the requirement that only cable ship's flying the coastal State's flag can repair international cables in the coastal State's territorial seas, archipelagic waters, or EEZ are not.

The above ACMD³⁴ results in a dramatic reduction in the cable ships that are available to carry out a repair. The one ship available will likely not have a qualified and trained crew up to the standards normally found in cable ships. This is because cable ship crews are trained onboard the vessels in a long career process of on the job training. There are no shore schools whereby cable ship crews are trained and certified. In this particular case tremendous backlogs of repairs have accrued because of the limited availability of State B's cable ship has increased the risk of many cable systems as one system after another is down, awaiting a cable ship. The possibility of corrupt practices evolving in the cost and availability of the domestic flag cable ship is a concern as well.

³⁴ *Supra* note 48.

Restrictions of a cable ship to a single flag State for repairs in the EEZ or upon the continental shelf is inconsistent with the freedoms of navigation³⁵ and to lay and maintain cables.³⁶

Within a State's territorial seas and archipelagic waters, the enforcement of cabotage laws is lawful as this is a valid exercise of the coastal State's sovereign rights in these waters. However, this is certainly an anti-competitive practice which results in output restrictions (fewer ships available) and higher prices. If all of the coastal States followed the same practice, it would result in an uneconomic and unrealistic requirement for a cable ship for each coastal State registered in that State. The cost of maintenance would skyrocket and the tight quality of repair work now enjoyed would plummet. As it now stands a relatively small number of cable ships provide repair services worldwide to international cables in an efficient and economic contract approach which provides the international community with undeniably reliable repair services.

A reasonable provision should remove this barrier in an ISA would commit the Members to allow repairs to international cable systems in their EEZ or upon their continental shelf to proceed regardless of the flag of the cable ships assigned to do the repair work. A similar practice is recommended on the basis of good policy for repairs in territorial seas and archipelagic waters, perhaps with a simple notification requirement. ISA rules could provide that Members may not prevent repairs to cable systems in their EEZs based on the flag of the cable ships assigned to do repair work. Provisions in ISA (for example in a Reference Paper type document referred to above) preventing such anti-competitive government practices would also be useful.

6. Requirements that international cables be subject to fees, taxes, duties outside of territorial seas

Member C charges an annual fee or tax for any international cable system that merely transits the area it claims as part of its continental shelf, even though the cable system at no point lands in Member C or enters its territorial sea. The fee is assessed on a per kilometer basis and amounts to about 2.5M euros over the life of the cable system.

³⁵ See *supra* n. 46.

³⁶ See *supra* n. 50.

The action by Member C constitutes a barrier to trade, because it penalizes the cable system with a financial penalty for merely exercising the freedom to lay cables. It represents a dramatic example of coastal Member encroachment which if duplicated by other coastal Members would turn the world's oceans into an international toll road for cables. This would limit the ability of cable owners to economically plan cable routes efficiently and in accordance with good industry practices.

To achieve this goal, the ISA could provide that Members may not impose any fees, taxes, or duties on international cable systems outside of territorial seas, whether the cable lands in a Member or merely transits a claimed maritime EEZ or continental shelf boundary.

7. Failure of coastal Members to enact modern cable protection legislation and/or to enforce such legislation that makes it a crime to willfully or through culpable negligence injure a submarine cable.

Member D has domestic cable legislation, but never enforces it against vessels that willfully or by culpable negligence injure international submarine cables. As a result, there is no deterrence for conduct by fishermen who routinely hazard and injure cables, costing millions of dollars in repairs and significantly increase the risk of multiple cable failure that can disrupt international trade.

The impact of the lack of action by Member D is found in the approximately 72 cable faults experienced by international cable systems in Member D's territorial sea and EEZ between 2008-2012. The majority of these faults were the result of aggressive high density fishing. With repair cost ranging from \$1-3M each, these impacts are substantial. Adding the requirements for obtaining permits for repairs, averaging 1 to 2 weeks for each repair, it is obvious that this situation constitutes a barrier to the smooth delivery of communications services by submarine cables. While Member D does have what appears to be adequate domestic legislation applicable to wrongdoers who injure cables by culpable negligence or willful actions, there is no record of the law every being enforced since its enactment in 2004.

An important enhancement would be encouragement of the highly effective use of sharing of AIS data between Members and cable owners to prevent injury to international cables in the first instance, in addition to identifying culprit vessels that have injured cables.³⁷

The ISA should commit the Members to adopt modern domestic legislation that complies with Article 113 of UNCLOS and provides meaningful penalties and enforcement to punish and deter conduct that willfully or by culpable negligence injures international submarine cable systems. Members should also be encouraged to implement the practice of timely sharing AIS data with the owners of cable systems to prevent injury to cable systems and enforce domestic cable protection laws. It is vital that Members not only maintain laws, but also actually enforce them. A pattern of lack of enforcement could be grounds for binding dispute resolution in the ISA. Such provisions in the ISA would mirror similar base level requirements for both domestic legislation and the enforcement of that legislation similar to those found in the Trade Related Intellectual Property Agreement (“TRIPS”). Under TRIPS, a minimum standard intellectual property law is mandated.³⁸ Failure to enforce the law through appropriate remedies can also constitute a violation of the agreement (see for example Article 50, TRIPS on remedies that must be prompt, adequate and effective³⁹).

V. Positive steps to improving international trade by facilitating the laying and repair of submarine cables.

This section addresses steps that may be considered to strengthen the reliability of communication services and avoid future actions by Members that may lead to trade barriers. They are certainly consistent with its goals of facilitating international communications.⁴⁰ Failures of coastal Members to establish a single point of contact within their national government for issues concerning security threats to international cables should be violations of the ISA.

³⁷ Burnett, D., Cable Vision, U.S. Naval Institute Proceedings, August 2011 at p. 71.

³⁸ See Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 42-29, Apr. 15, 1994, 1869 U.N.T.S. 299.

³⁹ *Id.* at art. 50.

⁴⁰ Preamble: *Recognizing* the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and ocean which will facilitate international communication....

Members should have a single point of contact for cable system owners and cable ships to report suspicious or hostile actions. The single point of contact is authorized to coordinate with other government agencies and take fast action. So far, only Australia and Singapore have designated such single points of contacts. This solution sounds simple and obvious. But the reality is much more complicated.

In most countries there are many agencies that have some involvement with submarine cables. There may be no coordination mechanism to make a timely national decision, let alone a liaison with other governments in an emergency security situation. If each country established a single point of contact the ability to protect international cable systems across the globe would be enhanced and the resulting security enhancement will foster confidence in the world's submarine cable infrastructure.

A reasonable provision would facilitate trade in an ISA would commit the Members to designate a single point of contact in the national government to receive and act on reports of hostile actions or threats to international cables. The single point of contact would be responsible for coordinating all actions from agencies within the Member's national government and for liaison with other Members as necessary in the case of threats or hostile actions outside of territorial seas. For these reasons, we advocate strong transparency provisions in the ISA which would enable single points of contact to be obvious to outside parties dealing with a government. Once again, a persistent lack of clarity with respect to a single point of contact should be grounds for a negotiation and consultation mechanism which if unsatisfactorily resolved could lead to binding dispute resolution.

- 1. The operations of cable vessels in laying and repairing international cables should be regarded by all Members as without prejudice to any claim by any Member that may arise from disputed maritime boundaries.**

A major impediment to smooth cable laying and repair operations arises whenever a cable is laid or repaired in an area of the sea which is a disputed maritime boundary by two or more States. In practice, this means that the cable owner or its contractor must apply for permits in each jurisdiction. But in doing so, to avoid delays from political considerations, the cable owner must avoid telling one State that it is also applying for similar permits in other States.

Such discretion is important because States may regard the mere act of applying for a permit to another State in a disputed maritime boundary situation as recognition of one State's claim over another's.

The reality is that cable owners and cable ship operators have no interest in selecting sides or being perceived as choosing sides in a maritime boundary dispute by two or more States. They are and want to be neutral and merely get on with laying or repairing the cable.

A reasonable provision would facilitate trade in an ISA would specifically commit the Members to agree that the actions by a cable ship or survey vessel used in a cable route survey cannot be rejected simply because another Member considers them to prejudice any claim regarding a maritime boundary. In addition to the ISA disciplines we advocate in paragraph 4 above (such as preventing Members from imposing requirements like permits for the cable ship to enter port prior to commencement of a repair), we also advocate that the ISA's national security exemption is narrowly tailored so that a Member cannot maintain that the assertion of a maritime boundary is grounds to reject cable ship laying, repair or cable survey activity.

2. Failure to recognize cable route surveys as necessary operations associated with the freedom to lay and maintain cables

Submarine cables cannot be laid without first performing a cable route survey to confirm the most appropriate route to lay a submarine cable. For this reason the cable route survey is considered as an operation incidental to the freedom to lay and maintain submarine cables. A cable route survey is not Marine Scientific Research (MSR).⁴¹ Nor is it used to explore for natural resources. As long as the cable route survey data is used solely for the purpose of delineating the cable route, it is not subject to coastal State regulation outside of territorial seas.⁴² Recognition of this fact will save needless permit compliance work and facilitate the creation of new cable systems to provide for greater connectivity and redundancy in the world's undersea cable infrastructure.

⁴¹ J. Roach and R. Smith, *Excessive Maritime Claims*, 3rd Ed. (2012) at pp. 458-459.

⁴² *See supra* at 10 and n.'s 43 and 44.

A reasonable provision would facilitate trade in an ISA would commit the Members to agree that a cable route survey is an essential tool required to lay submarine cables. Provided the cable route data is solely used to delineate the cable route, it will not be subject to permit or considered as MSR. The way that this can be achieved in the context of an ISA is to provide that the Members shall not prevent cable route surveys or impose permits, taxes or other restrictions on them, unless the Member has very strong grounds for belief that the survey is in fact being used for MSR or other non-cable related geological purposes.⁴³

VI. General Observations

1. National Security Exemptions

All trade agreements have national security exemptions. For example, the Agreement on Technical Barriers to Trade (“TBT Agreement”) stipulates that “national security requirements” constitute a “legitimate [government] objective[;]”⁴⁴ and the GATS states that “[n]othing in this Agreement shall be construed . . . to prevent any Member from taking any action . . . necessary for the protection of its essential security interests[.]”⁴⁵ Other examples include the U.S. Free Trade Agreements (FTAs) with Korea, Morocco, and Australia, which all contain the provision that “Nothing in this Agreement shall be construed . . . to preclude a Party from applying measures that it considers necessary for . . . the protection of its own essential security interests.”⁴⁶ In this sector it is critical that these national security exemptions are not abused to distort the trade in cable service laying, repair or ancillary activities. To do so would be to drive a coach and horses through the ISA itself. It is critical therefore that the national security

⁴³ This type of discipline is analogous to the Agreement on Implementation of Article VII of the GATT 1994 (“Customs Valuation Agreement”), where Parties must accept the importer’s declared value when the buyer and seller are related unless there are strong grounds for belief that the declared value is inaccurate. *See* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, art. 1(2)(a), 1868 U.N.T.S. 279; *see also* Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value, Apr. 15, 1994, 1867 U.N.T.S. 81.

⁴⁴ Agreement on Technical Barriers to Trade, Apr. 15, 1994, art. 2.2, 1868 U.N.T.S. 121.

⁴⁵ General Agreement on Services, Apr. 15, 1994, art. XIV *bis*, 1868 U.N.T.S. 183.

⁴⁶ *See* US-Korea FTA, Article 23.2, *available at*

http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file476_12722.pdf (codified in P.L. 112-41, Oct. 21, 2011); US-Morocco FTA, Article 21.1 (codified in P.L. 108-302, Aug. 17, 2004) *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file570_3860.pdf; and US-Australia FTA, Article 22.2 (codified in P.L. 108-286, Aug. 3, 2004), *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file530_5162.pdf.

exemption is narrowly tailored to admit only true national security objectives, and not operate as a shield for other non-security related government objectives.

2. Dispute Resolution

Binding dispute resolution is critical to ensuring that Members will actually comply with the terms of the ISA itself. NASCA advocates an approach where binding dispute resolution be used to support each of the heads of claims listed in this comment, with only very limited exceptions such as in the transparency provisions set out above.

Annex

Reference Paper on Anti-Competitive Market Distortions in Submarine Cable Sector

Chapeau

This Reference Paper contains definitions and principles on the regulatory framework for the submarine cable sector, and limits the ability of ISA Members from acting in ways that are anti-competitive and distort the trade in the laying, repair and maintenance of submarine cables.

Definitions

The “Submarine Cable Sector” is defined as the business of laying, maintaining, repairing and operating international fiber optic submarine cables connecting two or more Members.

A “Cable Ship” is defined as a vessel specifically designed and built or modified to lay and repair submarine cables and employing a specialized crew with the skills and experience required to lay and repair submarine cables.

“Survey Vessels” shall mean a vessel that is equipped and employed to carry out a cable route survey wherein the data collected is used solely for the purpose of delineating the route for an international submarine cable.

Anti-Competitive Market Distortions (“ACMDs”) are defined as laws, regulations and government practices (including the practices of sub-national and quasi- governmental bodies) which substantially lessen competition by reference to their impact on consumer and producer surpluses.

“EEZ” shall mean Exclusive Economic Zone as defined in customary international law.

“Continental Shelf” shall mean as defined in customary international law.

General Competition Safeguards

Members shall maintain regulatory systems with regard to permitting, licensing, taxation and other restrictions that minimize ACMDs, and are least burdensome consistent with regulatory goals that are clearly expressed, narrowly tailored, least trade restrictive and least distortive of competition.

The dispute settlement rules set forth in ISA shall apply to this Reference Paper, unless otherwise stated.

Specific Articles

Article 1

Members shall not require permits, payment of fees, duties or import charges, or impose requirements on cable ships that are entering ports prior to the repair of a submarine cable.

Article 2

Members shall not impose technical barriers to the trade related to the laying, servicing or repair of submarine cables that are more burdensome than strictly necessary to achieve a regulatory goal which is clearly stated, narrowly tailored, least trade restrictive and least anti-competitive as possible.

Article 3

Members may not impose localization requirements with respect to the manning of cable ships.

Article 4

Members will not prevent repairs of international cable systems in their EEZ or upon their Continental Shelf on the basis of the flag of the Cable Ship.

Article 5

Members may not impose fees, taxes or duties on international cable systems outside of territorial seas, regardless of whether the cable lands in a Member or transits through a maritime EEZ or continental shelf boundary.

Article 6

Members agree to adopt domestic legislation regarding damage to submarine cables that contains the following core principles:

- (a) Members' legislation must provide that willful or culpable negligence that leads to injury to submarine cables will be punished.
- (b) Members must share Automatic Identification Systems ("AIS") data in a timely fashion with owners of cable systems so that domestic cable protection laws can be enforced.

Article 7

Members agree that failure to enforce legislation referred to in Article 6 shall constitute a violation of the agreement.

Article 8

Members agree to appoint a single point of contact in the member government which will be responsible for coordinating all actions from agencies within the Members' national government regarding any permits, licenses, taxes or other restrictions in the Submarine Cable Sector.

Article 9

If a Member persistently fails to make clear what the single point of contact is, or if a person reasonably skilled in the Submarine Cable Sector would find it difficult to identify the single point of contact, then the dispute settlement provisions of the ISA would be applicable.

Article 10

Members may not reject the reasonable requests of a cable ship or survey vessel or impose additional restraints on the exercise of the functions of a cable ship or survey vessel on the basis that a Member might consider that to prejudice any claim regarding a maritime boundary.

Article 11

Members may not impose permitting requirements, licenses, taxes or other restrictions on the ability of Cable Ships or Survey Vessels to conduct cable route surveys. Members shall accept the declaration by Cable Ships or Survey Vessels that a cable route survey is required and that the information gathered is not being used for any other purpose, unless there are strong grounds for belief that the information is being used for another purpose, and the Member states those reasons in writing as the justification for its application of restrictions on Cable Ships or Survey Vessels.

General Provisions In ISA

National Security Exemptions Language

National security exemptions shall be narrowly tailored, be based solely on true national security objectives, and must not be used by members as a shield for other non-security related governmental objectives.

Appendix

Relevant UNCLOS Provisions

Article 21

Laws and regulations of the coastal State relating to innocent passage

1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

- (a) the safety of navigation and the regulation of maritime traffic;
- (b) the protection of navigational aids and facilities and other facilities or installations;
- (c) the protection of cables and pipelines;
- (d) the conservation of the living resources of the sea;
- (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
- (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
- (g) marine scientific research and hydrographic surveys;
- (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.

3. The coastal State shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.

Appendix

Relevant UNCLOS Provisions

Article 51

Existing agreements, traditional fishing rights

and existing submarine cables

1. Without prejudice to article 49, an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third States or their nationals.
2. An archipelagic State shall respect existing submarine cables laid by other States and passing through its waters without making a landfall. An archipelagic State shall permit the maintenance and replacement of such cables upon receiving due notice of their location and the intention to repair or replace them.

Article 58

Rights and duties of other States in the exclusive economic zone

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.
3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

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Relevant UNCLOS Provisions

Article 79

Submarine cables and pipelines on the continental shelf

1. All States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this article.
2. Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines.
3. The delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State.
4. Nothing in this Part affects the right of the coastal State to establish conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.
5. When laying submarine cables or pipelines, 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.

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Relevant UNCLOS Provisions

Article 87

Freedom of the high seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

2. These 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.

Article 112

Right to lay submarine cables and pipelines

1. All States are entitled to lay submarine cables and pipelines on the bed of the high seas beyond the continental shelf.
2. Article 79, paragraph 5, applies to such cables and pipelines.

Article 113

Breaking or injury of a submarine cable or pipeline

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Relevant UNCLOS Provisions

Every State shall adopt the laws and regulations necessary to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine pipeline or high-voltage power cable, shall be a punishable offence. This provision shall apply also to conduct calculated or likely to result in such breaking or injury. However, it shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid such break or injury.

Article 114

Breaking or injury by owners of a submarine cable or pipeline of another submarine cable or pipeline

Every State shall adopt the laws and regulations necessary to provide that, if persons subject to its jurisdiction who are the owners of a submarine cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost of the repairs.

Article 115

Indemnity for loss incurred in avoiding injury to a submarine cable or pipeline

Every State shall adopt the laws and regulations necessary to ensure that the owners of ships who can prove that they have sacrificed an anchor, a net or any other fishing gear, in order to avoid injuring a submarine cable or pipeline, shall be indemnified by the owner of the cable or pipeline, provided that the owner of the ship has taken all reasonable precautionary measures beforehand.

Article 297

Limitations on applicability of section 2

1. Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases:

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Relevant UNCLOS Provisions

(a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;

(b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or

(c) when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.

2. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of:

(i) the exercise by the coastal State of a right or discretion in accordance with article 246; or

(ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253.

(b) A dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under articles 246 and 253 in a manner compatible with this Convention shall be submitted, at the request of either party, to conciliation under Annex V, section 2, provided that the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas as referred to in article 246, paragraph 6, or of its discretion to withhold consent in accordance with article 246, paragraph 5.

3. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive

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economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

(b) Where no settlement has been reached by recourse to section 1 of this Part, a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that:

(i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;

(ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or

(iii) a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.

(c) In no case shall the conciliation commission substitute its discretion for that of the coastal State.

(d) The report of the conciliation commission shall be communicated to the appropriate international organizations.

(e) In negotiating agreements pursuant to articles 69 and 70, States Parties, unless they otherwise agree, shall include a clause on measures which they shall take in order to minimize the possibility of a disagreement concerning the interpretation or application of the agreement, and on how they should proceed if a disagreement nevertheless arises.