

Legal Opportunities and Risks with Dual-Purpose Submarine Cables

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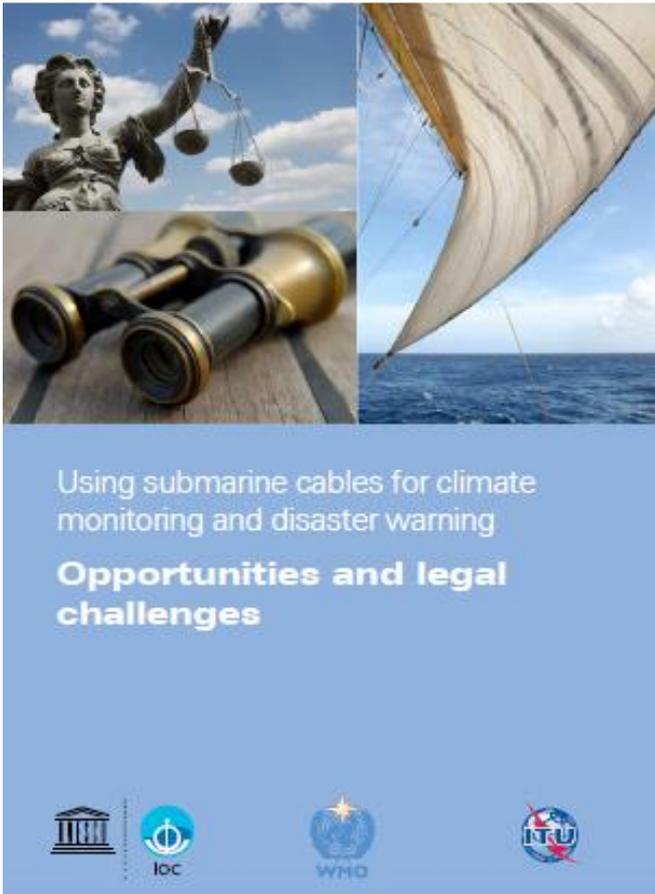
Submarine cables and tsunami warning

- ICPC supports the development of new technologies, including sensing capabilities, that enhance submarine cables' economic and social benefits and assist in protecting the cables themselves.
- ICPC's members have participated in the SMART Cables Task Force almost since its inception, providing technical and legal support and funding and to identify opportunities for low-risk pioneer deployments.
- ICPC's members have also installed many single-purpose submarine cables devoted to scientific observatories and tsunami warning.
- ICPC remains neutral on the concept of purpose cables that combine telecommunications with marine data collection due to the uncertain legal environment and variations in state practice.
- ICPC opposes government mandates requiring use of sensors on cables, principally because the requirement of one state can cause jurisdictional concerns with other states.

Potential trade-offs

- Dual-purpose submarine cables can be deployed to collect data to enhance our understanding of the oceans, the environment, and climate change, as well as to warn against natural disasters such as tsunamis.
- In some scenarios, however, dual-purpose cables could unintentionally:
 - Erode submarine cable protections under international law
 - Encourage excessive regulation by coastal and transit states that could increase costs and delays for installations and repairs
 - Encourage requirements to change routes or use devices or configurations that could compromise submarine cable performance
 - Raise security and surveillance concerns and render cables as targets
 - Raise concerns about unauthorized exploration for natural resources, either on the continental shelf or in the Area

2012 Report for the SMART Cables Task Force

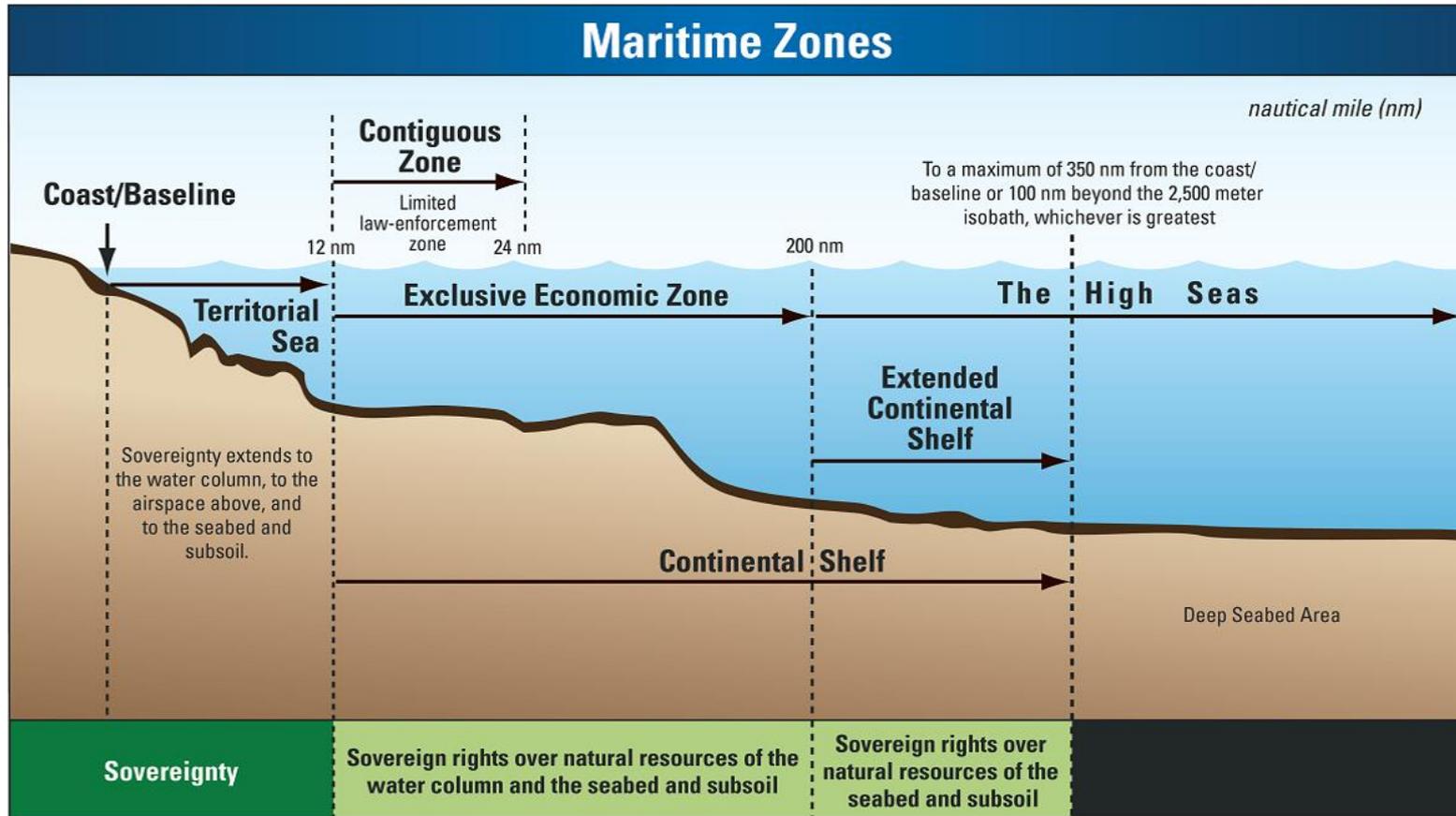


- Report examines in a dispassionate fashion:
 - Treatment of dual-purpose submarine cables under international law
 - The potential erosion of submarine cable protections under international law
 - Easier cases where dual-purpose cables are more likely to be developed
 - Harder cases where dual-purpose cables are likely to be regulated as MSR
 - Potential security concerns

Submarine cable freedoms under the United Nations Convention on the Law of the Sea (“UNCLOS”)

- States that negotiated UNCLOS recognized “the desirability of establishing . . . a legal order for the seas and oceans which will facilitate international communication.” (UNCLOS preamble)
- **High seas:** all states are entitled to install and maintain submarine cables (UNCLOS arts. 87(1) & 112(1))
- **Continental shelf:** all states are entitled to install and maintain submarine cables, subject to reasonable measures of the coastal state with respect to exploration of the continental shelf and exploitation of its resources (UNCLOS art. 79)
- **Exclusive economic zone:** all states are entitled to install and maintain submarine cables (UNCLOS art. 58(1))
- **Territorial sea:** coastal states may regulate submarine cable installation and repair (UNCLOS art. 2)

Maritime zones under UNCLOS



No agreed treatment of dual-purpose cables under UNCLOS or customary international law

- UNCLOS establishes separate legal regimes for submarine cables, marine scientific research (“MSR”), and energy and mineral exploration and exploitation.
- Neither UNCLOS nor customary international law classifies dual-purpose telecommarine data cables definitively as MSR.
- UNCLOS does not define “submarine cable” or “MSR.”
- Coastal states have hotly disputed the scope and meaning of MSR since the earliest negotiations over UNCLOS, and the resulting UNCLOS provisions essentially sidestep this dispute, rather than resolve it.
- Consequently, there is little agreement on the ordinary meaning of UNCLOS’s MSR provisions, including its application to dual-purpose submarine cables.
- The case of the Argo floats illustrates the risks.

Jurisdictional creep

- Submarine cable operators seek to protect submarine cables from excessive assertions of jurisdiction and excessive coastal state regulation, particularly measures that could compromise system reliability or performance.
- Some coastal states either ignore EEZ and continental shelf freedoms in UNCLOS articles 58 and 79 or wrongly assert that submarine cables are installations or structures subject to coastal state permitting and regulation.
- With some states, the introduction of marine data-gathering capabilities on submarine telecommunications cables could provide an additional pretext for excessive regulation.
- Cable owners are concerned that sensing capabilities for cable protection purposes could be misconstrued as a basis for additional regulation.
- Coastal state permitting requirements increase costs and timeframes for installation and repair, harming continuity of communications.

Security

- As compared with 2012 (the date of the legal report for the SMART Cables Task Force), security concerns relating to submarine cables have increased significantly.
- Governments are increasingly concerned about protecting submarine cables from intentional damage and sabotage.
- Governments are also increasingly suspicious of submarine cables with surveillance capabilities, particularly in relation to vessel detection—reflecting an awareness that a number of countries already operate military submarine cables for vessel detection purposes.

Easier cases for dual-purpose submarine cables

- **Easier case 1:** deployments on the high seas and in the Area
- **Easier case 2:** deployments in the EEZs and continental shelf areas of coastal states that do not treat routine ocean data gathering as MSR.
- **Easier case 3:** deployments in EEZs and continental shelf areas by domestic entities, regardless of whether activities are classified as operational oceanography or MSR

Harder cases for dual-purpose submarine cables

- **Harder case 1:** coastal state regulates deployment and operation of sensors in EEZ and continental shelf (whether for transit or in connection with a landing in that state) as MSR
- **Harder case 2:** coastal state in which a cable lands regulates entire dual-purpose cable as MSR on theory that sensors anywhere deployed “taint” the entire cable
- **Harder case 3:** coastal state regulates, damages, or disables dual-purpose submarine cable on the continental shelf as security threat
- **Harder case 4:** coastal state regulates dual-purpose cable on the continental shelf as resource exploration activity

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