

INTERNATIONAL LAW ASSOCIATION

SUBMARINE CABLES AND PIPELINES UNDER INTERNATIONAL LAW

[SECOND] INTERIM REPORT 2022

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I. BACKGROUND

1. The International Law Association (ILA) Committee on Submarine Cables and Pipelines under International Law (hereinafter referred to as “the ILA Committee”) was established by the ILA Executive Council in November 2018. In doing so, the ILA acknowledged that the international legal regime governing submarine telecommunication and power cables and oil and gas pipelines established by the United Nations Convention on the Law of the

Sea of 1982 (LOSC)¹ (and other conventions), and the implementation of States' rights and obligations concerning submarine cables and pipelines, may not address the myriad of challenges that States, and entities engaged in cable and pipeline activities, currently face in the development of policies relating to all aspects of the life cycles of submarine cables and pipelines, particularly given their extensive use.²

2. Some of these challenges have been briefly outlined in the original proposal for the establishment of the ILA Committee³ and include issues of how to address the impact of competing ocean activities such as shipping, fishing, marine energy activities, seabed mining, and other new or emerging uses of the oceans on activities relating to submarine cables and pipelines (and vice versa);⁴ increasing coastal State regulation of cable and pipeline activities in a manner that may be inconsistent with the LOSC; the interaction between submarine cables and pipelines activities and the protection of the marine environment; and the need to protect submarine cables and pipelines from a variety of threats, including natural hazards, accidental and intentional damage.
3. The First Interim Report of the ILA Committee on Submarine Cables and Pipelines was issued in December 2020 (hereinafter referred to as “the First Interim Report”). The objective of the First Interim Report was to ‘map the field’ to help identify the existing law on submarine cables and pipelines, with a specific focus on law of the sea, and to assess whether there is a need for further clarification or development of the law. To this end, the First Interim Report focused on examining the relevant articles on submarine cables and pipelines in maritime spaces beyond national jurisdiction—high seas [LOSC, Articles 87(1)(c) and 112–115]) and the Area [LOSC, Article 145(a)]—as well as maritime spaces within national jurisdiction—continental shelf (CS) [LOSC, Article 79], the exclusive economic zone (EEZ) [LOSC, Article 58], the territorial sea [LOSC, Articles 19(2)(k) and 21(c)] as well as archipelagic waters [LOSC, Article 51(2)].
4. As a result of this mapping exercise, the First Interim Report identified certain issues in paragraph 210 that could be the subject of future work of the ILA Committee:

¹ *United Nations Convention on the Law of the Sea*, adopted 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) (LOSC).

² Submarine communications cables provide 99% of international telecommunications and have been described as “critical communications infrastructure” and “vitally important to the global economy and the national security of all States.” General Assembly Res. 65/37A, para. 112, U.N. Doc. A/RES/65/37A (Dec. 7, 2010). As of 2020, it has been estimated by some sources that there are approximately 406 submarine communication cables in service around the world amounting to approximately 1.2 million kilometres of submarine cables in service globally. Telegeography online <https://www2.telegeography.com/submarine-cable-faqs-frequently-asked-questions>. There are no equivalent publicly available statistics available for submarine power cables and pipelines, although the International Cable Protection Committee (ICPC) is developing a list of submarine power cables. ICPC website available at <https://www.iscpc.org/information/cable-data/>.

³ Proposal for the Establishment of a New ILA Committee on Submarine Cables and Pipelines available at <https://www.ila-hq.org/index.php/committees>.

⁴ ‘Activities relating to submarine cables and pipelines’ have been defined in paragraph 14 of the First Interim Report of the ILA Committee on Submarine Cables and Pipelines available at <https://www.ila-hq.org/index.php/committees>.

- The difference between marine scientific research and surveys for laying cables and pipelines under LOSC;
- Issues relating to Article 51 of the LOSC - future work may consider whether at the time of negotiations of UNCLOS III, whether the lack of pipelines laid in archipelagic waters was the reason for not including pipelines in this provision; and will assess whether the subsequent practice of LOSC parties meets the requirements of Vienna Convention on the Law of Treaties (VCLT) Article 31(3)(b) for including pipelines in the interpretation of this provision;
- The regulation of activities relating to cables and pipelines by coastal States (including fiscal jurisdiction) and its compatibility with the LOSC regime in the EEZ and continental shelf. In relation to LOSC Article 79, future work will, *inter alia*, deal with the definition of ‘reasonable measures for the exploration of the continental shelf and exploitation of its national resources’ and whether coastal States are allowed to impose conditions on cables and pipelines laid on their continental shelf, including taxes;
- Issues relating to Article 145 of the LOSC: future work may examine how to resolve the ‘conflict’ between laying, operating, repairing/maintaining and removing pipelines in (and from) the Area, and on the other hand, activities in the Area, taking into account the ongoing work on the ISA Mining Code;
- The due regard obligation in relation to balancing activities relating to submarine cables and pipelines with other activities at sea (such as fishing), in maritime spaces within and beyond national jurisdiction;
- The due regard/reasonable regard obligation set out in Articles 87 and 147 in relation to activities relating to submarine cables and pipelines and activities in the Area;
- The application of LOSC marine environment obligations (Part XII) to activities relating to submarine cables and pipelines (as well as other techniques of harmonisation or conflict resolution between LOSC provisions on submarine cables and pipelines and Part XII) and the manner in which these provisions affect such activities;
- Which State has jurisdiction over activities relating to submarine cables and pipelines in different maritime zones and the implications of the fact that private entities often conduct activities relating to submarine cables and pipelines;
- Maritime security issues relating to the protection of cables and pipelines, which could include the consideration of, *inter alia*, the application of the laws of war and of terrorism conventions, the developing international law on cyber-attacks to submarine cables and pipelines; and whether a new international legal framework is necessary in relation to maritime security of cables and pipelines, and how national implementation could be improved; and
- The activities relating to cables and pipelines in areas where no maritime delimitation has taken place.

5. This Report (the Second Interim Report) sets out the conclusions of the Committee on two substantive issues identified in the First Interim Report relating to the difference between marine scientific research and surveys for laying cables and pipelines under LOSC (Part II); and issues relating to Article 51 of the LOSC (Part III). It also outlines the current work plan of the Committee (Part IV).

II. MARINE SCIENTIFIC RESEARCH AND SURVEYS FOR LAYING CABLES AND PIPELINES UNDER LOSC

6. In the First Interim Report, the Committee indicated that its future reports may consider the distinction between marine scientific research ('MSR') and surveys for laying submarine cables and pipelines. The following analysis focuses exclusively on when and how MSR differs from surveys for laying submarine cables and pipelines. The regulation of the latter will be addressed in the Committee's future work (along with the regulation of cables and pipeline activities), pursuant to the Committee's First Interim Report (see paragraph 210 of the First Interim Report).
7. There is no definition of the term MSR in the LOSC. LOSC Article 238 establishes the right to conduct MSR, but does not define what activities are included within the term MSR. Given the term's unclear open-ended character, the question arises whether for the purposes of the LOSC surveys for laying cables and pipelines are captured by the term 'MSR'.
8. If this were the case, the rules applicable to MSR would apply to surveys for laying submarine cables and pipelines. More specifically, MSR in the exclusive economic zone ('EEZ') and on the continental shelf is subject to the consent of the coastal State (Article 246(2)), which has a right to participate in the research project on board the research vessel (Article 249(1)(a)). States are obliged to 'make available by publication and dissemination through appropriate channels information on proposed major programmes and their objectives as well as knowledge resulting from marine scientific research' (Article 244).
9. Two arguments support that surveys for laying submarine cables and pipelines differ from MSR under the LOSC. The first argument is textual. The second argument is functional.
10. First, although the LOSC does not define MSR nor does it define the term 'surveys', which is used in numerous provisions, the text of LOSC includes both terms in a single provision. For instance, Article 21(1)(g) mentions 'marine scientific research and hydrographic surveys'. This suggests that there is a distinction between MSR and hydrographic surveys. This suggests that not all surveys are covered by the scope of MSR, and by implication surveys in connection with pipelines and cables are not subsumed in the term MSR in the LOSC.⁵

⁵ Nele Matz-Lück, *Marine Scientific Research*, in Alexander Proelss (ed) *United Nations Convention on the Law of the Sea: A Commentary* (München: Nomos Verlagsgesellschaft 2017) p. 1610.

11. Second, although MSR and cable and pipeline surveys are technically similar, because they use the same equipment and methods,⁶ and rely on the collection and analysis of scientific data,⁷ they are functionally distinct. They serve different purposes.⁸ As argued by Lagoni, the principal purpose of MSR ‘is to contribute to the internationally available scientific knowledge about the sea.’⁹ This is the reason why the results from MSR shall be made internationally available (LOSC, Article 244). Instead, cable and pipeline surveys ‘enable the owners of these devices to lay and maintain them.’¹⁰ For example, a route survey for a submarine telecommunications cable typically collects data along a narrow strip of seabed, typically 500 metres to three times the depth of water, including: bathymetric data to show seafloor topography; sonar imagery data to show seabed surface features; sub-bottom profiling data showing subsurface soil profile; and/or burial assessment data, showing the mechanical properties of the seabed soils. Where burial is contemplated, at depths less than 1,000 metres, geophysical and soils data may be collected. At depths greater, only bathymetric data is typically collected. The cable owner and its contractors use this data to confirm or amend the preliminary route for the cable, determine the engineering of the cable (including jointing, amplifier spacing, and armouring), develop installation procedures, and identify post-installation and residual hazards (such as tectonic activity).¹¹ These objectives are not scientific, but strictly concern the laying of submarine cables and pipelines.
12. In addition, during negotiations at the Third UN Conference on the Law of the Sea (‘UNCLOS III’) there was a perception that MSR has as its object the natural marine environment; and for this reason, a distinction was made from maritime archaeology, which was addressed separately in Part XVI of the Convention. This supports the functional argument that MSR differs from surveys for pipeline and cables: the latter’s objective does not coincide with the objective of MSR as regulated under LOSC. Like maritime archaeology, surveys for pipeline and cables are also arguably addressed in separate provisions of the Convention: the provisions that relate to the laying of cables and pipelines, since such surveys can be seen as inherent to and inseparable from the right to lay cables and pipelines. They are necessary to operationalize this right.
13. For these reasons, surveys for laying submarine cables and pipelines are not subject to the MSR rules, including the obligation to publicize knowledge resulting from them, as is required in relation to MSR.

⁶ Rainer Lagoni, *Cable and Pipeline Surveys at Sea*, in Holger P. Hestermeyer et al. (eds), *Coexistence, Cooperation and Solidarity* (2 Vols.): *Liber Amicorum Rüdiger Wolfrum* (Brill 2011) p. 934.

⁷ Matz-Lück, *supra* note 5, 1608.

⁸ Lagoni, *supra* note 6, 936.

⁹ *Ibid*, 934-935.

¹⁰ *Ibid*.

¹¹ Graham Evans, *Overview of Submarine Cable Route Planning & Cable Route Survey Activities*, Activities, presentation at the CIL Workshop on Submarine Cables and Law of the Sea, Singapore, 14–15 December 2009, available at <https://cil.nus.edu.sg/wp-content/uploads/2009/10/CIL-Survey-Background-Presentation-Graham-Evans.pdf>.

III. ISSUES RELATING TO ARTICLE 51

14. Article 51 (2) of UNCLOS states that ‘an archipelagic State shall respect existing submarine cables laid by other States and passing through its waters without making a landfall’ and that ‘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.’

15. The First Interim Report noted that:

The fact that the provision exclusively refers to submarine cables allows for the *a contrario* argument that pipelines were specifically excluded. While it may be argued that not many pipelines were in archipelagic waters at the time of the negotiations and this may have been a reason for which negotiators did not include pipelines, pipelines were considered in earlier proposals, but a reference to pipelines did not finally appear in the text of the convention. Given that both terms ‘cables’ and ‘pipelines’ have been used in other provisions of LOSC, it may be argued that the reference only to ‘cables’ in this provision reflects the intention of the parties to limit the provision to cables. However, the subsequent practice of LOSC parties (assuming that it meets the requirements of VCLT Article 31(3)(b)) may reveal some evidence about whether pipelines are or not covered by this provision. However, such research has not yet been conducted by the Committee at the time of writing this Report.¹²

16. Accordingly, one of the issues for further research identified by the First Interim Report was whether the lack of pipelines laid in archipelagic waters was the reason for not including pipelines in this provision; and whether the subsequent practice of LOSC parties meets the requirements of VCLT Article 31(3)(b) for including pipelines in the interpretation of this provision. The analysis in this Report is limited to this question. Subsequent reports may wish to consider the rights and obligations of archipelagic States and other States in relation to new submarine pipelines, existing submarine cables that make landfall in archipelagic States (prior to archipelagic waters being declared) as well as new submarine cables in archipelagic waters.

17. As a starting point, the proposed archipelagic regime was prompted by the concerns of States such as Malaysia, Singapore, Thailand and Japan that existing waters that were previously considered high seas would now be enclosed as archipelagic waters subject to the sovereignty of the archipelagic State.¹³ Singapore had issues with the implications of the archipelagic regime for transit, access to fishery resources in areas where Singaporean fishermen had traditionally fished and training activities by Singapore’s military aircraft and naval ships.¹⁴ Thailand was worried about the transit of vessels as well as access to fishery resources given that Thailand was at the time one of the biggest fishing nations.¹⁵ Only Malaysia and Japan expressed explicit concerns about the laying of submarine cables and pipelines. Malaysia was concerned about ensuring passage, direct communications

¹² First Interim Report, *supra* note 4, para. 205.

¹³ *Ibid*, para. 198.

¹⁴ John G. Butcher and R.E Elson, *Sovereignty and the Sea: How Indonesia Became an Archipelagic State* (NUS Press: Singapore, 2017), 197; 208, 232, 334.

¹⁵ *Ibid*, 232.

(including the laying of submarine cables and pipelines) and access to these waters for resource purposes particularly in the waters between East and West Malaysia which overlapped with Indonesia's archipelagic waters claim.¹⁶ Japan, while not a neighbouring State, was also concerned about the 'rights and interests of States relating to the existing uses' of archipelagic waters, such as access to fisheries resources and the impact on submarine cables and pipelines including those maintained by Japan singly or jointly with other countries of Southeast Asia.¹⁷

18. Early discussions on previous versions of Article 51 recognized the importance of safeguarding the interests of other States regarding any existing uses of the sea in such areas including submarine cable and pipelines.¹⁸ However, Article 122 of the Informal Single Negotiating Text in 1975 (which formed the basis for Article 51 (1) LOSC) did not refer to submarine cable and pipelines and only focused on existing agreements with other States and traditional fishing rights of immediately adjacent neighbouring States.¹⁹ In the New York Session of UNCLOS III in 1976, Japan proposed an additional paragraph to Article 122 that provided that '[a]rchipelagic States shall respect existing submarine cables laid by other States and passing through the archipelago' and 'in particular, the maintenance and replacement of such cables shall not be hampered.'²⁰ Six States expressed their support for this proposal.²¹ The addition was acceptable to Indonesia provided that it was modified to ensure that the State wanting to repair such cables made its location known to the archipelagic State and provided the archipelagic State with prior notification.²² Indonesia's amendments were reportedly supported by twelve States including Australia, Thailand, Bulgaria and the other main archipelagic States.²³ This was reflected in the Revised Single Negotiating Text in 1976 and ultimately adopted in Article 51 (2) of the LOSC.²⁴

19. It is not clear why pipelines were not included in Article 51(2). One possible reason is that there were no pipelines laid by other States in waters that were to be enclosed as archipelagic waters and did not make landfall in archipelagic States.²⁵ For example, with regard to Indonesia, who (along with the Philippines, Fiji, Mauritius and Bahamas)²⁶

¹⁶ Ibid, 197, 232, 265.

¹⁷ Third UN Conference on the Law of the Sea (UNCLOS III), Summary Records of Meetings of the Second Committee, 36th Meeting, Official Records of UNCLOS III, Volume II, A/CONF.62/C.2/SR.36, 261 – 262. Japan had interests in access to the Banda Sea tuna fishery which was governed by the Banda Sea Agreement between Japan and Indonesia: Butcher and Elson, *supra* note 13, 308.

¹⁸ Item 16, "Archipelagos," Variant F, reproduced in IV SBC Report 1973, at 156.

¹⁹ UNCLOS III, Informal Single Negotiating Text/Part II, article 122, A/CONF.62/WP.8/Part II, Official Records, Volume V, 169.

²⁰ Japan (1976, mimeo), article 122 (ISNT II), reproduced in IV Platzoder, 339.

²¹ Butcher and Elson noted that this was a G5 amendment, thus implying that it was supported not only by Japan, Soviet Union, US, UK and France: See Butcher and Elson, *supra* note 13, 334.

²² Ibid.

²³ Ibid.

²⁴ UNCLOS III, Revised Single Negotiating Text, A/CONF.62/WP.8/Rev.I/Part II (RSNT, 1976), article 123, at 171.

²⁵ Churchill and Lowe observed that pipelines passing through archipelagos may only be 'of theoretical interest.' R.R. Churchill and A.V Lowe, *The Law of the Sea*, 3rd Edition (1999), 126.

²⁶ Mauritius dropped out of the group in the later stages of the Conference and Bahamas was not a formal member of the group although it cooperated with the other members. See Tommy T.B Koh and Shanmugam Jayakumar,

championed the archipelagic concept, it has been noted that there were no pipelines connecting East and West Malaysia passing through Indonesia's archipelagic waters.²⁷ The Philippines began oil exploitation in the Nido fields in 1979 (at the tail end of UNCLOS III) and after Article 51 (2) had more or less been agreed upon.²⁸ Similarly, Fiji was only engaged in exploration for oil and gas reserves between 1969 and 1980 and is unlikely to have had any offshore pipelines in what would be its archipelagic waters.²⁹ Mauritius had also not discovered any hydrocarbon reserves in the period leading up to the adoption of the LOSC.³⁰ Pipelines, therefore, may not have been a priority for archipelagic States.

20. The existing rights of immediately adjacent neighbouring States in archipelagic waters were also addressed in Article 47(6) LOSC, which specifically catered to the situation of Indonesia's archipelagic waters between East and West Malaysia. This provision was not discussed in the First Interim Report which only addressed LOSC articles that explicitly referred to submarine cables and pipelines. However, Article 47(6) is relevant as previous drafts of this article did expressly mention the laying of submarine cables and pipelines. Article 47(6) provides:

If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected.

21. The initial draft of this provision was based on a proposal by nine States and only addressed the situation where the drawing of baselines encloses part of the sea traditionally used by an immediate and adjacent neighbouring State for 'direct communication from one part of its territory to another part,' guaranteeing that such communication shall continue to be respected.³¹ Indonesia, Philippines, Fiji and Mauritius proposed an amendment that explicitly mentioned 'direct communication, including the laying of submarine cables and pipelines,'³² after discussions with its regional neighbours.³³ Malaysia suggested a further amendment which changed 'direct communication' to 'direct access and all forms of

"The Negotiating Process of the Third United Nations Conference on the Law of the Sea" in Myron Nordquist (ed.) *United Nations Convention on the Law of the Sea 1982: A Commentary Volume I*, (Netherlands: Martinus Nijhoff, 1987) 29, 76.

²⁷ B.A. Hamzah, *Indonesia's archipelagic regime: Implications for Malaysia*, 8 *Marine Policy* 30 – 43 (1984), 41.

²⁸ John Mark Bautista, *Oil and Gas Exploration in the Philippines*, 17 (3) *GeoExpro* 2020 available at <https://www.geoexpro.com/articles/2020/07/oil-and-gas-exploration-in-the-philippines>.

²⁹ *Petroleum Potential of Fiji*, available at https://www.mrd.gov.fj/images/Geological_Survey/petrol_potential.pdf.

³⁰ "Island Nations off East Africa hold Frontier Exploration Potential," *Offshore Magazine*, 13 Dec 2014 available at <https://www.offshore-mag.com/home/article/16804589/island-nations-off-east-africa-hold-frontier-exploration-potential>.

³¹ Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand and Norway: working paper, art 6 (2) UNCLOS III, Doc A/CONF.62/L.4, 26 July 1974, Official Records, Vol III, 82.

³² Fiji, Indonesia, Mauritius and Philippines, Draft Article Relating to Archipelagic States, UNCLOS III, Doc. A/CONF.62/C.2/L.49, 9 August 1974, art 2, Official Records, Volume III, 226.

³³ S.N. Nandan and S. Rosenne (eds), *United Nations Convention on the Law of the Sea: A Commentary*, Vol. II (1993), 421.

communications, including the laying of submarine cables and pipelines.’³⁴ Proposals by other States on this particular provision mentioned ‘direct communication’ without the laying of submarine cables and pipelines.³⁵

22. Outside of UNCLOS III, Indonesia and Malaysia had been engaging in bilateral negotiations on the specific situation of archipelagic waters between East and West Malaysia. In July 1976, both States concluded a Memorandum of Understanding, where in exchange for Malaysia’s recognition of the archipelagic concept, Indonesia agreed to recognize the right of access and communication through Indonesian territorial waters and archipelagic waters between East and West Malaysia by sea, air, or for civil or military purposes; Malaysia’s traditional fishing rights; the protection of existing cables and pipelines between East And West Malaysia (even though there were no pipelines in the waters between East and West Malaysia); and protection of other legitimate interests.³⁶ They also agreed to conclude a bilateral treaty before the final adoption of the LOSC.³⁷
23. In UNCLOS III, Malaysia submitted a broader formulation of its rights in Indonesia’s archipelagic waters between East and West Malaysia which removed references to communications and the laying of submarine cables and pipelines and instead, stipulated that if the drawing of archipelagic baselines results in enclosing an area separating two or more parts of an immediately adjacent neighbouring State, ‘all existing rights which that State has traditionally exercised and all rights stipulated under agreements already concluded and other legitimate interests shall endure and remain unaffected.’³⁸ Indonesia suggested changes that were similar to those proposed by Malaysia.³⁹
24. These changes ultimately were adopted in Article 47 (6) which is broader than earlier formulations which had confined the rights of immediately adjacent neighbouring States to direct communications including the laying of submarine cables and pipelines. Article 47 (6) applies to (1) existing rights that an immediately adjacent neighbouring State has traditionally exercised; (2) all other legitimate interests that an immediately adjacent neighbouring State has traditionally exercised; and (3) all rights stipulated by agreement between archipelagic States and immediately adjacent neighbouring States. Although ‘existing rights’ and ‘other legitimate interests’ are not defined, it is said to be inclusive of direct access and communication (including the laying of submarine cables or pipelines) and is dependent on the immediately adjacent neighbouring State establishing that it had traditionally exercised the rights or interests claimed.⁴⁰ Article 47(6) applies in a specific geographic situation, namely when archipelagic waters lie between two parts of an

³⁴ Malaysia: amendments to document, UNCLOS III, A/CONF.62/C.2/L.49, 16 August 1974, Official Records, Vol. III, 233 – 234

³⁵ See discussion in Nandan and Rosenne, *supra* note 33, 422 – 423.

³⁶ Memorandum of Understanding Between Malaysia and Indonesia signed in Jakarta on 26 – 27 July 1976 cited in Hamzah, *supra* note 26, 36.

³⁷ *Ibid.*

³⁸ UNCLOS III, A/CONF.62/C2/L.92 (1976) Official Records, Vol. V, 203.

³⁹ Indonesia, art 119 (2) (RSNT II), reproduced in IV Platzoder, Vol. IV, 476.

⁴⁰ Nandan and Rosenne, *supra* note 33, 428.

immediately neighbouring State, the baselines potentially separating two parts of the areas involved and only applies to immediately adjacent neighbouring States.⁴¹ As mentioned above, this would apply only to the situation of Malaysia and Indonesia, where East and West Malaysia are separated by the archipelagic waters of Indonesia.⁴² This is in contrast to Article 51(2) of the LOSC which refers to existing submarine cables laid by other States in *all archipelagic waters* without making a landfall.

25. Prior to the adoption of the LOSC, Malaysia and Indonesia signed a bilateral treaty on 25 February 1982, (the ‘Jakarta Treaty’) implementing the 1976 Memorandum of Understanding (see discussion in paragraph 22 above).⁴³ The Jakarta Treaty affirms that Indonesia shall continue to respect existing rights and legitimate interests which Malaysia has traditionally exercised in Indonesia’s territorial sea and archipelagic waters lying between East and West Malaysia including Malaysia’s legitimate interest relating to the existence, protection, inspection, maintenance, repair and replacement of *submarine cables and pipelines* already in position (emphasis added).⁴⁴ It also permits Malaysia to lay new cables and pipelines provided due notice is given to the Indonesian authorities.⁴⁵
26. Under Article 31 (3) (a) and (b) of the VCLT, subsequent agreement between parties regarding the interpretation of the treaty or the application of its provisions and any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation, shall be taken into account (together with context). For subsequent practice to be taken into account under the rule set forth in VCLT Article 31(3)(b), there must be ‘agreement’ by all treaty parties, even though only some parties may be involved in the relevant subsequent practice.⁴⁶
27. There is some subsequent practice of States Parties to the LOSC that suggests that existing pipelines are not intended to be covered by Article 51(2) of the LOSC. Of the 22 States that have declared themselves as archipelagic States in accordance with Article 47 LOSC,⁴⁷ only 4 have expressly adopted legislation which addresses the obligations of archipelagic States in relation to existing submarine cables in their archipelagic waters (Indonesia,

⁴¹ Clive Symmons, ‘Article 47: Archipelagic Baselines,’ in Alexander Proelss (ed) *United Nations Convention on the Law of the Sea: A Commentary* (München: Nomos Verlagsgesellschaft 2017), 352, 370.

⁴² The other members of the archipelagic States group in UNCLOS III supported the amendment of Article 47 (6) as they did not face the same problem that Indonesians had with the Malaysians. See Butcher and Elson, *supra* note 13, 298.

⁴³ Treaty Between Malaysia and the Republic of Indonesia Relating to the Legal Regime of Archipelagic States and the Rights of Malaysia in the Territorial Sea, Archipelagic Waters and the Territory of the Republic of Indonesia Lying between East and West Malaysia, 25 February 1982 (Jakarta Treaty).

⁴⁴ Jakarta Treaty, *ibid*, art 2 (f).

⁴⁵ Jakarta Treaty, *ibid*, art 15.

⁴⁶ Conclusions 4(2) and 10(2), ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, UN Doc. A/73/10, 31 para. 16 and 75-82.

⁴⁷ These States are Antigua and Barbuda, the Bahamas, Cape Verde, Comoros, Dominican Republic, Fiji, Grenada, Indonesia, Jamaica, Maldives, Marshall Islands, Papua New Guinea, the Philippines, Saint Vincent and the Grenadines, Sao Tome and Principe, Seychelles, Solomon Islands, Trinidad and Tobago, Tuvalu and Vanuatu: See J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims*, Third Edition (Martinus Nijhoff, 2012), 206 – 207.

Jamaica, Seychelles and Trinidad and Tobago). The legislation of these States only refers to submarine cables and not pipelines, consistent with the ordinary meaning of Article 51(1).⁴⁸

28. The 1982 Jakarta Treaty discussed in paragraph 25 above, while not subsequent practice of States, could imply that States were at least aware of the possibility that pipelines could be laid in archipelagic waters and their exclusion from Article 51 (2) was intentional. This, coupled with subsequent State practice outlined in paragraph 27 above, may allow a preliminary conclusion to be made that States parties to the LOSC intended for existing pipelines to be excluded from Article 51 (2). However, further research is needed on the full extent of subsequent State practice to definitively confirm this conclusion.

IV. CURRENT WORK PLAN

29. Taking into account comments made during the working meeting of the ILA Committee in December 2020, the Chair and Co-Rapporteurs proposed on 15 March 2021 that the focus of the next stage of the Committee's work be on State jurisdiction in relation to each activity relating to submarine cables and pipelines (i.e., surveying of cable and pipeline routes; installation of cables and pipelines; repair and maintenance of cables and pipelines; the operation of cables and pipelines; and abandonment or removal of cables and pipelines) in all maritime zones. In particular, the Co-Rapporteurs proposed examining coastal State jurisdiction; flag State jurisdiction; jurisdiction of States of the nationality of the entity engaged in cable and laying activities; and the State of nationality of the owner or operator of cables and pipelines.
30. In order to enable the Committee to fully understand the issues relating to State jurisdiction over submarine cables and pipelines activities, the Co-Rapporteurs, with the agreement of the Chair, proposed on 19 September 2021 further research and study be undertaken on regional State practice concerning State jurisdiction over submarine cables and pipelines activities, which may be further discussed at an informal workshop on Regional Practice on Submarine Cables and Pipelines. The Co-Rapporteurs invited Committee Members to express an interest in presenting regional State practice from different regions including Africa, Asia, the Middle East, the Pacific, Latin America and the Caribbean, Europe, and North America. The Co-Rapporteurs suggested that presentations on regional practice be guided by the different grounds of jurisdiction described in paragraph 29 above, a more detailed outline of which can be found in Appendix 1 to this Report.
31. The outcome of study on Regional Practice on Submarine Cables and Pipelines would significantly supplement the existing research done by the Chair and Co-rapporteurs on State practice, a summary of which can be found in Appendix 2 of this Report (Appendix 2 is a work-in progress and is not exhaustive). The aim of the study is to help collate and

⁴⁸ Act No. 6 of 8 August 1996 regarding Indonesian Waters, art 9 (4) and (5); Jamaica's Maritime Areas Act of 1996, art 7; Seychelles Maritime Zone Act 1999 (Act No. 2 of 1999), art 14 (1); Trinidad and Tobago's Archipelagic Waters and Exclusive Economic Zone Act 1986, Act No. 24 of 11 November 1986, art 10.

synthesize existing State practice related to submarine cables and pipelines so as to assist the Co-Rapporteurs in the examination of how States have addressed jurisdiction over activities relating to submarine cables and pipelines and identify gaps and uncertainties in determining which State has jurisdiction over such activities.

32. The Committee's current mandate ends in November 2022. Given that the ILA Committee's work on State jurisdiction over submarine cables and pipelines is ongoing, coupled with the challenges posed by the onset of the global pandemic in conducting research as well as co-ordination and collaboration between the Co-Rapporteurs, it has been proposed that the mandate of the ILA Committee be expanded for a further 4 years, which has been accepted. During this time, it would consider the following matters:
 - a. Continue research on State practice on State jurisdiction on submarine cables and pipelines building upon the ongoing research on State Jurisdiction on Submarine Cables and Pipelines;
 - b. Complete the Third Interim Report on State Jurisdiction on Submarine Cables and Pipelines by 15 January 2023 for discussion by the Committee;
 - c. Discuss and identify which issues of those listed in paragraph 7 above should be the priority for the future work of the Committee.