

# OSPAR and Coastal State Encroachment on High Seas Submarine Cable Freedoms

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## 1 Introduction

For over 166 years, submarine cables have brought the world closer together. But the advent of fibre optic technology has turned submarine cables into a critical international infrastructure upon which the world's digital economy and the internet depend.

The first part of this paper examines how cables are integral to sustainable development. This development has taken place with a neutral impact on the marine environment. The second part of the paper examines recent actions taken by the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) and argues that extending these or similar actions to regulate submarine cables on the high seas undermines the United Nations Law of the Sea Convention (UNCLOS)<sup>1</sup> and imposes needless risks of unintended consequences on the world's critical international submarine cable infrastructure. The third part of the paper examines legal and environmental aspects of cables and the adequacy of existing ocean governance on the high seas proper and in the Area. Central to the success of submarine cables has been the freedom to the laying and repair of cables under UNCLOS and customary international law. Coastal State encroachments, current discussions on biodiversity beyond national waters and a possible new treaty to regulate international cables on the high seas proper and the Area as defined in UNCLOS threaten to undermine the current successful balance between submarine cables and protection of the marine environment.

In this paper, 'BBNJ' refers to the high seas proper and the Area beyond national jurisdiction as defined in UNCLOS. Additionally, 'submarine cable community' refers to cable owners, cable ship operators, marine route surveyors, scientific institutions and interested governments.

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1 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 21 ILM 1261 (1982) (UNCLOS).

## 2 Submarine Cables are Critical International Infrastructure Crucial for Development

The Oceans and the Law of the Sea Report of the Secretary-General<sup>2</sup> succinctly sums up the conventional wisdom about international submarine cables and sustainable development:

53. Submarine cables are critical communications infrastructure, being used for more than 98 per cent of international internet, data, and telephone traffic, with only a few States being without fibre connectivity, and many of these having cable projects currently underway.<sup>3</sup> Submarine cables are recognized as vitally important to the global economy<sup>4</sup> and hence to economic growth. By underpinning international communications, their role in providing access to data and information for all people is evident. [...]

55. Functioning as the backbone of the international telecommunications system, submarine cables are directly part of the global critical infrastructure and sustainable industrialization and indirectly they contribute to all other areas recognized as important for sustainable development.

Amazingly, when people think about international communications, they often mistakenly regard satellites as the primary medium of modern international communications. They express surprise to learn that over 98% of international communications are carried by a relatively small number of fibre-optic submarine cables with diameters akin to a domestic garden hose even though this has been the case for almost 30 years. The confusion is understandable. The idea that a person's cell phone air link is sent to a nearby cell tower and that the overseas messages themselves are then broken down into bits of data, which then at the speed of light ply the ocean depths on unseen cables, is hard to imagine. This is difficult to comprehend. The tremendous volume of data carried at low cost by modern fibre-optic submarine cables dwarfs the limited capacity of higher cost satellites. For example, the capacity

<sup>2</sup> UNSG Report A/70/74 (30 March 2015).

<sup>3</sup> D. Burnett, D. Freestone, and T. Davenport, 'Submarine Cables in the Sargasso Sea: Legal and Environmental Issues in Areas Beyond National Jurisdiction', Report from the Workshop held 23 October 2014 at George Washington Law School, Washington, D.C. (16 January 2015), <<https://www.iscpc.org/documents/?id=1792>> accessed 1 July 2017.

<sup>4</sup> UNGA Res. 69/245 (29 December 2014).