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Flag State Responsibility for Damage to Submarine Cables and Pipelines

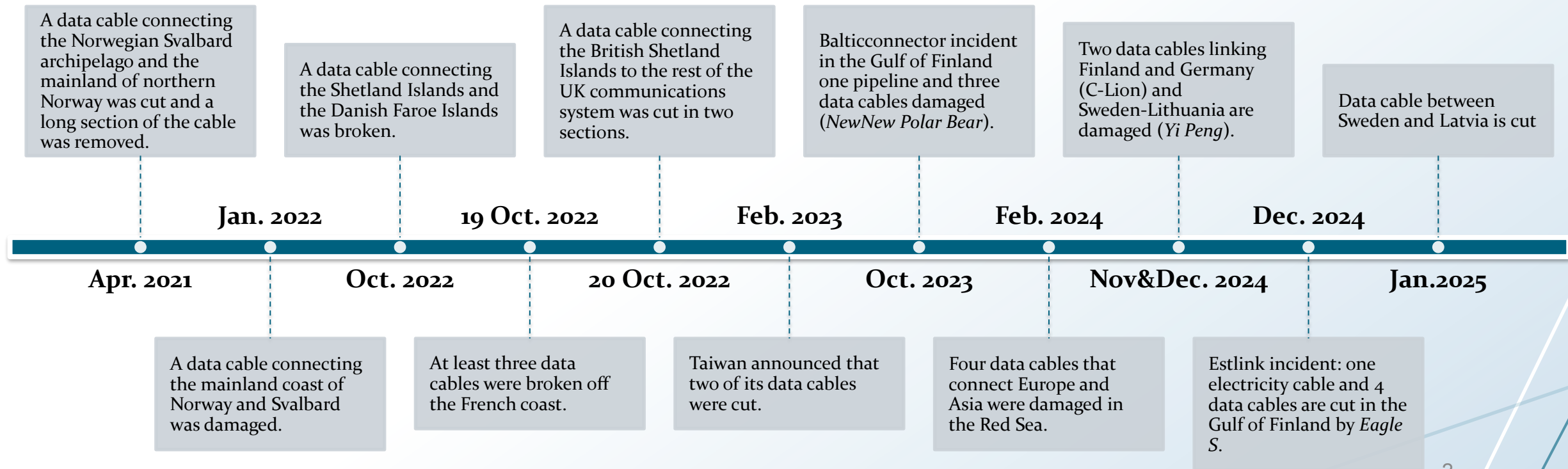
Dr Youri van Logchem

Associate Professor (Law of the Sea & Environmental Law)
Norwegian Centre for the Law of the Sea (NCLOS)
UiT-The Arctic University of Norway, Faculty of Law

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Can a Flag State be Responsible for Deliberate or Negligent Damage to a Cable or Pipeline by a Vessel Flying its Flag?

- possibly, if the damage results from an act of omission on the part of the flag State, which is attributable to it and constitutes a breach of an international obligation.



Modalities of Flag State Jurisdiction

Concept of nationality of vessels has become the primary guide for determining the State that is responsible for vessels;



Major challenges flow from the exclusive jurisdiction that the flag State possesses in relation to ships flying its flag on the high seas, and also in the exclusive economic zone (EEZ), for cable and pipeline protection.



Absent coastal State jurisdiction, it is only the flag State that has prescriptive and enforcement jurisdiction, subject to exceptions such as major pollution incidents and necessity.



A flag State can permit a third State to board, inspect, arrest or detain one of its vessels.



In that light, a flag State can take enforcement measures against vessels flying its flag suspected of having damaged cables and pipelines.

Shortcomings of Flag State Jurisdiction

(i)

- The exercise of flag State jurisdiction has several shortcomings:
 - the vastness of the ocean prevents flag States from always being aware what is going on;
 - unwillingness or inability on the part of States to enforce laws and regulations (the damage caused to a cable or pipeline may not directly impact the flag State);
 - when a convention is ratified, treaty obligations may not be properly implemented in domestic law;
 - compounding matters is when flag State jurisdiction is combined with the phenomenon of vessels using flags of convenience, which are flown on a wide scale.



Article 113 of the LOSC (i)

- *obliges* flag States to adopt laws and regulations that criminalize certain acts related to cables and pipelines;
- more specifically, they need to provide that it is a punishable offence for a ship flying its flag or a person subject to its jurisdiction to:
 - wilfully or through culpable negligence break or injure a submarine cable or pipeline beneath the high seas/EEZ;
 - such laws and regulations also need to cover conduct that is calculated or likely to result in breaking or damaging a submarine cable or pipeline.

Shortcomings of Flag State Jurisdiction (ii)

- In the 1982 Law of the Sea Convention (LOSC), it is provided that if there is no effective jurisdiction and control being exercised over a ship, the State believing this to be the case can:
 - report the matter to the flag State;
 - the latter is required to open an investigation;
 - to take remedial action, if necessary;
 - no further actions may be taken by a State other than the flag State (Article 94(6)(7) of the LOSC);
 - in the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (SRFC AO), the ITLOS was of the view that the flag State is under the obligation to inform the reporting State about the action taken.

Article 113 of the LOSC (ii)

- the provision speaks only about prescriptive jurisdiction;
 - » can a flag State avoid responsibility for cable or pipeline damage caused by a ship flying its flag, by merely having enacted relevant laws and regulations?;
- or is there beyond the direct obligation to have laws and regulations for damaging cables and pipelines on the books, a concurrent obligation for flag States to take appropriate measures to ensure compliance?
 - » yes, flag States are required under international law to take certain steps to prevent such an outcome;
 - » two paths can be identified when a flag State would be responsible for damage caused by vessels flying its flag, one which is built around the principle to not cause transboundary damage, the other if the flag State fails to effectively exercise jurisdiction and control over vessels flying its flag (Article 94 of the LOSC).

State Responsibility for Flag States: Not to Cause Transboundary Damage

- This principle originated in the *Trail Smelter* Arbitration of 1938.
- A State has the responsibility not to cause damage to another State because of activities having been undertaken in its territory, or “any area under its jurisdiction” (*Pulp Mills*, para. 101);
 - this obligation extends to activities that are not directly pursued by the State in question.
- No strict liability exists, however;
 - there will be no liability when the State has taken the required care in preventing the damage, or that the damage was unforeseeable (*Corfu Channel* Case).
- A ship that damages a cable or pipeline would clearly not be a territory of the flag State, but it would be under its jurisdiction as confirmed in Articles 92 and 94 of the LOSC.

Article 92 of the LOSC: Exclusive Flag State Jurisdiction

- Emphasis on the central role of the flag State:
 - jurisdiction over a vessel on the high seas, or in the EEZ (Art. 58(2) of the LOSC), resides ‘exclusively’ with the flag State (Article 92(1) of the LOSC);
 - “Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”
 - confers immunity on a ship from the interference of other States’ government vessels, except when based on:
 - ❖ consent;
 - ❖ treaty.
- The exclusivity that the flag State has over the ship damaging a cable/pipeline on the high seas, or in the EEZ, attributes the act to the flag State, in principle.

Article 94 of the LOSC: Effective Exercise of Jurisdiction and Control (i)

- With registration of a ship, whereby nationality is attributed by a State, comes responsibilities/obligations for the flag State.
- A key provision is Article 94 of the LOSC:
 - its scope of application is not limited to the high seas;
 - paragraph 1 provides that a flag State has to “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag”;
 - wording “administrative, technical and social matters” includes everything that concerns vessel operation;
 - wording “jurisdiction and control” encompasses prescriptive, adjudicative and enforcement jurisdiction;
 - in short, the flag State has to make such matters domestically enforceable.

Article 94 of the LOSC: Effective Exercise of Jurisdiction and Control (ii)

- paragraph 2 does not provide an exhaustive list as to the measures that must be taken by the flag State to effectively exercise its jurisdiction and control in administrative, technical, and social matters (*SRFC AO*, para. 117);
- paragraph 3 of Article 94 of the LOSC specifies examples of flag state measures that "are necessary to ensure safety at sea", but this is a non-exhaustive list;
- Article 94 of the LOSC is sufficiently broad worded to argue that in relation to cables and pipelines the flag State has to effectively exercise jurisdiction and control over its vessels to avoid damaging them;
- however, constitutes an obligation of conduct/due diligence.

State Responsibility for Flag States: A Lack of the Necessary ‘Due Diligence’ (i)

- Although dealing with different contexts, inspiration can be drawn from two advisory opinions (one by the Seabed Disputes Chamber, the other by the ITLOS) in which ‘due diligence’ was applied;
 - that is, the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (SRFC AO) and *Responsibilities and obligations of States with respect to activities in the Area*.
- The obligation to “effectively exercise jurisdiction and control” over fishing vessels would be one of “to ensure” (SRFC AO, par. 119);
 - the sponsoring State’s obligation “to ensure” is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations ... To utilize the terminology current in international law, this obligation may be characterized as an obligation “of conduct” and not “of result”, and as an obligation of “due diligence”. (*Responsibilities and obligations of States with respect to activities in the Area*, para. 110)
- In this light, the flag State must do “the utmost” (SRFC AO, para. 129);
 - “ it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result.” (*Responsibilities and obligations of States with respect to activities in the Area*, para. 110).

State Responsibility for Flag States: A Lack of the Necessary 'Due Diligence' (ii)

- Has sufficient diligence been had if the flag State has adopted laws and regulations, for example under Article 113 of the LOSC;
- According to the ICJ in *Pulp Mills*: “...due diligence is an obligation which entails not only the adoption of appropriate measures but also a degree of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators.” (para. 197);
- Similar in *SRFC AO*: “While the nature of the laws, regulations and measures are to be determined by each flag State, the flag state nevertheless has the obligation to include in them enforcement mechanisms to monitor and secure compliance with these laws and regulations. Sanctions...must be sufficient to deter violations and to deprive offenders of the benefits...”(para. 138).

A Heightened Due Diligence Obligation for the Flag State to Prevent Cable and Pipeline Damage?

- The standard of due diligence that is owed is not static;
 - it may vary over time and the diligence due would increase in parallel with the riskiness of the activity.
- “The content of “due diligence” obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that “due diligence” is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity...The standard of due diligence has to be more severe for the riskier activities.” (*Responsibilities and obligations of States with respect to activities in the Area*, para. 117)
- Due to the importance that cables and pipelines presently have, combined with that developments in technology have increased risks that they are damaged, would this raise the bar for the level of care due on the part of flag States to prevent this outcome?

Some Final Remarks

- There is fertile ground for arguing that the flag State could be responsible for the damage caused to cables and pipelines by vessels flying its flag;
 - although surely not all flag States are to warmly embrace this position.
- However, when a vessel damages a cable or pipeline this will not automatically result in responsibility for the flag State (no strict liability);
- The act must be attributable to the flag State, and the flag State must have breached an international obligation:
 - whether there is a breach of a flag State obligation may be entwined with whether it has made good faith efforts to ensure compliance with the laws and regulations the flag State is required to adopt respecting cable and pipeline damage by vessels flying its flag;
 - for example, when a flag State does not comply with its 'due diligence' obligations as part of the obligation to effectively exercise jurisdiction and control, there would be State responsibility, and liability for the damage.
- But perhaps it is good to keep in mind a consideration of the Arbitral Tribunal in *South China Sea* respecting (illegal) fishing: it is “often carried out covertly, far from any official presence, and it will be far from obvious what the flag State could realistically have done to prevent it.” (para. 754).

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Thank you for your attention

Any questions?

Youri.vanlogchem@uit.no

uit.no

