

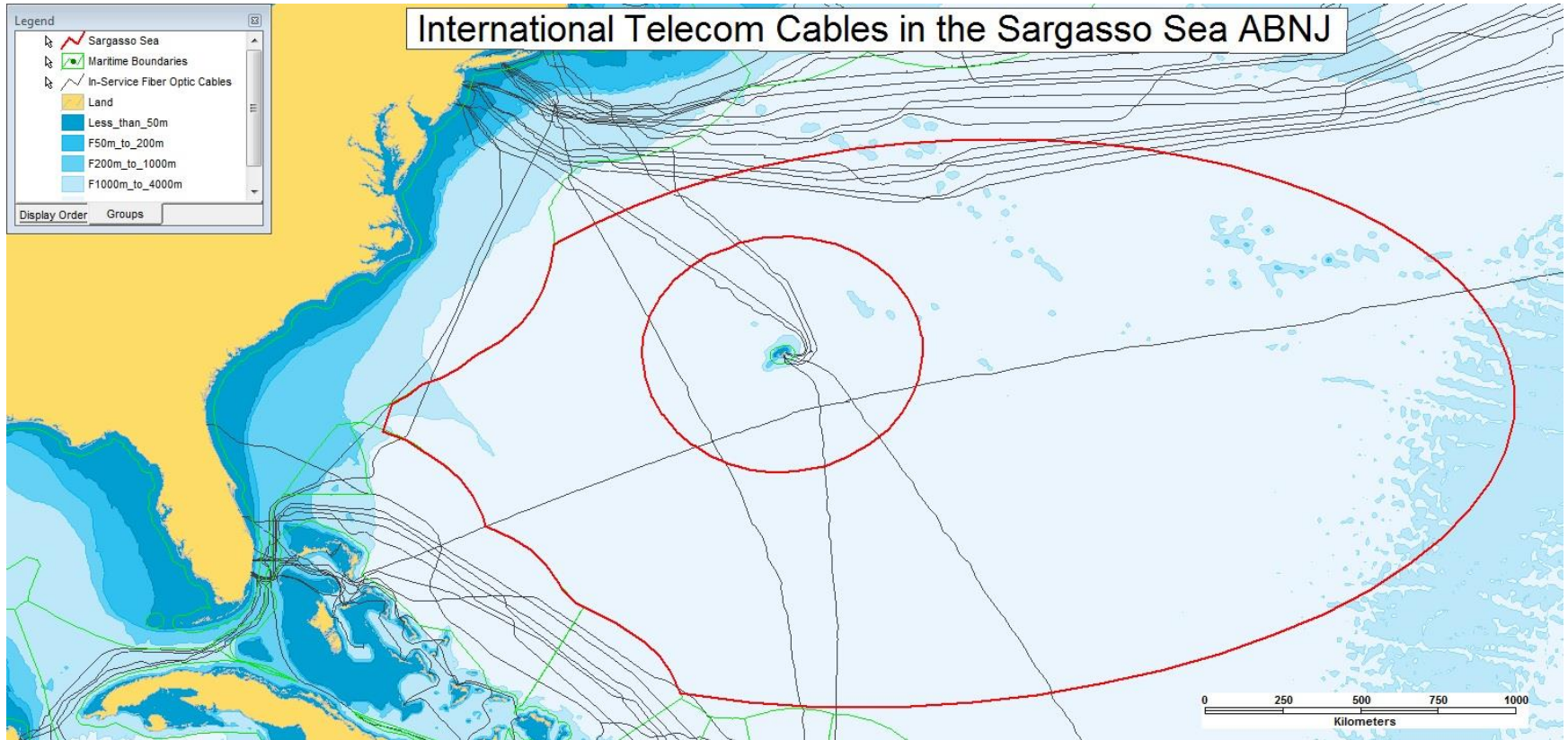
Submarine Cables in the Sargasso Sea
Legal and Environmental Issues in Areas
Beyond National Jurisdiction
The Legal Framework under UNCLOS

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23 October 2014



The Area of Focus



International Submarine Cable Systems Transiting Sargasso Sea

System Name	Ready For Service year (upgrade)	Length (Overall) KM	Owner	Landing Points
APOLLO	2003 (2012/2014)	12,700	Alcatel, Apollo SCS Limited C&W	Brookhaven (USA), Lannion (France), Manasquan (USA), Widemouth (UK)
CB-1	2009	1,448	Cable Company Ltd., Verizon	Bermuda, Charleston, RI (USA)
COLUMBUS III	1999 (2012)	9,833	Columbus III Consortium	Conil (Spain), Hollywood (USA), Lisbon (Portugal) Mazara (Italy), Ponta Delgada (Portugal)
GEMINI BERMUDA	2007	1,500	C&W, Verizon	Manasquan (USA), Bermuda
GLOBENET	2001 (2010)	22,960	Globenet	Bermuda, Boca Raton (USA), Fortaleza (Brazil), Maiquetia (Venezuela), Rio de Janeiro (Brazil) Tuckerton (USA)
MAC	2000 (2010/2011)	7,461	Global Crossing	Brookhaven (USA), Hollywood (USA), St Croix (US Virgin Islands)
TAT 14	2001	15,453	TAT-14 Consortium	Blaabjerg (Denmark), Katwijk (Netherlands), Manasquan (USA), Norden (Germany), Saint-Valery-en-Caux (France), Tuckerton (USA), Widemouth (UK)
TGN TRANS-ATLANTIC	2001 (2013)	12,670	Tata Communications	Highbridge (UK), Saunton Sands (UK), Wall Township (USA)

Treaties and Agreements with Express Reference to Submarine Cables

- 1884 Submarine Cables Convention
- 1958 Continental Shelf Convention (N/A in ABNJ)
- 1958 High Seas Convention
- 1972 Collision Regulations
- 1982 Law of the Sea Convention
- Most comprehensive is LOS Convention

United Nations Convention on the Law of the Sea (1982)

- The preamble of UNCLOS state, in part:
 - Recognizing the desirability of establishing through this Convention, with due regard to the sovereignty of all States, a legal order for the seas and oceans which will facilitate **international communication**...
- The official position of the UN on this issue:
 - “Beyond the outer limits of the 12NM territorial sea, **the coastal State may not (and should not) impede the laying or maintenance of cables**, even though the delineation of the course for laying of pipelines [**not cables**] on the continental shelf is subject to its consent”
 - Response to Question #7, Frequently Asked Questions at UN website:
www.un.org/Depts/los/LEGISLATIONANDTREATIES/frequently_asked_questions.htm

Article 87. Freedom of the High Seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
 - a. freedom of navigation;
 - b. freedom of overflight;
 - c. **freedom to lay submarine cables and pipelines**, subject to Part VI; . .
2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

Article 112. Right to lay submarine cables and pipelines

1. All States are entitled to lay submarine cables and pipelines **on the bed** of the high seas beyond the continental shelf.
2. Article 79, paragraph 5, applies to such cables and pipelines

Articles 113 [Breaking or injury of a submarine cable or pipeline], 114 [Breaking or injury by owners of a submarine cable or pipeline of another submarine cable or pipeline], and 115 [Indemnity for loss in avoiding injury to a submarine cable or pipeline] apply in ABNJ.

Article 297 [Limitation of applicability of section 2] accords submarine cables the highest level of dispute resolution protection.

UNCLOS Article 79, paras 1, 3 & 5

1. All States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this article.
3. The **delineation of the course** for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State.
5. When laying submarine cables or pipelines, States shall have **due regard** to cables or pipelines already in position. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.

2. Subject to its right to take reasonable measures for

- the exploration of the continental shelf,
- the exploitation of its natural resources and
- the prevention, reduction and control of pollution from pipelines,
- the coastal State may not impede the laying or maintenance of such cables or pipelines.

4. Nothing in this Part affects

- the right of the coastal State to establish conditions for cables or pipelines entering its territory or territorial sea, or
- **its jurisdiction over cables** and pipelines constructed or used in connection with
 - the exploration of its continental shelf or exploitation of its resources or
 - the operations of artificial islands, installations and structures under its jurisdiction.

UNCLOS and Domestic Laws Implementing OSPAR Guidelines

- Domestic laws of OSPAR Contracting Parties implementing the 2012 Guidelines on BEP in Cable Laying and Operation for fibre optic telecommunications cables may not be consistent with UNCLOS
 - Such laws are likely to interfere with the freedom of other States to lay cables on the high seas and on the continental shelf
 - Laying and repair of cables may not be “pollution of the marine environment” as defined in UNCLOS

UNCLOS Article 1:

- "pollution of the marine environment" means
- the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries,
- which results or is likely to result in such deleterious effects as
 - harm to living resources and marine life,
 - hazards to human health,
 - hindrance to marine activities, including fishing and other legitimate uses of the sea,
 - impairment of quality for use of sea water and
 - reduction of amenities;

UNCLOS Conflict Analysis Between a Competing Express Right and a General Principle

Three part analysis:

1. Is there in fact a conflict between the expressly protected activity and the general principle-can they co-exist.
2. Is there an issue or protection of human life at sea-if so, priority lies with this protection.
3. If there remains a conflict after considering items 1 and 2, then the express activity has priority over the general principle.

Dupuy-Vignes, *A Handbook on the New Law of the Sea*, Vol. 2, Chapter 17, pp. 872-873 (1997), (ITLOS Judge Tulio Teves-author)

“A principle must be more than merely professed or aspirational. . . it is only incorporated into international law if States accede to it out of a sense of legal obligation.”

“ Practices adopted for moral or political reasons, but not out of a sense of legal obligation, do not rise to rules of customary international law.”

“Customary international law addresses only those wrongs that are of mutual, and not merely several concern to States.”

“Customary international law cannot be established by reference to ‘abstract rights and liberties devoid of articulable or discernable standards and regulations.’”

“The practice of relying on contemporary international law scholars. . . setting forth the ‘speculation of authors concerning what the law *ought to be*’ . . . makes less sense today . . . because it is characterized by normative rather than positive argument and by idealism and advocacy.”

Flores v. S. Peru Copper Corp, 414 F.3d 233, 248-252 (2nd. Cir. 2003)



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