



Submarine Cables as International Investments : Supporting the Aims of UNCLOS through International Investment Law

Christophe Bondy

Challenges in the Implementation of
UNCLOS – Regional Perspective

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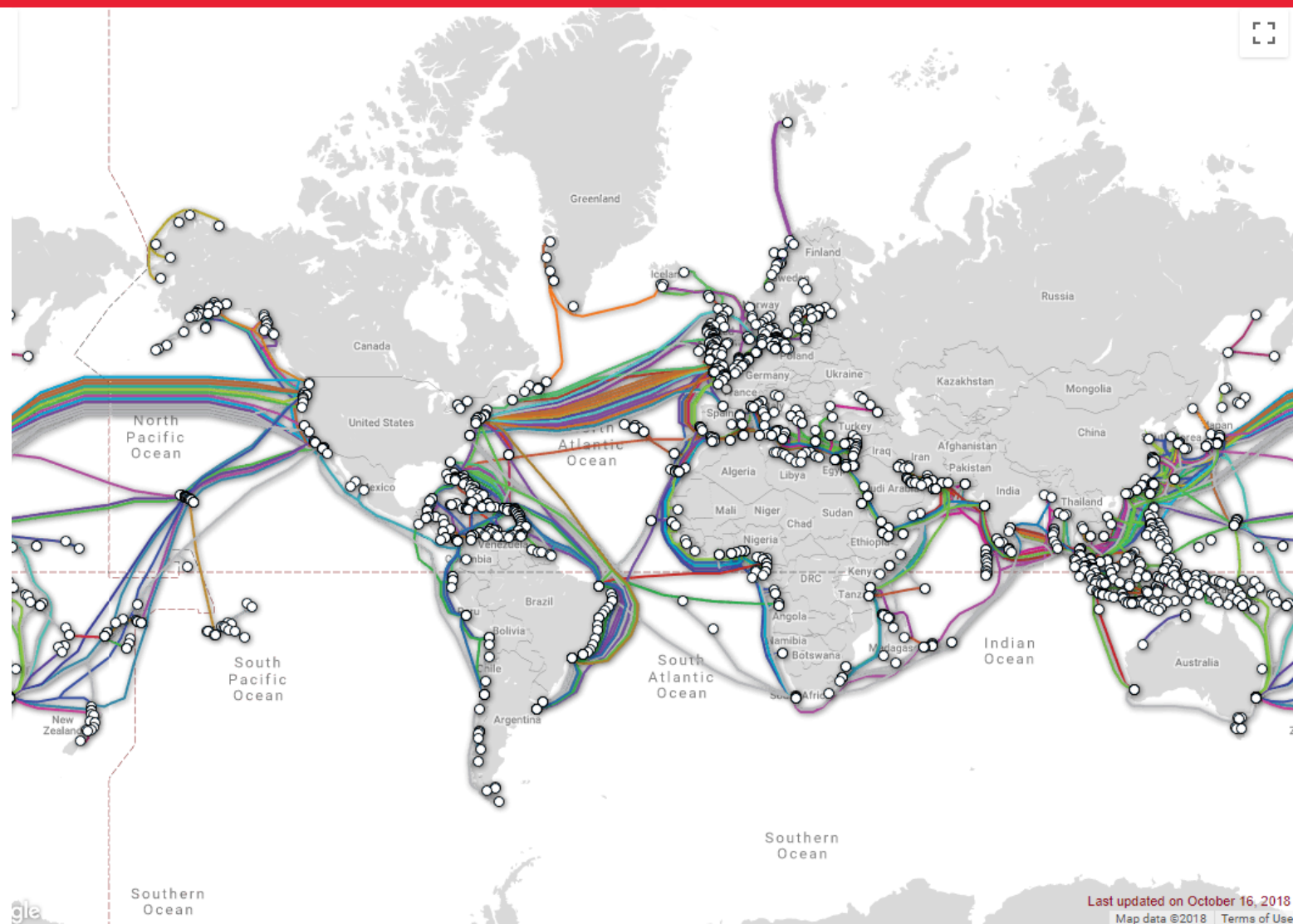
Overview

- Introduction : Interaction between UNCLOS and investment treaty protections
- Implications for submarine cables :
 - Territorial Sea
 - EEZ / Continental Shelf
 - The High Seas / the Area
- A regional perspective?
- Lessons for States and for investors

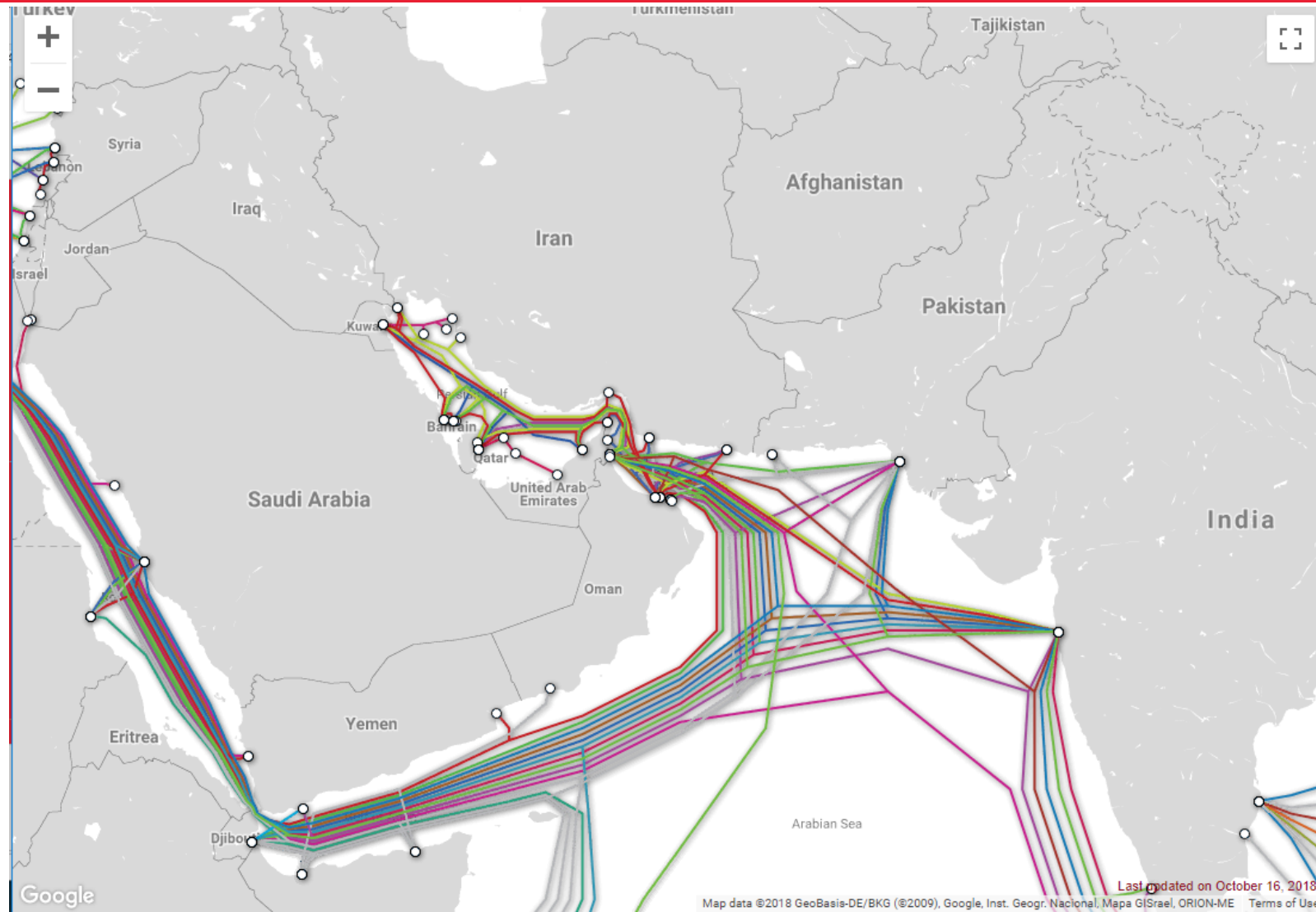
Introduction

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Global network of submarine cables



Gulf Area Network of Submarine Cables



International Investment Agreement (IIA) Network



- Currently about **3,500** IIAs around the world (bilateral investment treaties / investment chapters of Free Trade Agreements)
- Network is both **North-South** and increasingly **South-South**
- **Domestic investment laws** can also provide access

Investment Treaties Cover Investments in the Territorial Sea + EEZ / Continental Shelf

Unless otherwise specified, this Agreement applies:

(a) for Canada, to:

(i) the land territory, air space, internal waters, and **territorial sea** of Canada;

(ii) the **exclusive economic zone** of Canada, as determined by its domestic law, consistent with Part V of the United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982 ("UNCLOS"); and,

(iii) the **continental shelf** of Canada, as determined by its domestic law, consistent with Part VI of UNCLOS (**see: Canada-EU CETA**)

Investment Treaties Cover Investments in the Territorial Sea + EEZ / Continental Shelf

Argentina – Qatar Bilateral Investment Treaty (proposed)

For the State of Qatar: land inland and territorial waters of the State of Qatar **and their bed and subsoil**, and air space above them, and the **economic zone and continental shelf**, which is exercised by the State of Qatar's sovereign rights and jurisdiction, in accordance with the provisions of international law and domestic laws and regulations.

The Territorial Sea

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Investment Treaty Protections in the Territorial Seabed

- Right of coastal State to control (and to deny) laying of submarine cables
- Potential coastal State duties vis-a-vis those seeking to invest
- Duty of coastal State to act in a non-discriminatory, non-arbitrary manner
- Duty of coastal State to avoid uncompensated expropriation for established submarine cable investments
- Continuing right of coastal State to good faith regulation

The EEZ and Continental Shelf

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Investment Treaty Protections in the EEZ / Continental Shelf

- Competing rights of coastal States and of other States
- Coastal State has exclusive right to exploit living & non-living resources vs right of other States to free passage and (*inter alia*) to lay submarine cables – regime of “due regard”
- Coastal State has right to regulate in support of its rights and to protect environment – interaction with submarine cable laying?
- Potential for claims of arbitrary / discriminatory regulation, citing non-compliance with UNCLOS freedoms as a factor

The High Seas / The Area

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Investment Treaty Protections in the High Seas / the Area

- Broad entitlement to lay submarine cables / beyond State jurisdiction
- No investment « in the territory » of a host State
- ISA jurisdiction not focussed on submarine cables
- Regime of compensation for damage to or caused by avoiding submarine cables – patchy adoption in domestic law
- Overall, « gap » in investment protection
- UNCLOS considers resource extraction in the Area – doesn't fully address potential conflict over submarine cables!

Regional Perspective?

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Regional Implications for UNCLOS / IIA Interaction

- Overlapping UNCLOS claims in a region = potential uncertainty about jurisdiction for purposes of IIA claims
- Potential regional solutions for conflicting uses of undersea resources? Regional environmental / fisheries agreements with related provisions for submarine cables.
- Can feed into whether regulation was consistent with expectations / reasonable = less likely to attract claims
- Regional context and IIA protection often overlap – nature of trade is regional!

Implications for States / Investor

- For States
 - Awareness of potential claims
 - Need to maintain best practices for investor management in the territorial sea / EEZ
 - Need to consider balance of rights inherent in UNCLOS
 - Development of more comprehensive regime for High Seas?
- For Investors:
 - Awareness of rights under IIAs
 - Awareness of balance of State rights under UNCLOS

Preamble of UNCLOS

- The State Parties to this Convention [...]
- Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans ***which will facilitate international communication*** [...]
 - (my emphasis)

Your Questions ?

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Christophe Bondy, Cooley (UK) LLP

+44 (0)20 7556 4326; cbondy@cooley.com



Christophe Bondy
Barrister and Solicitor (Ontario)
Avocat au Barreau de Paris
Registered Foreign Solicitor (UK)
Cooley (UK) LLP
Dashwood House
69 Old Broad Street
London EC2M &QS
cbondy@cooley.com

Christophe is among the world's most experienced investment treaty counsel. He spent nearly a decade as lead counsel to Canada in multiple NAFTA Chapter Eleven arbitrations. Since his return to the private sector in 2015 he has been lead counsel in multiple investment arbitrations on behalf of several other sovereigns and private claimants. Through his work he has addressed and considered in depth virtually all procedural and substantive issues arising in the international law of investment protection. His cases have made a substantial contribution to the development of international investment law.

Christophe also has unmatched experience as counsel in the negotiation of international trade and investment agreements. He was involved for five years as Senior Counsel to Canada in negotiations for the Canada-EU Comprehensive Economic and Trade Agreement (CETA). He has taken part in Canada's trade and investment negotiations with India, Tanzania, and Cuba, among others. He has directly advised up to the highest levels of government on trade issues, and has trained officials from over 40 States on various aspects of international trade and investment law.

In 2018 Christophe was invited to the UK Select Committee on Exiting the EU to provide expert testimony on the negotiation of free trade agreements.

Christophe also has substantial experience in international commercial arbitration under all major rules, as well as in advisory work on Public International Law issues, including the law of State Responsibility, sovereign and diplomatic immunities, and international intellectual property law.

Christophe currently is designated by a State as its party-appointed arbitrator in an investment treaty dispute relating to the energy sector. He is a designated NAFTA Chapter 19 panellist (review of anti-dumping and countervailing duty determinations).

He is a visiting professor of international dispute resolution at the Centre for Transnational Legal Studies, London.

Christophe is "highly recommended" in the UK Legal 500 for Public International Law work.