

## The 13<sup>th</sup> Global Ocean Regime Conference

The Law of the Sea and the Blue Economy in the Age of Climate Crisis: Emerging Challenges

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### Special Session: Protecting Submarine Cables: Legal Gaps and Global Imperatives

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The issue of the security of submarine cables and other underwater infrastructure has arisen following the breaking of cables by ships dragging their anchors in the Baltic and Scandinavia, and off the coast of Taiwan. The incidents have resulted a controversial court case in the domestic courts of Finland, and triggered legislation in Estonia extending its jurisdiction over ships suspected of cutting of cables in its EEZ. The incidents raise interesting questions on the adequacy of the provisions in the 1982 United Nations Convention on the Law of the (1982 UNCLOS).

#### **Issues under 1982 UNCLOS**

The right of coastal States to protect submarine cables landing in their territory has raised issues concerning the limited jurisdiction of coastal States over the activities of foreign ships in their exclusive economic zone (EEZ). The general principle governing jurisdiction over foreign ships outside the 12 nm territorial sea of a coastal State is that, except as expressly provided in the Convention, ships are subject to the exclusive jurisdiction of the flag State. The only provision in UNCLOS on the breaking or injury of cables is Article 113, which is in Part VII on the High Seas. Article 58(2) provides that Articles 88 to 115 apply to the EEZ insofar as they are not incompatible with the EEZ provisions.

Other provisions in UNCLOS also suggest that the breaking of cables is under the exclusive jurisdiction of the flag State. The breaking of cables or pipelines by the anchors of ships in the EEZ can be characterized as an “incident of navigation”. Under Article 94(7) of UNCLOS, the State has an obligation to cause an inquiry to be held if there is an **incident of navigation** on the high seas involving a ship flying its flag . . . and causing serious damage to . . . installations of another State. Furthermore, under Article 97 of UNCLOS, if there is an **incident of navigation** concerning a ship on the high sea involving the penal or disciplinary responsibility of the master or any other person in the service of the ship, **no penal or disciplinary proceedings** may be instituted against such person **except by the flag State or the State of which such person is a national**.

As a result of these provisions, arguments have been put forward on how the issue can be addressed within 1982 UNCLOS.

One argument that has been made is that that cutting of cables can be considered “piracy”. This is based on a creative interpretation of the definition of “piracy” in Article 101 of UNCLOS. The argument has been put forward that the breaking of a cable or pipeline can be considered piracy because it is an *illegal act of violence . . . committed for private ends by the crew of passengers of a private ship. . . and directed . . . against property in a place outside the jurisdiction of any State*.

Other commentators have pointed out that article 10 of *1884 Convention on Submarine Cables* permits the boarding and questioning of the crew by a coastal State party to the Convention. However, this provision only permits the questioning of the master and crew, and arguably would not allow a State to arrest the master and the ship. In any case, very few coastal States are parties to this convention.

The better solution seems to me to be for the international community to convince States parties to UNCLOS to implement their obligation under Article 113 of UNCLOS. Under Article 113, flag States have an obligation to adopt laws and regulations to provide that the breaking or injury by a **ship flying its flag** or by a **person subject to its jurisdiction** of a submarine cable beneath the high seas done **wilfully** or through **culpable negligence** in such manner as is likely to disrupt communications . . . shall be a **punishable offence**. Unfortunately, very few States have enacted legislation implementing Article 113. Therefore, this issue should be raised in the Legal Committee of the International Maritime Organization, and the IMO should adopt a resolution strongly encouraging States to implement article 113.

Another possible option is for coastal States to establish “cable protection zones” in their territorial sea and EEZ, and prohibit commercial ships from entering the zones. Australia and New Zealand have enacted such legislation. However, it is my understanding that Australia only enforces the regulations in their EEZ against ships flying the flag of Australia because they are concerned that they do not have jurisdiction over foreign ships in their EEZ.

The Baltic and Scandinavian States are the most concerned about this issue because both cables and pipelines have been cut in their region. Therefore, it is not surprising that proposals have been made for Estonia to extend its jurisdiction in its EEZ to take action, including the use of force, to prevent a threat to its underwater infrastructure from a foreign ship.

In my opinion, the better option would be for all flag States to implement their obligations under Article 113. In addition, flag State should require the master of a ship and the flag State administration to cooperate with the coastal authorities if they are advised that a ship flying its flag is suspected of damaging critical underwater infrastructure.

If flag States take no action to address this issue, it is likely that coastal States will feel it necessary to extend their jurisdiction to protect critical underwater infrastructure in their EEZ, notwithstanding the provisions in UNCLOS. Coastal States could attempt to justify their actions by the falling back on general principles of criminal jurisdiction such as the “protective principle” or the “effects doctrine”.

In the meantime, concerns over the safety of submarine cables and disputes over sovereignty and jurisdiction has resulted in cable companies laying submarine cables so that they avoid contested waters such as the South China Sea.

In addition, concerned coastal States have begun discussions with the cable industry to develop private sector-public sector partnerships to address the security of cables. This is critically important because the vast majority of cables are laid by private companies, not by States.

