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Seson 2: Legal Regime of Sea

Submarine Cables: A Critically Important but Neglected Area of the Law of the Sea

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The number of submarine cables grew exponentially with the Internet, and 95% of telecommunications in most countries is now from submarine cables.

Submarine cables are critically important to the world’s communication systems, financial systems and security systems.

Cables are broken or damaged by natural disasters such as earthquakes or tsunamis, as well as by fishing activities and shipping activities, especially anchoring.
International Regime & Cables

- The legal framework governing submarine cables is set out in 1982 UNCLOS
- Despite the increased importance of cables in recent years, there has been no review of the international legal regime governing cables
- In UN System there is no agency with responsibility for law and policy on submarine cables
National Governments & Cables

- In many countries, several agencies have responsibility for some cable issues, but there is no lead agency with a mandate to coordinate a unified government policy.
- In other countries, there is vacuum, and it is not clear which government agencies are responsible for submarine cables.
- The result is that in most States there is no agency responsible for setting a clear national policy or reviewing the international legal regime.
History of Legal Regime

- **1884 Convention for the Protection of Submarine Cables**
  - EIF on 1 May 1888; 39 States Parties, but only Parties in Asia-Pacific are Japan, Australia and New Zealand
  - Served as basis for review of LOS by ILA and ILC in 1950s

- **1958 Convention on High Seas** recognized right to lay submarine cables as high seas freedom

- **1958 Conventions on High Seas and Continental Shelf** incorporated some provisions of 1884 Convention

- **1982 UNCLOS** provisions based on those in 1958 Conventions
Cables within Sovereignty

- In their territorial sea and archipelagic waters, States have the right to regulate the laying and repair of submarine cables.
- In the territorial sea, coastal States can adopt laws and regulations on ships exercising innocent passage in order to protect cables.
- In archipelagic waters, States must respect existing cables laid by other States and passing through its archipelagic waters, and must permit the maintenance and replacement of such cables.
Cables within Sovereignty

- Coastal States are not required under UNCLOS to protect cables within their territorial sea
- States should adopt laws and regulations to protect cables from shipping and fishing activities
- States such as Australia and New Zealand have enacted legislation establishing “cable protection zones”
- Permits for cable laying and repairs in many States is often delayed because Government agencies have no lead agency to expedite approvals
Repair of Cables in TS

- Most States impose requirements for permits for the repair of cables inside the territorial sea.
- In some States (e.g., India) permits are often subject to long delays because many agencies are involved.
- Delays in the repair of broken or damaged cables slows Internet traffic in all States connected to the broken or damaged cable.
- Cable ships which conduct repairs are strategically located around the world and pose no risk to the resources or security of the coastal State.
Repair of Cables in TS

• Governments should establish procedures to expedite Permits for cable ships to repair cables could including:

1. Appointing a lead agency to coordinate the permit process

2. Standardizing forms for information about the cable ship and its crew members, including procedures for continually updating information on the background and employment record of crew members aboard the cable ship
Cables outside Sovereignty

- Laying of Cables beneath High Seas or EEZ and on Continental Shelf is a freedom of the high seas
- Conduct of cable route surveys is a “lawful use of the sea” related to the freedom to lay cables
- The freedom to lay submarine cables includes the freedom to maintain and repair them
- In exercising their freedom to lay submarine cables, States must have due regard for the rights and duties of the coastal State
Cables outside Sovereignty

• Article 79(2) provides that subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of cables.

• Article 79(4) provides that this limitation does not affect the right of the coastal State to establish limits for cable entering its territory or territorial sea.
Cables vs Pipelines on CS

- Two important differences between **pipelines** and **cables** on the continental shelf:
  1. Article 79(2) also provides that coastal States may take reasonable measures for the prevention, reduction and control of **pollution from pipelines**.
  2. Article 79(3) provides that the **delineation of the course** for the laying of **pipelines** on the continental shelf is subject to the consent of the coastal State.
- The legislation of India fails to recognize the distinction between **cables** and **pipelines**.
Repair of Cables outside TS

- The vast majority of States do not require any permits or clearance for the repair of cables outside the territorial sea.
- India is one of two States in Asia which requires clearance or permits for repair of cables in the EEZ.
- Although coastal States may subject repair ships to reasonable requirements relating to the exploration of the continental shelf, clearance for cable repair ships should be immediate because they are not engaged in exploration of the shelf.
Repair of Cables outside TS

• There should be an Expedited Pre-Clearance Notification Procedures for cable ships that repair cables in the EEZ

• The Government of India should enter into discussions with the cable industry to establish such procedures

• The cable industry has suggested ‘confidence-building measures’ such as visits by government agencies to cable ships when they are in port, and “ship-riders” on cable ships engage in repairs
Protection of Cables

- Article 113 of UNCLOS obligates States to create an offence for the breaking or injury of a cable beneath the high seas or EEZ by their nationals or by a ship flying their flag, if such break was done wilfully or through culpable negligence.

- This provision is inadequate for two reasons:
  1. Most States have not enacted legislation implementing this provision.
  2. This provision does not deal adequately with the threat to cables from terrorists.
Protection of Cables

- Given the importance of submarine cables to the world’s economy and to all States, additional measures are necessary to protect cables.
- States should make acts intended to damage or destroy cables or cable infrastructure within their territory or territorial sea a criminal offence.
- States should also make such acts by their nationals or by ships flying their flag a criminal offence.
Protection of Cables

• Cables are vulnerable to intentional acts by terrorists intended to disrupt the world’s economy

• International community should adopt a “counter-terrorism” convention similar to 1988 SUA Convention making the intentional destruction or damage of submarine cables an international crime

• Like the other counter-terrorism conventions, there should be universal jurisdiction among States Parties based on the presence of the offender in their territory, with a duty to extradite or prosecute
Protection of Cables

• Major naval powers in the region should cooperate with each other and with the cable industry to take measures consistent with international law, including UNCLOS, to protect cables outside of national jurisdiction

• Such cooperation should include naval exercises and the development of common rules of engagement and procedures to deal with terrorist attacks on cables and theft of cables
Theft of Cables as Piracy

- More than 100 nm of cables were stolen by fisherman in Vietnam in 2007 and sold as scrap.
- States should make the theft of cables beneath the EEZ or high seas a crime if committed by their nationals or a ship flying their flag.
- Theft of cables could arguably fall within the definition of “piracy” in article 101 of UNCLOS if:
  - Such cables are property outside the jurisdiction of any State.
  - Theft by persons on a private ship for private ends is an act of depredation.
Recommendations

1. The gaps and lacunae in the legal regime governing submarine cables should be brought to the attention of the United Nations

2. Key States in Asia should cooperate to raise this issue at the meeting of the Conference of Parties to UNCLOS

3. States should identify a lead agency to review their national laws and policies on cables

4. States should establish a mechanism to meet with the cable industry to discuss how to enhance cooperation in the common interest
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- Background Materials on Submarine Cables
- CIL Database of ASEAN and International Law Documents