
DIGITAL DIVIDE AND THE LAW: A CRITICAL ANALYSIS OF THE LEGAL AND REGULATORY FRAMEWORK FOR THE DEPLOYMENT, OPERATION AND MAINTENANCE OF INTERNATIONAL SUBMARINE CABLES IN WEST AFRICA - THE MAIN ONE CABLE SYSTEM AS A CASE STUDY

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Abstract: This paper examines the core regulatory and permitting framework relevant to the deployment, operation and maintenance of a submarine cable system in West Africa, including the core permits that are required on a country-by-country basis. In appropriate cases, the process for obtaining the relevant permits will be highlighted. From a post-deployment perspective, the paper will also focus on the adequacy of the existing laws in the relevant jurisdictions as regards the protection of submarine cables.

1. INTRODUCTION

It is without dispute that the impact of the digital divide in sub-Saharan Africa is much more severe compared to the situation in other parts of the World. Accordingly, African governments now encourage telecommunications infrastructure projects that will further open the continent to the rest of the world, particularly in the area of regulatory reforms.

Over the years, the telecommunication sectors of most African countries have witnessed enormous growth; rapid mobile uptake and internet penetration is driving a spike in demand for international connectivity. Although there are a number of submarine cables in various stages of development on the East African coast, to date, the only international fiber-optic connection on the West coast of Africa is being provided by the SAT-3 cable.

Sometime in August 2009, about seventy percent of Nigeria's bandwidth capacity was reportedly severed when the SAT 3 was damaged, a development that had severe impact on the economy as most institutions were unable to provide relevant services to the populace. This incident brings to fore, the need for alternative

source of bandwidth capacity to the West African sub-region.

Thus the Main One Cable System Project (the "Project") is expected to provide the much-needed fiber-optic broadband connectivity to help meet the growing international connectivity needs of Africa, with particular, the West African Sub-region.

An analysis of the permits obtained by Main One in connection with the Project and the status of legal protection for cables in the region is discussed in this paper.

2. PROJECT STRUCTURE

The Project consists of approximately 12,378 kilometres of sub-marine fiber optic cabling based on a trunk and branch topology with proposed landing stations in Portugal, Morocco, Senegal, Cote D'Ivoire, Ghana, Nigeria (Lagos and Bonny), Congo, Angola, and further south to South Africa, with interconnection in Portugal to cable systems serving other geographies i.e. Europe, the Americas and Asia. The Project will adopt the Dense Wave Division Multiplex ("DWDM") fiber optic system technology and will provide a design capacity of 1.28 Tbps representing

approximately 10 times the current capacity of SAT-3.

Phase 1 of the Project will involve the establishment of landing stations in Lagos in Nigeria; Accra in Ghana; and Seixal in Portugal. Whilst the Company is constructing landing stations in Nigeria and Ghana, Main One will enter into a Landing Party Agreement (“LPA”) with TATA Communications (“TATA”) for the provision of its cable landing station at Seixal, Portugal. Landing with TATA provides Main One with a high quality, reliable solution through (a) TATA’s landing station at Seixal and also (b) onward bandwidth connectivity via Tata’s existing Tier 1 Western European Ring network.

3. INTERNATIONAL LAW AND CABLE INSTALLATION IN WEST AFRICA

Pursuant to the provisions of the United Nations Conventions on the Law of the Seas (UNCLOS), the laying of submarine cables in the high seas and on the continental shelves is not subject to restrictions.

However, regarding the territorial waters of each country, the UNCLOS grants jurisdiction over same with the attendant power to impose restrictions/regulations on its use to the relevant coastal country. Accordingly, the laying of submarine cables in the territorial waters of any particular country is subject to the laws of the relevant coastal country.

The aforementioned position is applicable to to be cables laid in the west coast of Africa. Nearly all of the countries in this region are signatories to the UNCLOS and these countries accorded due recognition to Main One’s unrestricted access to lay cables in the high seas bordering their territory. In cases where Main One had to lay its cables or conduct surveys within the territorial waters of some of these countries,

the procedure for and restriction on such installations were duly communicated to the Company.

4. PERMITS FOR DEPLOYMENT AND INSTALLATION OF CABLES IN WEST AFRICA

Prior to the installation of fibre-optic cables in the high seas, it is expected that a route survey will be conducted to determine the route of the cables and to also identify the peculiar nature of the route where the cable is being laid.

The result of the route survey is of particular importance as it will determine, among others, the kind of armour or protection that will be used for the cables and the extent to which it has to be buried under the sea to avoid damage thereto.

Accordingly, the first step in the installation of cables in the West coast of Africa is the procurement of Marine Route Survey Permit from all of the relevant countries. Main One was able to obtain Marine Survey Permits from countries including Nigeria, Ghana, Morocco, Cote d’voire, Liberia, Sierra Leone, Guinea Bissau, Togo, Benin, Senegal, Gambia etc.

The application process for Marine Route Survey Permit is mostly similar in these countries. A formal application is made to the relevant governmental agency in charge of the administration of maritime activities to conduct the survey and the permit is usually granted after due consideration and the payment of prescribed fees.

The support of the governments of the West African countries to the Main One Project was overwhelming in the course of the surveys. The governments realised the potentials the Project affords to the region in relation to digital penetration and in most of the cases, the surveys were completed far ahead of schedule.

After a final determination of the cable route, the next significant permit to be obtained is the permit to install the cables.

The usual procedure is for the installation permit to be granted after the completion of the marine route survey. This is to forestall a scenario where the results of the route survey make the installation of the cable in the relevant territory impracticable.

An application for the installation permit is filed with the relevant government agency along with the results of the marine route survey. In Nigeria, the relevant agency is the Nigerian Maritime Administration and Safety Agency (NIMASA). The application will identify the exact points where the cables will be installed and will be supported with the consents/approvals obtained from the owners of any pipelines, pre-existing cables or other marine installations that will be affected by the proposed installations.

The commitments of the governments of the relevant West African countries to cable infrastructure and the attendant digital advantage is further displayed in the willingness of these governments to grant installation permits along with the permits to conduct route surveys as done in respect of Main One. There were however certain countries which required that the surveys be completed, and the reports of the survey filed with them prior to the issuance of the permits to install.

5. PERMITS TO OPERATE FIBRE OPTIC CABLES

In addition to the permits to survey and install the cables, where the intention is to operate the cables and provide capacity to customers in some of these jurisdictions, there are additional permitting requirements over and above the survey and installation permits.

In respect of the Main One Project, there were proposed landing stations in Nigeria and Ghana. Accordingly, there was need to obtain additional range of permits for these countries. These permits include:

Nigeria:

- i. System Operating Permit: Section 31 of the Nigerian Communications Act provides that “no person shall operate a communications system or facility nor provide a communications service in Nigeria unless authorised to do so under a communications licence or exempted under regulations made by the Nigerian Communications Commission” (“the NCC”).

An entity interested in deploying and operating a fibre-optic cable system in Nigeria is required to obtain an International Submarine Cable Infrastructure and Cable Landing Station Licence (“ISCL”): from the NCC. The first of this licence to be issued in Nigeria was issued to Main One and the procedure for obtaining same is set out in the NCC’s guidelines.

- ii. Environmental Impact Assessment Approval (EIA): An entity interested in deploying cables within Nigeria’s territorial waters is required to obtain an EIA from the Federal Ministry of Environment (“the Ministry”).

The procedure for obtaining the EIA is quite lengthy and starts with an application being filed at the Ministry and the payment of relevant application fees. An EIA report will be prepared by the prospective cable company which will be filed with the Ministry. An inspection of the cable landing site will be conducted by officers of the Ministry as part of the application process before the EIA is granted.

There is also an EIA approval to be obtained from the relevant state government in Nigeria where the cable is landing. In the case of the Main One, the landing station in respect of Phase 1 is being constructed in Lagos and thus an application for EIA was also made to and obtained from the Lagos State Environmental Protection Agency (LASEPA).

- iii. Building Permit: The deployment and operation of a submarine cable system usually involves the construction of a cable landing station in the relevant jurisdiction.

In Nigeria, it is required that a building permit will be obtained from the Urban and regional planning department of the Government of the State where the cable landing station is to be constructed.

- iv. Nigerian Maritime Administration and Safety Agency (NIMASA): The landing and installation of the cables within the Nigerian territorial waters will also require consents from the NIMASA being the agency in charge of the administration of the Nigerian maritime industry.
- v. Nigerian Navy: The approval of the Nigerian navy is also critical to a successful installation of the cables.

Ghana

- i. System Operating Permit: As in Nigeria, the National Communications Authority Act of Ghana imposes restrictions on the ability of a company to render telecommunication services in the country.

The Act provides that “no person shall establish, install, operate or otherwise use a communications system or provide communications services in

Ghana unless he has been granted a license by the authority”.

The Act further provides that “a person shall not qualify to operate a communication service unless: a) a citizen of Ghana; or b) a body corporate registered under the Companies Code, 1963 (Act 179); or c) a partnership registered under the Incorporated Private Partnerships Act, 1962.

An entity interested in deploying and operating a fibre-optic cable system in Ghana is required to obtain a Licence for the Installation of a Submarine Cable Landing Station from the NCA. This licence was also issued to Main One in respect of its operations in Ghana.

- ii. Ghana Environmental Protection Agency: An EIA approval is also required for the deployment of fibre-optic cables in Ghana.
- vi. Ghana Maritime Authority: The installation of cables within the Ghanaian territorial waters requires consents from the Ghana Maritime Authority.
- vii. Building Permit: The construction of a cable landing station in Ghana requires a building permit from the relevant metropolitan assembly or local council.

6. PROTECTION OF CABLES IN WEST AFRICA

As mentioned above, about seventy percent of Nigeria’s bandwidth capacity was reportedly severed when the SAT 3 was damaged in August, 2009. Apart from the need for alternative source of capacity, this incident brings to fore, the importance that should be given to the protection of cables in the West African sub-region.

The UNCLOS provides for the protection of cables in the High Seas and in the

Exclusive Economic Zones (EEZS) of coastal countries by making it a punishable offence not only to break a cable but also to “engage in conduct calculated or likely to result in such breaking or injury”. Whilst most of the countries on the West coast of Africa have ratified or are signatories to the UNCLOS, quite a number of these countries have not established adequate domestic laws providing for effective penalties against such violations.

In Nigeria specifically, there are no local laws protecting owners of submarine cables from damages that may be caused by fishermen in the course of their business. In the absence of such statutory enactments, cable owners will have to resort to law of torts to seek redress in the event of such damage.

7. CONCLUSIONS

From the foregoing analysis, it is clear that the desire of the governments of West African countries to bridge the digital divide between the region and the rest of the world has had significant impact on the liberalisation of the permitting framework for the operations of submarine fibre optic cables in the region.

A company interested in fibre-optic cable installation in the region will discover that the system is far more conducive to such projects, compared to the situations in the late 90s. A further proof of this is the ISCL that was recently issued to MTN Nigeria Telecommunications Limited in respect of another proposed fibre-optic cable installation connecting the West African sub-region with landing station in Nigeria. This brings to three, the number of cables currently being constructed in the region.

There is however much work to be done in the area of protection of submarine cables in the region, particularly from the activities of fishermen. Considering the potential damages that cable cuts can have

on the digital drive of the West African Governments, the need to guarantee the integrity of submarine cables is essential to avoid interruptions affecting international traffic to and from the sub-region.

It is believed that statutory enactments imposing high economic sanctions for damages to cables will go a long way in alleviating the situation. It has been suggested that the best model legislation for protecting submarine cables is the Australian 2005 legal framework (summarised in the Protection of Submarine Cables and Other Measures Bill 2005). The framework establishes corridor systems between cable systems where certain fishing activities are prohibited and high penalties imposed.

Apart from statutory penalties, there is also a need to create awareness among the citizens and governmental agencies to the potential effects of cable cuts to the economy of the country and the entire region as a whole.

8. REFERENCES

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