

RECONCEPTUALIZING COASTAL STATE
SOVEREIGNTY IN THE TERRITORIAL SEA
THROUGH THE LENS OF TRANSIT
SUBMARINE CABLES

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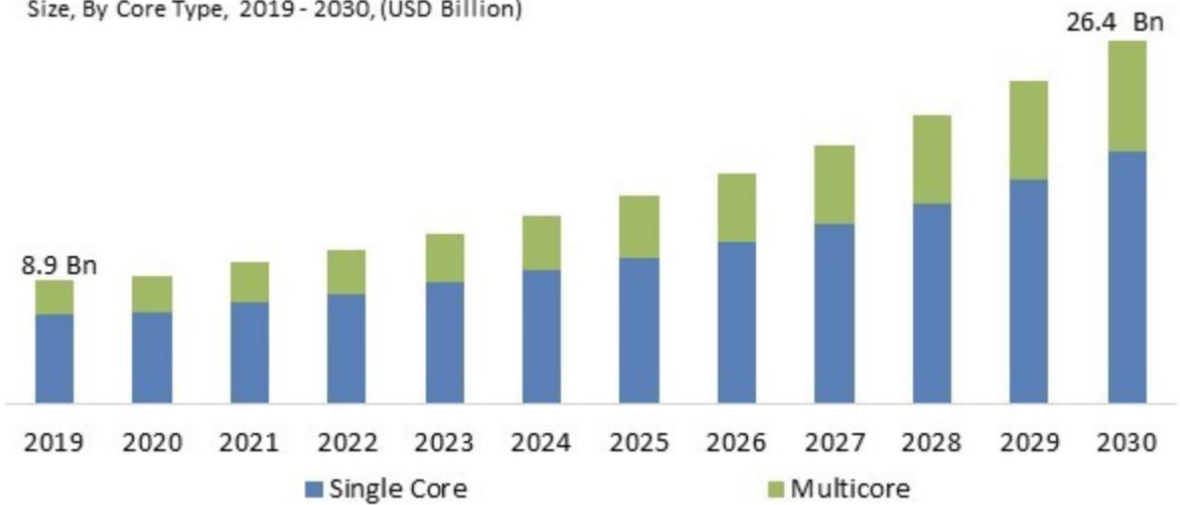
OUTLINE

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- 5) Limits to Coastal State Sovereignty
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THE PROBLEM

Global Submarine Power Cable Market

Size, By Core Type, 2019 - 2030, (USD Billion)



Source: www.kbvresearch.com

THE PROBLEM

1884 Convention on the Protection of Submarine Telegraph Cables

1956 ILC Articles on the Law of the Sea

1958 Geneva Convention on the High Seas

1958 Geneva Convention on the Continental Shelf

1982 UN Convention on the Law of the Sea

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, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment,

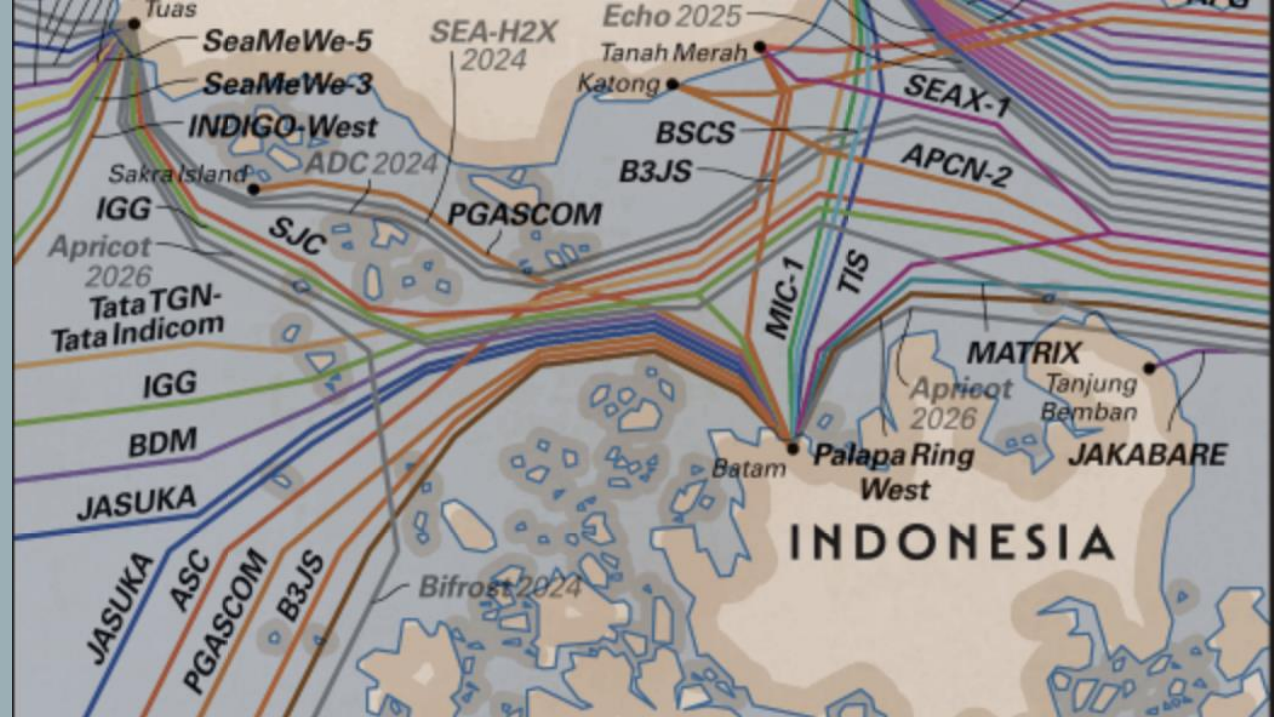
1982	2024	
6 submarine fiber optic cables	559 submarine fiber optic cables	99% of global telecommunications
27 submarine power cables	450 submarine power cables	Increasing proportion of energy needs including renewable energy

THE PROBLEM

Maritime Zones	Coastal States	All States	
		Passage Regimes	Submarine Cables
Areas under sovereignty			
Territorial Sea	Sovereignty	Innocent Passage	X
International Straits	Sovereignty	Transit Passage	X
Archipelagic Waters	Sovereignty	Archipelagic Sea Lanes Passage	X
Areas beyond sovereignty and under national jurisdiction			
Contiguous Zone	Sovereign Rights	Freedom of Navigation	Freedom to Lay & Repair Submarine Cables
Exclusive Economic Zone	Sovereign Rights	Freedom of Navigation	Freedom to Lay & Repair Submarine Cables
Continental Shelf	Sovereign Rights	Freedom of Navigation	Freedom to Lay & Repair Submarine Cables
Areas beyond national jurisdiction			
High Seas	X	Freedom of Navigation	Freedom to Lay & Repair Submarine Cables
Deep Seabed	X	Freedom of Navigation	Freedom to Lay & Repair Submarine Cables

THE PROBLEM

Submarine Cables that transit areas under sovereignty without making landfall



Not representative of the exact route

THE PROBLEM

Submarine cables that transit areas under sovereignty without making landfall are subject to coastal state sovereignty

Refusal to let new submarine cables be deployed or existing ones repaired?



Onerous permitting requirements?



Cabotage requirements?

Coastal states have a significant degree of leverage relating to both the deployment and repair of submarine cables that transit their territorial sea, and the assumption is that states that are connected or going to be connected to transit submarine cables have little recourse to challenge such regulations due to coastal state sovereignty



THE QUESTION

Do coastal states have obligations to states that are connected to submarine cables that transit the coastal state's territorial sea?

HISTORICAL DEVELOPMENT OF COASTAL STATE SOVEREIGNTY

The meaning of state sovereignty over territory has evolved across historical and political contexts and has also been heavily contested

12th -16th Century:

Emergence of
Modern State in
Europe

18th-19th
Century: Rise of
Nation State

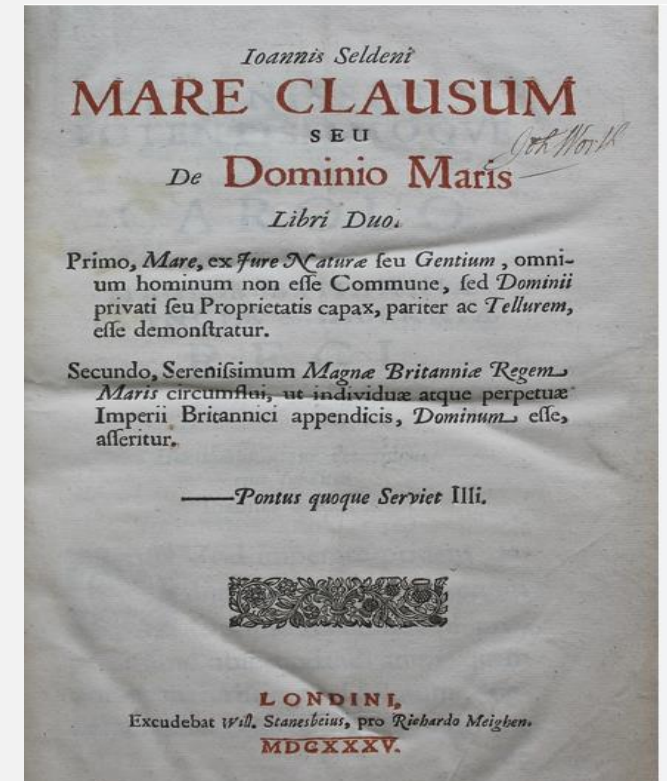
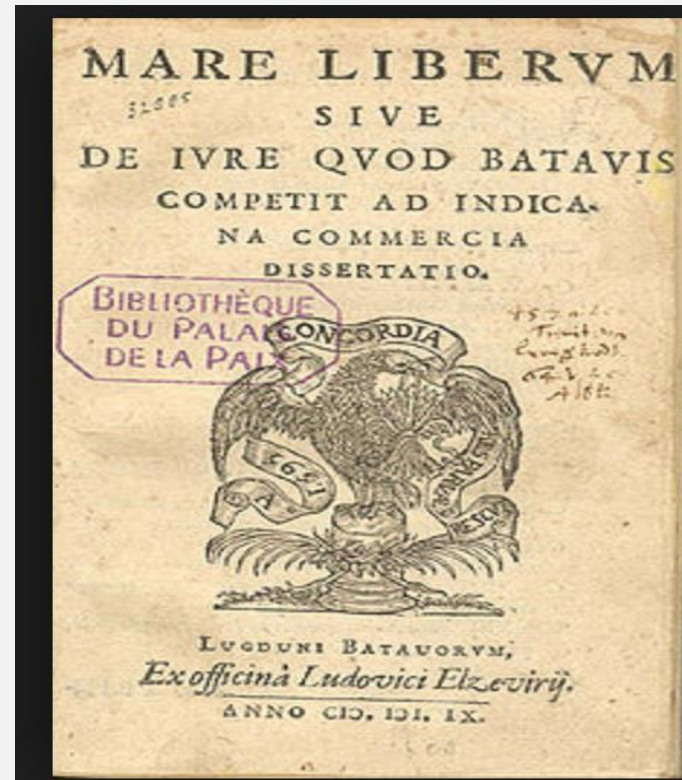
1648 Peace Treaties of Westphalia: Establishment of
Modern System of States:
Sovereignty over Territory & Sovereign Equality

20th Century:
Modern
sovereignty

Jean Bodin: Sovereignty is absolute, perpetual and undivided

Gradual limitations to state sovereignty

HISTORICAL DEVELOPMENT OF COASTAL STATE SOVEREIGNTY



- For Grotius, the sea was *res communis* (common property) because it could not be occupied due to its non-rivalrous nature, its susceptibility to universal use and therefore could not be subject to appropriation
- He later acknowledged that some parts of the sea could be occupied but even then, such occupation should not hinder “common use” such as navigation

HISTORICAL DEVELOPMENT OF COASTAL STATE SOVEREIGNTY

Different theoretical justifications for coastal state rights in the territorial sea

17th
Century

- Generally accepted that the coastal state acquired property in coastal waters near its coast through occupation

18th
Century

- Property theories became dominant justification for coastal state control over waters near its coast

19th
Century

- Property theories were challenged by the growth of trade and the right of innocent passage, giving rise to other theories, such as jurisdictional theories and sovereignty theories

20th
Century

- Sovereignty theories became entrenched where “property-based claims merged with the exercise of governmental authority” (Richard Barnes, Property In Natural Resources)

HISTORICAL DEVELOPMENT OF COASTAL STATE SOVEREIGNTY

1909 Grisbardana Case:	Maritime territory constituted “an inseparable appurtenance of the land territory, which automatically forms part of ceded territory”
1930 Hague Conference	...it would seem possible to take as a point of departure the proposition that the State possesses sovereignty over a belt of sea around its coasts. This involves possession by the State in the belt of the totality of those rights which constitute sovereignty, so that it is not necessary to specify, for example, it has legislative authority over all persons, power to make and apply regulations, judicial authority, power to grant concessions and so forth
1956 ILC Draft Articles	<ul style="list-style-type: none"> • Article I (1): The sovereignty of a state extends to a belt of sea adjacent to its coast, described as the territorial sea • Article I (2): The sovereignty is exercised subject to the conditions prescribed in these articles and by other rules of international law • Paragraph I brings out the fact that the rights of the coastal State over the territorial sea do not differ in nature from the rights of sovereignty which the State exercises over other parts of its territory • Some of the limitations imposed by international law on the exercise of sovereignty in the territorial sea are set forth in the present articles which cannot, however, be regarded as exhaustive. Incidents in the territorial sea raising legal questions are also governed by the general rules of international law, and these cannot be specially codified in the present draft for the purposes of their application to the territorial sea.

COASTAL STATE SOVEREIGNTY UNDER UNCLOS

- **Article 2 Legal Status of the Territorial Sea, of the Air Space over the Territorial Sea and of its Bed and Subsoil**
 1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
 2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
 3. The sovereignty over the territorial sea is exercised subject to this Convention and **to other rules of international law.**
- Primary limitation on coastal state sovereignty is the obligation to not to hamper the innocent passage of foreign vessels
- Beyond innocent passage, there is uncertainty on coastal state authority to control activities in the territorial sea – a state claiming otherwise must prove that "other rules of international law" restrict the residual authority of a coastal state to regulate a particular activity
- Unlike the EEZ and continental shelf, there is no explicit obligation on the coastal state to exercise "due regard" to the rights and duties of other states (art 56.2) or to not cause "unjustifiable interference" with rights and freedoms of other states (art 78)

COASTAL STATE SOVEREIGNTY UNDER UNCLOS

*“A State is sovereign over something which it can impose its power over that thing, and the territorial sea is something over which a State can exercise its dominion by force of arms. International law in its present form, admits that the territorial sea, without being susceptible of property in the private law sense of the term, is so in the international sense of sovereignty. The result is that the coastal State is sovereign in the coastal seas as it is on the dry land, and its sovereignty is a prolongation of its territorial sovereignty. **The territorial sea is part of its domain and not simply a part of the vast ocean envisaged in its majestic unity.** Hence, the frontier of each maritime State is fixed at the limits of the territorial sea, subject only to the qualification that...practice requires that the passage and sojourn of merchant ships in times of peace should not be prohibited...”*

D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA, VOLUME I 72 (1982)

LIMITS TO COASTAL STATE SOVEREIGNTY

Chagos Marine Protected Area Arbitration (2015)

- Article 2 (3) “the sovereignty over the territorial sea is exercised subject to this Convention and **to other rules of international law**” places an obligation on coastal states to exercise their sovereignty subject to the general rules of international law (as opposed to bilateral undertakings)
- Noted that the ILC considered reference to “other rules of international law” necessary as “there were certain general rules of international law which were applicable in the matter, as indeed to other topics of international law, such as the principle prohibiting the abuse of rights and, generally, the law of state responsibility”
- Article 2(3) requires the United Kingdom to exercise good faith with respect to Mauritius’ rights in the territorial sea. Article 56(2) requires the United Kingdom to have due regard for Mauritius’ rights in the exclusive economic zone. The Tribunal considers these requirements to be, for all intents and purposes, equivalent
- The extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches. In the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State

LIMITS TO COASTAL STATE SOVEREIGNTY

South China Sea Arbitration (2016)

- Traditional fishing rights constitute a vested right, and the Tribunal considers the rules of international law on the treatment of the vested rights of foreign nationals to fall squarely within the “other rules of international law” applicable in the territorial sea
- The Tribunal noted, however, that traditional fishing rights are not absolute or impervious to regulation. Customary international law, in this respect, does not restrict the coastal State from reasonable regulation

LIMITS TO COASTAL STATE SOVEREIGNTY

- **Duzgit Integrity Arbitration (2016)**

- In the Tribunal's view, when considered together, the prolonged detention of the Master and the vessel, the monetary sanctions, and the confiscation of the entire cargo, cannot be regarded as proportional to the original offence or the interest of ensuring respect for São Tomé's sovereignty (including São Tomé's interest in demonstrating that such conduct will not be tolerated in future cases).
- The disproportionality is such that it renders the cumulative effect of these sanctions incompatible with the responsibilities of a State exercising sovereignty on the basis of Article 49 of the Convention.
- As already noted, the Applicant has invoked Article 300 of the Convention. The Tribunal is not aware of any prior instance in which another tribunal or court has found a breach of Article 300 of the Convention. There is, therefore, little guidance as to the legal test to be satisfied to establish such a breach. In the present case, the Tribunal sees no need to determine a violation of Article 300 given that it has already determined that Article 49(3) has been violated.

LIMITS TO COASTAL STATE SOVEREIGNTY

- **Other relevant rules of international law?**

- No harm principle: a state's sovereign right to use its territory is circumscribed by an obligation not to cause injury to, or within another State's territory
 - **Island of Palmas Arbitration (1928):** "territorial sovereignty has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability"
 - **Corfu Channel Case (1949):** "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"
- Obligation to ensure that activities carried out in coastal state's territorial sea do not cause transboundary environmental harm (**Land Reclamation Case/South China Sea Arbitration**)
- **Article 300 of UNCLOS:** States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right

TESTING THE LIMITS: BACK TO THE QUESTION

- **Do coastal states have obligations to states that are connected to submarine cables that transit the coastal state's territorial sea?**
- The cases demonstrate that there are limits to sovereignty underpinned by the understanding that even in areas under sovereignty, it is necessary to balance the rights and obligations of other states by various mechanisms such as good faith and proportionality
- Chagos Marine Protected Area Arbitration & South China Sea Arbitration, however, was based on the acceptance that other states had vested rights – states connected to transit submarine cables have no such vested rights
- Duzgit Integrity Arbitration: the enforcement actions taken by São Tomé's were not proportional to the interest of ensuring respect for São Tomé's sovereignty under Article 49 of UNCLOS – could it be argued, for example, that coastal state regulations for the *repair* of transit submarine cables which are excessive are disproportionate and not necessary to protect its sovereignty?
- Obligation to ensure that any regulations relating to transit submarine cables do not cause harm to the states connected to the transit submarine cable?
- Possibility of using Article 300 of UNCLOS on good faith and abuse of right?

CONCLUSION

- While there has been a shift towards viewing the territorial sea (and other areas under sovereignty) as not the absolute domain of the coastal state and an area of shared rights and responsibilities in which the balancing of interests must take place, there is still uncertainty on the limits of coastal state sovereignty
- As a matter of *lex lata*, it is not possible to state with certainty whether coastal states have obligations to states that are connected to submarine cables that transit the coastal state's territorial sea, although plausible arguments can be made
- UNCLOS was adopted at a time when submarine cables were not in extensive use as they are now
- As a matter of *lex ferenda*, a question remains as to whether the interest of all states in communications and energy supply necessitates a rethinking of the laying and repair of transit submarine cables in areas under sovereignty – coastal states can regulate such activities as they do with innocent passage but cannot hamper such activities and any regulations must be proportionate and enacted and implemented in good faith?