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Marine Jurisdictional Problems for Submarine Cables

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Emerging Subsea Networks



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years
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Kent specializes in cross-border and national security regulation of telecommunications networks, investment, and technology and in law-of-the-sea issues. He works extensively in the undersea cable sector and has led various industry-wide regulatory reform and cable-protection initiatives. He has led many licensing and merger review proceedings for undersea cable operators and carriers before the FCC, Team Telecom, and the Committee on Foreign Investment in the United States. He chairs the undersea cable working group of the FCC's Communications Security, Reliability, and Interoperability Council and has long served as counsel to the North American Submarine Cable Association.

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Overview

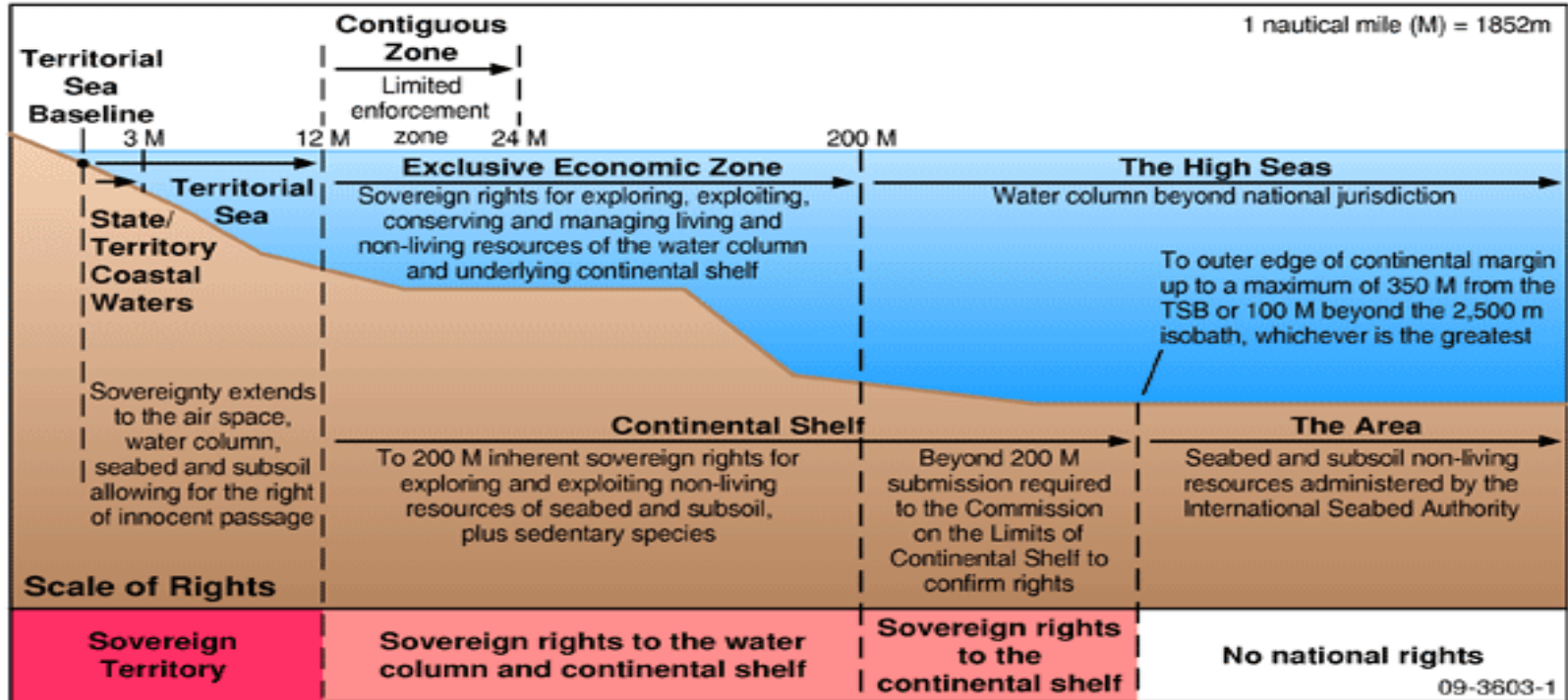
Rights of, and claims by, coastal states to maritime zones

- Territorial sea, contiguous zone, EEZ, continental shelf, high seas, and the Area

Problem areas

- Permissible but harmful assertions of jurisdiction
- Excessive assertions of jurisdiction inconsistent with international law
- Failure to coordinate marine activities and protect submarine cables
- Failure to address emerging technologies and industries
- Failure to plan adequately for future submarine cable development
- Lack of private right of action under international law
- Lack of framework for resolving territorial disputes under the United Nations Convention on the Law of the Sea (“UNCLOS”)

Maritime zones



Territorial sea

- A coastal state may claim a territorial sea extending up to 12 nautical miles beyond its land territory, internal waters, or archipelagic waters. UNCLOS art. 3.
- Within its territorial sea, a coastal state has rights and duties inherent in sovereignty (e.g., reservation of fisheries for nationals and exclusion of foreign vessels from cabotage), although the coastal state must accord to a foreign-flagged vessel the right of innocent passage.
- Coastal states can restrict or prohibit installation or repair of submarine cables in territorial sea, although WTO commitments may limit such restrictions or prohibitions.
- Territorial sea claims vary from 3 to 200 nautical miles, though a claim of 12 nautical miles is most common among coastal states.

Contiguous zone

- A coastal state may claim a contiguous zone extending up to 24 nautical miles beyond its land territory or internal (or archipelagic) waters. UNCLOS art. 33(2).
- Within its contiguous zone, a coastal state may exercise control necessary to “prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.” *Id.* art. 33(1).

Exclusive economic zone (“EEZ”)

- A coastal state may claim an EEZ extending 200 nautical miles beyond its land territory or internal (or archipelagic) waters. UNCLOS art. 57.
- Within its EEZ, a coastal state has the right to:
 - explore, exploit, conserve, and manage natural resources;
 - establish artificial islands, installations, and structures;
 - conduct marine scientific research; and
 - protect and preserve the marine environment. *Id.* art. 56.
- EEZ forms basis for most marine pollution control regulation by coastal states.
- A coastal state may exercise its rights within the EEZ **subject to freedoms of laying of submarine cables** and pipelines, navigation, and overflight. *Id.* art. 58(1).

Continental shelf

- A coastal state has a continental shelf, regardless of assertion, occupation, or control. UNCLOS art. 76(1).
- A coastal state's continental shelf comprises the submerged prolongation of the land territory of the coastal state, which UNCLOS defines in a very complex manner, or to a distance of 200 nautical miles where the outer edge of the continental margin does not extend that far. *Id.* art. 76(3).
- A coastal state has the sovereign and exclusive right to explore and exploit natural resources of its continental shelf. *Id.* art. 77.
- All states may install submarine cables and pipelines on the continental shelf and have due regard for cables and pipelines already in position. Possibilities of repairing existing cables and pipelines shall not be prejudiced. *Id.* art. 79.

Extended continental shelf

- The Commission on the Limits of the Continental Shelf (“CLCS”) adjudicates extended continental shelf claims, based on submission of scientific and technical data by a state party or parties. UNCLOS art. 76(8).
- For a state for which UNCLOS entered into force before 13 May 1999, this ten-year time period was deemed to have commenced on May 13, 1999.
- To date, 77 submissions have been made to the CLCS.

High seas

- The high seas consist of the seas outside of internal waters, territorial waters (or archipelagic waters, in the case of an archipelagic state), and EEZs of coastal states. UNCLOS art. 86.
- The high seas are not subject to the sovereignty of any state, although states should refrain from any acts that might adversely affect the use of the high seas by other states or their nationals.
- Freedoms of the high seas include: freedom of navigation; **freedom to lay submarine cables** and pipelines and construct artificial islands and other installations (with limitations relating to exploration and exploitation of natural resources); freedom of fishing (with certain limitations); and freedom of scientific research. *Id.* art. 87.
- Some states have asserted jurisdiction on the high seas under the “protective principle” against aliens for acts affecting security.

The Area

- The “Area” consists of “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.” UNCLOS art. 1.
- The Area and its resources are not subject to the exercise of sovereignty of any coastal state. *Id.* art. 137(1).
 - “Activities in the Area shall . . . be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked.” *Id.* art. 140(1).
 - The Area must be used “exclusively for peaceful purposes by all States.” *Id.* art. 141.
- The International Seabed Authority (“ISA”) regulates the exploration and exploitation of solid, liquid, or gaseous mineral resources in the Area at or beneath the seabed (including polymetallic nodules) and must provide for the equitable sharing of financial and other economic benefits derived from activities in the Area. *Id.* arts. 133(a), 156, 157, 160.

Permissible assertions of jurisdiction that harm submarine cable operators

- Cabotage restrictions in the territorial sea and archipelagic waters.
- Overly aggressive environmental regulation and permitting within the territorial sea.
- Compensation of commercial fishermen for lost fishing grounds, as in the case of Japan.

Cabotage

- Cabotage is coastwise trade, the transport of goods and passengers between two domestic coastwise points and (sometimes) the provision of maritime or infrastructure services in the territorial sea.
 - United States (Jones Act)
 - Indonesia (2008 Shipping Law)
 - India
- Potential responses and solutions
 - Engage early and often about the impact of cable-ship protectionism on domestic connectivity, economy, and national security, given the scarcity of cable ships.
 - Reflagging.

Overly aggressive environmental regulation

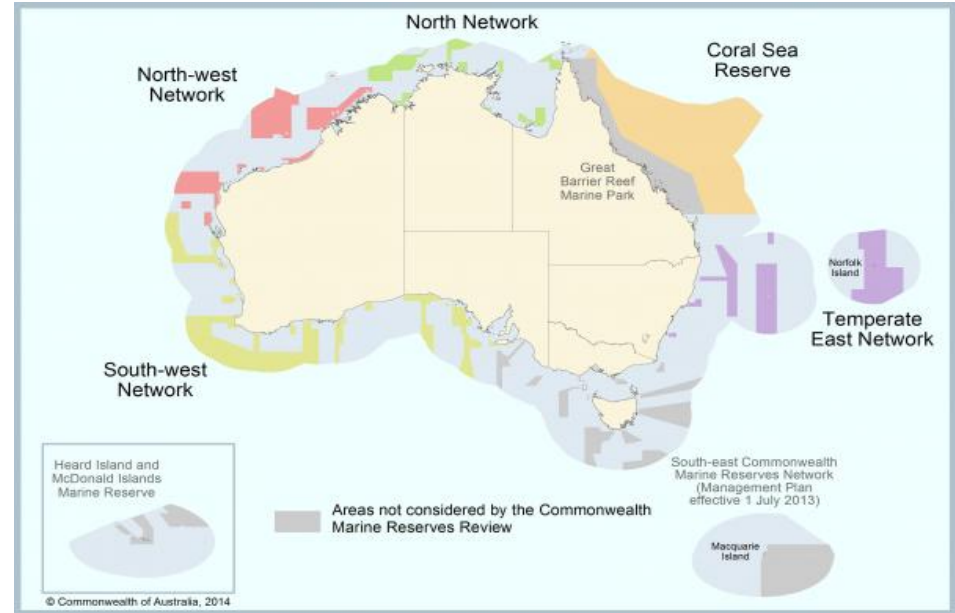
- Submarine telecommunications cables are often subject to the same extensive regulation as other marine infrastructure activities, particularly energy-related activities.
- Potential responses and solutions
 - Development of peer-reviewed research showing that submarine cable installation and maintenance activities and materials are benign
 - Establishment of permitting regimes unique to submarine telecommunications cables

Excessive assertions of jurisdiction inconsistent with international law

- Permitting requirements for surveys, installations, and repairs in EEZ
 - Claims that submarine cables are “installations and structures” in EEZ
 - Aggressive interpretation (or no recognition) of “due regard”
- Environmental regulation, *e.g.*, marine protected areas and regulation to protect marine biological diversity beyond national jurisdiction (“BBNJ”).
- Regulation of route surveys as marine scientific research, as many countries do.
- Assessment of taxes and customs duties on submarine cable equipment and services in the EEZ, as India does (simultaneously for the same value, in fact).

Australian marine reserves

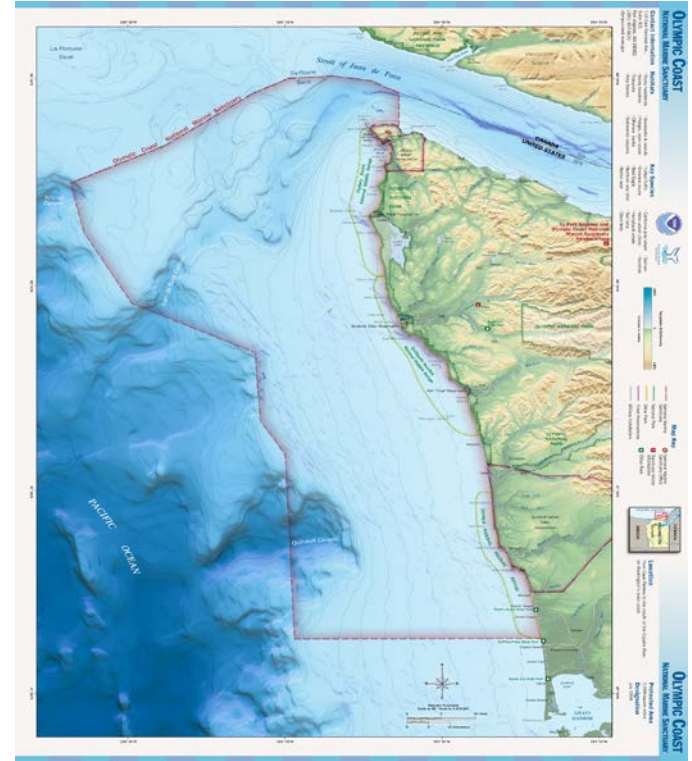
- Australia's ongoing marine reserves review proposed to treat submarine cable activities as "dredging," as no other category seemed to fit.
- Dredging activities would be prohibited in significant marine reserve areas.



Source: Australian Dep't of Environment

U.S. national marine sanctuaries

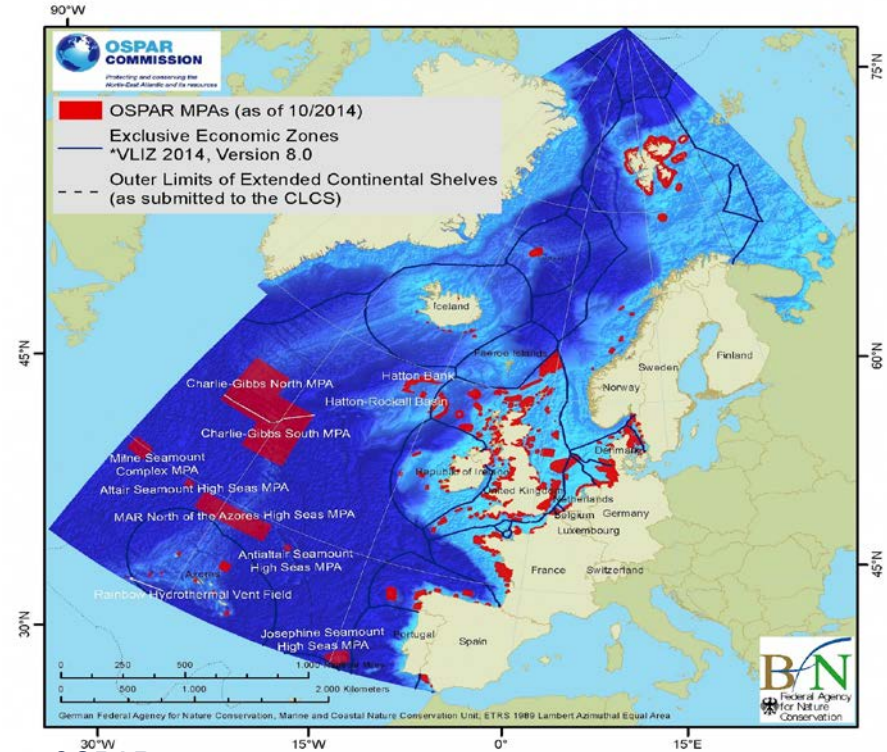
- Management of the Olympic Coast National Marine Sanctuary (“OCNMIS”) has effectively prohibited further submarine cable landings in Puget Sound and Seattle.
- OCNMS forced reinstallation of part of PC-1 to attempt to address suspended sections.
- All U.S. sanctuaries impose significant right-of-way fees.



Source: NOAA

Convention for the Protection of the Marine Environment of the North-East Atlantic (“OSPAR”)

- OSPAR seeks to protect the NE Atlantic—including EEZ and high seas areas—from impact of human activities.
- OSPAR has created marine protected areas.
- OSPAR developed guidelines on installation and operation of submarine cables without any telecom industry input.



Source: OSPAR

BBNJ regulation

- The United Nations has called for a new agreement to conserve and ensure sustainable use of marine biological diversity in areas beyond national jurisdiction.
- India has proposed a central repository of environmental impact reviews for activities conducted in areas beyond national jurisdiction and gating criteria for the conduct of such activities.

Potential responses and solutions to jurisdictional assertions inconsistent with international law

- Litigation and arbitration (requiring coastal state espousal of claim).
- Regular testing of limits of jurisdiction (as navies do in testing freedom of navigation).
- New multilateral treaty or UNCLOS implementing agreement (?)

Failure to coordinate marine activities and protect submarine cables

- Problems include:
 - Lack of understanding of spatial requirements for submarine cable installation and maintenance activities on ocean surface, in water column, and on sea floor.
 - Risks of direct damage (anchors, dredging, dumping)
 - Impeded access on ocean surface and to water column and sea floor
 - Lack of “due regard” for submarine cables already in place.
- Potential responses and solutions
 - Education
 - Establishment of single government point of contact and information clearinghouse
 - Establishment of coordination and consultation mechanisms across government agencies and ministries and international organizations regulating marine activities.

Failure to address emerging technologies and industries

- Renewable energy projects
 - Marine hydrokinetic projects
 - Ocean thermal energy conversion projects
 - Offshore wind farms
- Hybrid facilities
 - Submarine telecom cables connecting offshore oil and gas platforms
 - Submarine telecom cables deployed with sensors to gather marine data
- Deep seabed mining
 - ISA licensed exploration areas and created reserve areas without regard to existing submarine cables, although ISA is now seeking to address potential conflicts and is directly engaged with ICPC.

Failure to plan adequately for future submarine cable development

- Marine industries and activities are often regulated by separate agencies or ministries that do not consider the implications of foreclosing submarine cable routes and landings. This:
 - Limits route diversity;
 - Leads to clustering of submarine cables in excessively close proximity; and
 - Threatens continuity of communications and economic and security interests.
- Potential responses and solutions
 - Establishment of marine spatial planning activities that expressly include submarine cable operators.
 - Establishment of cross-industry planning bodies involving all affected industries and government entities at local and national level.

Lack of private right of action under international law

- Only state parties to UNCLOS may seek to enforce provisions of UNCLOS.
- Many states have created civil and criminal offenses for cable damage consistent with the 1884 Convention, and some have established private rights of action for cable damage. All such proceedings arise domestically.
- Potential responses and solutions
 - Some experts have called for the establishment of a submarine cable registry in a country, such as Singapore or Norway, that might be willing to espouse claims and assert protections on behalf of submarine cable operators more systematically.
 - Nevertheless, there is a danger that many coastal states could establish registries and require registration for cables that land in their territory or transit their EEZ or continental shelf areas, with risks of assertions in disputed areas and new fees and regulations.

Territorial disputes

- UNCLOS only establishes a framework for resolving maritime claim disputes.
- Yet many disputed maritime claims arise from disputes over land territory.
- Potential responses and solutions
 - Creation of bilateral or regional commissions to demarcate disputed areas and nevertheless permit commercial activities, as with the U.S.-Canada International Boundary Commission, which regulates terrestrial and marine activities within 10 feet of the boundary, regardless of disputes.
 - Creative litigation or arbitration under various international treaties.

U.S.-Canada International Boundary Commission

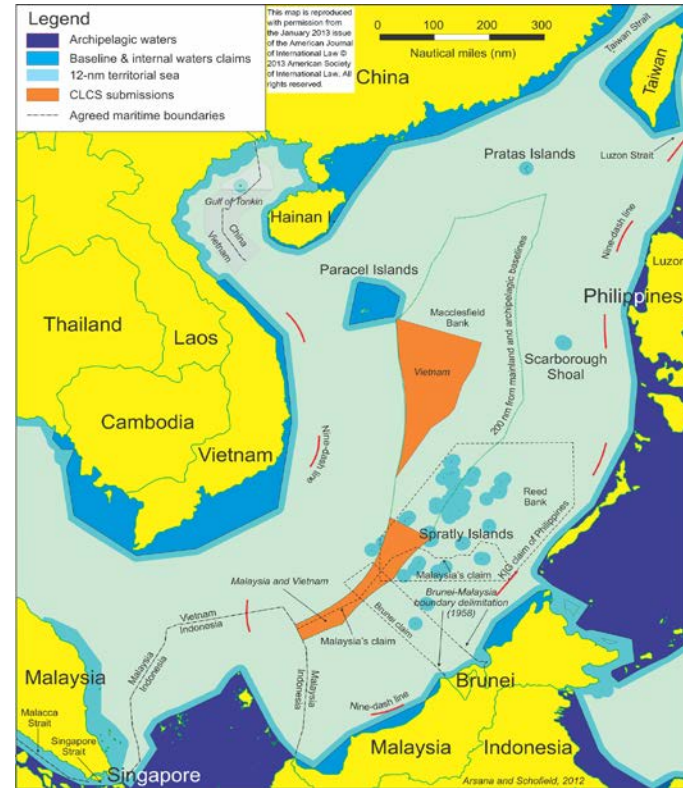
- U.S.-Canada International Boundary Commission regulates terrestrial and marine activities within 10 feet of the boundary, regardless of disputes.
- Most disputes are maritime-based, but the United States and Canada continue to dispute sovereignty over Macias Seal Island and related features.



Source: *Globe & Mail*

South China Sea disputes create uncertainty and risks

- China continues to assert jurisdiction within the historic “nine-dash line.”
- The Philippines sought arbitration under UNCLOS asserting that China’s historic claims are inconsistent with UNCLOS, otherwise based on marine features that fail to qualify as islands entitled to a territorial sea and/or EEZ, and infringe Philippine sovereignty.



Source: R. Beckman, *American Journal of International Law*

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