

JURISDICTIONAL CREEP AND THE RETREAT OF UNCLOS

Denise Toombs (ERM) and Roy Carryer (Alcatel-Lucent Submarine Networks)
Email: denise.toombs@erm.com

ERM
1277 Treat Blvd., Suite 500
Walnut Creek, CA 94597
USA

Abstract: The submarine cable industry has long held the view that in most instances coastal states have jurisdiction over cable installation and related operations only within their territorial seas. It is evident that the coastal states themselves, in apparently increasing numbers, do not share this view. States becoming active in exploiting and/or conserving natural resources in their exclusive economic zones (EEZs) are using the regulatory regimes controlling these activities to catch submarine cables in their jurisdictional nets. This Paper will show, through examples, how states are exercising ever-broader powers outside their territorial waters, frequently asserting control over activities that the industry considers to be basic “freedoms” under the United Nations Convention on the Law of the Sea (UNCLOS). The authors’ objective is to present issues and potential solutions from a project management and operational standpoint, and to leave legal interpretation in the capable hands of legal experts.

1. OVERVIEW

Coastal states have exclusive jurisdiction over their territorial seas [1]. Submarine cables (unlike vessels in “innocent passage” through territorial seas) enjoy no exemptions whether they are entering territorial seas to land or to transit through them.

Outside territorial seas, but within maritime areas defined either as EEZs or continental shelves, the industry has long considered that, with few exceptions, it has the right to install and repair cables without a requirement to obtain permits from the coastal state. Such rights are derived mainly from the restrictions on the powers of coastal states contained in UNCLOS. It is not the purpose of this paper to analyze the legal bases for these rights, but rather to examine the trends that are leading to the rights being ignored, overridden or challenged more and more frequently during the implementation of submarine cable projects.

2. INDUSTRY EXPECTATIONS

The submarine cable industry has accepted that coastal states have jurisdiction over cable installation and related operations, such as surveys and repairs, within their territorial seas.

What does “*have jurisdiction over*” look like from the bridge of a cable ship or in a project’s matrix of required approvals? Starting at the beach manhole and ending 12 nautical miles offshore—the boundary of territorial seas as defined in UNCLOS—the cable industry has grown to expect any or a combination of the following requirements for an installation:

- Environmental permits, usually backed by environmental impact assessments (EIAs) or similar documents, and oversight by environmental monitors;
- Seabed leases and concessions;
- Franchises, landing licenses;
- Vessel and beach works notifications;
- Fishing liaison and agreements; and

- Post-lay verification and documentation.

Outside of territorial seas, and within the EEZ, approvals and notification requirements have generally been less onerous, if they are imposed at all.

But this has been changing.

3. JURISDICTIONAL CREEP AND THE NEW RITES OF PASSAGE

The boundary of territorial waters is no longer the line in the sediment it was once thought to be. The jurisdiction of coastal states is creeping into the EEZ and beyond.

In the majority of cases, jurisdiction over submarine cable installation and repair is creeping into the EEZ and continental shelf areas as an *indirect* consequence of the more general extension of coastal state interests in these areas. The interests are most often economic—including oil and gas exploration and production, fisheries, mineral or aggregates extraction—but may also be driven by environmental policy such as the declaration of protected sites or critical habitats for endangered or threatened species. The latest trends marry the economic with the environmental in the search for sites for offshore windfarms that may extend outside territorial seas.

The examples we explore in this Paper fall into five categories:

- Coastal state law in conflict with UNCLOS;
- Ad hoc decision-making by officials of the coastal state;
- Habitat and species protection;
- Fisheries protection measures; and
- Resource exploitation in the EEZ and on the continental shelf.

Coastal State Law in Conflict with UNCLOS

Some coastal states that are signatories to UNCLOS have domestic legislation,

sometimes but not always pre-dating the Convention, requiring permits for surveys and/or cable lay on their continental shelves or in their EEZs. For example, Malta requires a license to be obtained under its Continental Shelf Act 1966, including an annual fee. Spain, under its Law of Coasts (*Ley de Costas 1988*), requires permits and environmental documentation for cable installation in its EEZ and Fisheries Zone.

Another subcategory relates to permitting requirements imposed under legislation for which the limit of jurisdiction is not clearly defined, but which in practice is interpreted as including the EEZ. In South Africa, for example, Environmental Authorizations for cable projects granted under the National Environmental Management Act 1998 are considered by the competent authority to include the EEZ.

Even very recent legislation, such as that introduced in Australia in 2005 [2], includes cable permitting requirements extending outside the territorial sea whether or not the cable is to be installed in one of several declared protection zones.

Ad Hoc Decision-making by Officials of the Coastal State

Experience shows that the determination that coastal state permission is required for survey, cable installation and repair outside the territorial sea is very often based on ad hoc decisions by officials of the coastal state. These are the occasions when the authorities, typically the Navy or the civil maritime authorities, intervene in the works and require them to cease pending the grant of permits. Arguing UNCLOS rights in such circumstances is unlikely to be productive. Such interventions, in fact, usually occur without UNCLOS rights even being considered. It is simply assumed by the officials that there must be an infringement because the vessel has not been explicitly authorized to carry out the

works in waters considered to be under the control of the coastal state.

Habitat and Species Protection

Designated conservation areas and critical habitats affect approvals for and conditions of cable installation, including routing, outside territorial waters.

The UK provides an example of protected areas being extended outside the territorial sea. The offshore implementation of the EU Habitats Directive was initially thought by the UK Government to extend only to the territorial sea. As a result of a High Court decision in 1999 in favor of Greenpeace [3], however, the Directive was held to extend across the continental shelf and the UK Exclusive Fisheries Zone. In 2007, regulations were introduced extending powers to designate Special Areas of Conservation (SACs) outside the territorial sea [4]. The UK authorities have already sought to control the routing of one new submarine cable system initially planned to enter a SAC located outside the territorial sea.

Similarly, in the U.S., resource protection review and measures are not necessarily restricted to the territorial sea. Permits for cable laying are contingent upon consultations with resource agencies, which address activity in the EEZ and continental shelf as part of the consultation. This may result in mitigations or other conditions to protect fish habitat or marine mammals in the EEZ. Environmental protection in the EEZ is allowable under UNCLOS, but, as applied, essentially extends permit requirements beyond the territorial sea.

As an example, the U.S. National Oceanic and Atmospheric Administration (NOAA) has issued a proposed rule to expand critical habitat for the endangered leatherback sea turtle by designating more than 70,000 square miles in three areas in the Pacific Ocean off the coasts of

California, Oregon and Washington [5]. These areas are outside the territorial sea in some locations, but within the EEZ. The rule is currently proposed as of this writing, thus specific permit requirements are unknown. However, at a minimum such a rule would trigger consultation and potential mitigations to be applied to cable-related activities in these areas.

In a more extreme example of jurisdictional creep, NOAA applied its evaluation of marine species impact and protection to an *entire* installation, into the high seas and another coastal state's EEZ and territorial sea. In the end, mitigation measures outside territorial waters were not incorporated into the permit conditions; however, the effort required to secure this result may be repeated on other projects in the future.

Fisheries Protection Measures

During the evaluation of several cable systems around the year 2000, California agencies used the 1,000-fathom (approximately 2,000 meters) contour as the analytical boundary for the fishery impact analysis. As a result, measures to protect commercial fisheries apply outside of territorial seas. Measures included cable burial and onboard fishery observers.

Resource Exploitation in the EEZ and on the Continental Shelf

Under UNCLOS, coastal states have sovereign rights to exercise jurisdiction over resource exploitation, scientific research and environmental protection in their EEZs. The protections under UNCLOS have potential to encroach on some of the freedoms previously expected for submarine cable installation and operation:

- Designated oil and gas blocks in the EEZ may have regulatory regimes associated with them that also control and encumber cable laying and maintenance activities. Separate

easements are sometimes required through oil and gas blocks.

- Cable surveys are treated as “marine scientific research” by some coastal states, which subjects such activity to requirements ranging from licensing restrictions to data-sharing.
- Because lease areas for resource extraction are essentially treated as a “property right,” some operators attempt to impose their own restrictions within a lease block.

4. MANAGING CREEP

The examples noted above are not inclusive of what the industry is experiencing globally. Although UNCLOS provides a framework for managing ocean activities and resources, it is clear it does not provide the industry with a universal regulatory mechanism in practice. Because the industry—by its technical and economic scope—is global, it requires an investment of time and money to decipher the permitting regime for each survey or installation into a new area.

Short of a new Law of the Sea Convention to resolve some of the greatest inconsistencies, is there something the industry can do to contain and manage them?

It is the responsibility of each prospective system developer to conduct its due diligence (typically beginning with the feasibility or desktop study) to assess the specific requirements and restrictions of a given area. That will not and should not change. There are some steps, however, that developers and the industry can take to reduce the anxiety and uncertainty surrounding jurisdictional creep:

- Monitor trends experienced by the industry in various regulatory regimes;
- Manage and resolve issues at the project level; and
- Long-range policy changes.

Monitor Trends in Regulatory Regimes

There is an abundance of information on regulatory regimes from individual projects. Some are publicly available, while others are proprietary and not generally known outside of a specific project or legal arrangement. If this information (collected at a fairly general level) were compiled centrally, for example by the International Cable Protection Committee (ICPC), trends in requirements for surveys, cable installation, and repairs could be seen by region.

This effort would not eliminate the need to determine and negotiate site-specific requirements, but it could reduce the time and uncertainty at the front end of an activity by identifying areas known to have requirements that potentially conflict with UNCLOS. Over time, it could also be used to draw comparisons between coastal state requirements, assess the roots of the inconsistencies and focus attention on high-priority issues and geographical areas.

Confidentiality would need to be managed, but cable fault databases provide a model for collecting industry information, while acknowledging the need for some information to remain proprietary.

Manage and Resolve at the Project Level

At the project level, requirements need to be identified and implemented expeditiously to meet project schedules and to reduce time for repairs. There is no time to debate or ruminate about UNCLOS when the ship is about to sail; however, the actions taken at the project level today become tomorrow’s accepted practices, and so it is important to avoid actions taken under schedule pressure that could set long-term precedents.

Be aware and informed of potential conflicts – Be prepared. Conduct due diligence and be as prepared as possible to avoid last-minute surprises.

Within legal bounds, avoid accepting conditions or requirements applicable to the EEZ to the extent feasible – Before accepting conditions, determine whether they are necessary to conduct the activity legally in accordance with the coastal state's laws, or simply recommended. There may be other means to address resource protection concerns besides mitigation measures. For example, the scope of an EIA may be able to resolve concerns about impacts without imposing restrictions in the EEZ.

Look for opportunities to build repairs into the permits-in-principle – If repairs are addressed up front in the permit(s)-in-principle and/or EIA, there may be opportunities to “pre-approve” repair activity, rather than waiting to raise these issues in emergency situations.

Long-Range Policy Changes

Recent papers and presentations suggest a range of actions to help the industry conduct its business efficiently and legally throughout the world. For this Paper, we focus on actions within the industry's control.

The critical interface for problematic and contentious decisions tends to occur at the staff level within agencies, and frequently during emergency situations (repairs); as such, it is unreasonable to expect dispersed and diverse personnel to have a working knowledge of UNCLOS.

Rather than push for an international or coastal state body to create a central lead, consider having the industry take the first steps to:

- Develop a concise set of descriptions of survey, repair and lay activities that can be used to convey the purpose of the vessel activity.
- Create a “registry” that can be used by various countries to recognize legitimate operators.

- Identify a central body to lobby for a universal system whose benefits to coastal states include: promotion and protection of critical infrastructure; a central point of contact for each coastal state; and improved security information of cable ships.

5. SUMMARY AND CONCLUSIONS

This Paper has sought to identify the reasons why coastal states are increasingly exercising jurisdiction over submarine cable installation and repair outside the territorial sea. The industry need not feel targeted and persecuted, because the key conclusion is that the trend is mainly an unfortunate by-product of a more general application of state-licensed economic activity and nature conservation measures to these sea areas. These trends have compounded longer-term problems arising from conflicts between UNCLOS and national law, and interventions by officials with little or no comprehension of the Convention or the rights that it grants to the submarine cable industry.

6. REFERENCES

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