

Coastal State enforcement jurisdiction over vessels suspected of intentionally damaging a submarine cable or pipeline in its EEZ or on its continental shelf

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Scope/Outline

- UNCLOS/customary international law
- 'enforcement' measures?
- only measures against vessels (not entitled to sovereign immunity); not unmanned vehicles
- vessels flying foreign flag; vessels without nationality
- enforcement measures: both during suspected attempt and after actual damage has occurred
- piracy law as legal basis for enforcement
- concluding observations: law development

UNCLOS

- Relevant UNCLOS provisions may be regarded as reflecting current customary international law
- Observations on enforcement measures in EEZ also apply to superjacent waters of continental shelf areas beyond the EEZ

(Law) Enforcement measures

- Measures to compel compliance with national legislation and to punish violations (act of intentional damage must be punishable offence) and may include measures during preparatory stage (depending on national legislation)
- May be distinct from (preventive) measures taken for the 'maintenance of public order'
- Various phases: identification of suspected vessel, collecting information from it or other sources, boarding and inspecting vessel, detaining vessel, institution of criminal proceedings

Enforcement measures in the EEZ: legal basis

Measures taken without flag State consent need a legal basis as exception to exclusive flag State jurisdiction

The legal basis varies depending on the category of SC&P involved; main categories:

(A) submarine cables or pipelines in use for the purposes listed in Art. 56 paragraph 1(a) UNCLOS (sovereign rights): exploitation of natural resources and production of energy from water, currents and winds

(B) submarine cables or pipelines (originating outside the continental shelf) landing in the coastal State

(C) submarine cables or pipelines only transiting the continental shelf/EEZ

Category (A): SC&P in use for sovereign rights (1)

Full coastal State enforcement jurisdiction:

Where the coastal State has reasonable grounds for suspecting that a vessel navigating in its EEZ has, in the EEZ, intentionally damaged a submarine cable or pipeline in use for the purposes listed in Art. 56 paragraph 1(a) UNCLOS, or that such vessel is preparing to engage in such acts, the coastal State may request the vessel to give information regarding its identity and port of registry, its last and its next port of call, and other relevant information required to establish if it had indeed engaged in (or is preparing to engage in) intentional acts of damage.

Category (A): SC&P in use for sovereign rights (2)

(cont'd)

If the information so obtained confirms the suspicion that the vessel had engaged or was preparing to engage in such acts, or if the vessel did not respond to the request for information, that State may undertake physical inspection of the vessel [at a location determined by it], and if the [clear objective] evidence obtained so warrants it may institute proceedings, including detention of the vessel. The flag State must be notified promptly of any measures taken.

Category (A): SC&P in use for sovereign rights (3)

The standard of suspicion to be applied by States before deciding to take measures may depend on national criminal law standards.

The following three standards can be found in UNCLOS:

- 'clear grounds for believing' (Art. 94(6); Art. 220, paragraphs 2, 3 and 5 UNCLOS)
- 'reasonable grounds for suspecting' (Art. 110, paragraph 1)
- 'good reason to believe' (Art. 111, paragraph 1).

Category (A): SC&P in use for sovereign rights (4)

Legal basis under UNCLOS: sovereign rights of the coastal State imply enforcement jurisdiction, but no specific provision

- UNCLOS includes no equivalent of Art. 73 (enforcement of laws concerning living resources) for non-living resources

But - see ILC 1956 Report, p. 297, commentary to draft art. 68, para 2 (on continental shelf rights): “(...) *leaves no doubt that the rights conferred upon the coastal State cover all rights necessary for and connected with the exploration and exploitation of the continental shelf. Such rights include jurisdiction in connection with the prevention and punishment of violations of the law*”.

- Support in *Arctic Sunrise* arbitral award, para’s 283-284

Category (A): SC&P in use for sovereign rights (5)

Legal basis (cont'd):

- Right of hot pursuit may apply if order to stop was given timely in area of EEZ/continental shelf and other conditions fulfilled
- Do any 'safeguards' apply? (cf. Artt. 223-233 UNCLOS)

Category (B): landing cables and pipelines (1)

Legal basis under UNCLOS for measures?

- In this case, the violation would be of the laws of the coastal State (and possibly other States) that are not derived from its sovereign rights, but from the right to lay and use submarine cables or pipelines (Art. 79 UNCLOS), implying the right to make it a punishable offence to intentionally damage such SC&P ('protective principle').
- This situation is similar to acts of interference with navigational or overflight rights (where piracy law could apply).
- No explicit or implied enforcement right when no consent from flag State – which has obligation to make this a punishable offence (but compare situation of Art. 220(6), where in case of major pollution damage by a vessel the coastal State may detain the vessel; or cases of unlicensed dumping, Art. 216).

Category (B): landing cables and pipelines (2)

Legal basis under UNCLOS for measures (cont'd)?

- Orthodox interpretation of the law thus leads to initial unsatisfactory finding of inadequacy of operational options, and inconsistency within the current law: legal basis available outside UNCLOS or change through practice?
- Anti-terrorism conventions do not seem to provide a basis for at sea enforcement
- In case of a vessel attempting to cause damage: take (disruptive) action based on 'necessity' (a circumstance precluding wrongfulness)? Conditions of 'essential interest' and 'grave and imminent peril' must be met

Category (B): landing cables and pipelines (3)

Legal basis (cont'd):

- Additional legal basis for cables only (boarding and inspection of foreign vessels): potential relevance for the (38?) parties to the 1884 Convention for the Protection of Submarine Telegraph Cables: Art. II, and Art. X : “When the officers commanding the ships of war, or ships specially commissioned for the purpose by one of the High Contracting Parties, have reason to believe that an infraction of the measures provided for in the present Convention has been committed by a vessel other than a vessel of war, they may demand from the captain or master the production of the official documents proving the nationality of the said vessel”.

Category (C): transit cables and pipelines

Legal basis under UNCLOS for measures?

Same as category (B)?

Difference with category B is that any prescriptive jurisdiction may not be based on protective principle

Situation concerns violations of the rights of other States (under whose authority the cable/pipeline was laid): could these States by agreement with the coastal State transfer any enforcement rights they may have to the coastal State?

In case of potential serious environmental consequences of pipeline damage: preventive measures allowed ('necessity')?

Potential relevance of piracy rules (= measures not in capacity of coastal State, so any State may act)

- Definition of piracy (Art.101(a) UNCLOS): “(...) any illegal acts of violence (...) committed for private ends (...) against (...) (ii) property in a place outside the jurisdiction of any State” (‘two ship requirement’ not applicable)
- ‘private ends’ = not by a government
- SC&P Category (A) seem not to qualify as ‘property in a place outside jurisdiction of any State’, but categories (B) and (C) may? Novel interpretation, no practice

Concluding observations

- Development of the law necessary to clarify/expand legal basis of enforcement measures for categories B and C: through practice (i.e., interpretation of UNCLOS provisions), or through new agreements?
- Amendment of UNCLOS not feasible; new Implementing Agreement? Resolution by SPLOS? Resolution by UNGA?
- Coordinated interpretative practice (cf. example of sea level rise); or new rules of customary international law