

Improper Regulation of Undersea Cable Activities as “Marine Scientific Research”

Kent Bressie

HARRIS,
WILTSHIRE &
GRANNIS LLP

The Temptation to Regulate

- Coastal states have economic incentives to assert jurisdiction over undersea cable installation and maintenance activities in their exclusive economic zones (“EEZs”) and on their continental shelves.
- Commercial entities also have incentives to assert that national jurisdiction extends to such activities.
- In recent years, a number of coastal states and commercial entities have asserted that national marine scientific research laws and regulations cover undersea cable activities.

Temptation to Regulate

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- Coastal states and commercial entities have asserted these laws and regulations in attempting to **bar foreign-flagged vessels** from EEZs or to **impose local subcontracting requirements**. In other cases, coastal states have sought to impose **fees** and have caused permitting **delays**.
- Such jurisdictional assertions are improper given UNCLOS protections afforded to undersea cables, but they are unsurprising, given coastal states' economic incentives, the failure of the UNCLOS to define "marine scientific research," and other imprecise textual provisions in UNCLOS.

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Qualified Right to Conduct Marine Scientific Research (“MSR”)

- “All States, irrespective of their geographical location, and competent international organizations have the right to conduct marine scientific research subject to the rights and duties of other States as provided for in this Convention.”
UNCLOS art. 238

Coastal-State Right to Regulate MSR

- “Coastal States, in the exercise of their jurisdiction, have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf in accordance with the relevant provisions of this Convention.” UNCLOS art. 246(1)
- “[M]arine scientific research shall be conducted in compliance with all relevant regulations adopted in conformity with this Convention including those for the protection and preservation of the marine environment.” UNCLOS art. 240(d)

UNCLOS's MSR Provisions Have Their Roots in the Convention on the Continental Shelf art. 5 (1958)

- Required consent of coastal state for "research."
- Presumed coastal consent would be granted so long as research was "purely scientific" and conducted by a qualified institution.
- Granted coastal state right to participate.

“Marine Scientific Research” Undefined

- UNCLOS does not define MSR.
- Instead, UNCLOS defines circumstances in which consent for MSR projects may be withheld.
- Coastal states have asserted that they have discretion to define the scope of MSR.

UNCLOS Addresses Certain Activities Separately from MSR

- Survey activities (UNCLOS arts. 19(2)(j), 40))
- Hydrographic surveys (UNCLOS art. 21(1)(g))

Absence of MSR Definition in UNCLOS Reflects Unresolved Drafting Dispute

- One camp believed that pure/fundamental research should always be permitted, whereas applied/resource-oriented research should require consent.
- Opposing camp believed that it was impossible to differentiate pure research from applied research
- The result was a muddled set of consent requirements.

Nordquist et al. (1982)

Consent Required in “Normal Circumstances”

- UNCLOS treats MSR within a coastal state’s EEZ or CS areas as activity subject to consent that should be granted in “normal circumstances” so long as the MSR is conducted:
 - Exclusively for peaceful purposes, and
 - In order to increase scientific knowledge

UNCLOS art. 249(3)

Exceptional Circumstances for Withholding Consent—EEZ

- Direct significance for the exploration and exploitation of natural resources, whether living or non-living
- “Drilling” into the continental shelf, the use of explosives, or the introduction of harmful substances into the marine environment
- Construction, operation or use of artificial islands, installations and structures referred to in UNCLOS arts. 60 and 80.
- Misrepresentation by the researching state to the coastal state.

UNCLOS art. 249(5)

Exceptional Circumstances for Withholding Consent— Continental Shelf Beyond EEZ

- Designated areas in which exploitation or detailed exploratory operations are occurring or will occur within a reasonable period of time.

UNCLOS art. 249(6)

Purported Bases for Excessive Jurisdictional Claims

- Coastal state may argue that undersea cable activities and MSR:
 - Use similar equipment
 - Generate similar data

Coastal state may argue that undersea cable activities are subject to “exceptional circumstances” consents because they involve:

- Drilling
- Exploration or exploitation of natural resources
 - U.S. Dep’t of Commerce/NOAA has long argued that commercial (but not research) cables “use” natural resources by their very presence on the seafloor

**Purported
Bases for
Claims**

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- Introduction of harmful substances into the marine environment
- Construction, operation or use of artificial islands, installations and structures
 - U.S. Army Corps of Engineers has taken position in permitting that undersea cables are “artificial installations and structures”

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EEZ and Continental Shelf Freedoms Accorded to Undersea Cables Are Absolute

- Freedoms accorded by articles 58 (EEZ), 79 (continental shelf), and 87 (high seas) of the Convention to undersea cable installation and maintenance activities reiterate absolute freedoms confirmed in earlier treaties.
 - Not conditioned upon MSR provisions.
 - Not cross-referenced with MSR provisions.
- No evidence in negotiating history and not conditioned by the marine scientific research provisions.

Undersea Cables Fall Beyond the Scope of Natural Resource-Related Regulation

- “[B]eyond the outer limits of the 12 nm 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 the laying of pipelines [but not submarine cables] on the continental shelf is subject to its consent. The coastal State has jurisdiction only over cables 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.”

*UN Office of Legal Affairs,
Division for Ocean Affairs and the Law of the Sea*

Harms Resulting from Improper Regulation of Undersea Cable Activities as MSR

- By asserting that UNCLOS's MSR provisions trump UNCLOS's freedoms to install and maintain undersea cables in the EEZ or on the continental shelf, a coastal state could inflict a variety of harms on an undersea cable operator or its contractor
 - Delays
 - Fees
 - Other burdensome conditions

Delays

- "A state intending to undertake marine scientific research in the EEZ or continental shelf of a coastal state must provide a full description of the project at least 6 months in advance, including vessel and equipment details, vessel schedules, and participation opportunities for coastal state." UNCLOS art. 248
- If coastal state objects within 4 months of notification, process can take even longer. UNCLOS art. 252
- In practice, delays are usually much shorter, but still disruptive.

Fees

- UNCLOS does not explicitly prohibit a coastal state from imposing fees on activities regulated as MSR.
- In practice, coastal states have attempted to impose fees.

Other Conditions

- Except in “normal circumstances,” UNCLOS does not preclude a coastal state from imposing other conditions on activities regulated as MSR.
UNCLOS art. 248
- Example: mandatory use of coastal state’s contractors and vessels, which can entail:
 - Expense
 - Risks associated with inexperience
 - Further delays due to availability (particularly with vessels)

Measures for Avoiding MSR Regulation

- Unless expedience precludes raising the slightest objection to a coastal state or commercial partner, an undersea cable operator or contractor should consider challenging or debunking the assertion that undersea cable activities are MSR.
- In virtually every case, time-to-market concerns make formal dispute resolution unworkable, so operator or contractor should focus on informal resolution.

Consider who is asserting MSR restrictions on undersea cables—government, or self-interested local partner or contractor?

- Private parties often posture that MSR restrictions serve their interests in a way that their governments would never support.

Determine whether problem with MSR restrictions is in the text of the underlying laws and regulations, or with the interpretation of vague or seemingly inapplicable laws and regulations.

- In practice, most national laws and regulations do not explicitly treat undersea cable activities as MSR.

Determine whether or not other treaty obligations would constrain the coastal state from imposing MSR restrictions on undersea cables.

- A number of countries have adopted World Trade Organization commitments that preclude application of MSR restrictions to undersea cables.
 - Most of these commitments relate to marine services and repair-of-electrical-equipment services.
- Other bilateral trade agreements also sometimes contain commitments that preclude application of MSR restrictions.

“Call Their Bluff”

- Undersea cable operator or contractor should state its objections in writing:
 - Highlight fact that relevant national laws and regulations do not reference undersea cables.
 - Highlight treaty protections for undersea cable installation and maintenance activities.
 - Note any other legal constraints (*e.g.*, trade commitments) on MSR regulation.

Kent D. Bressie

HARRIS, WILTSHIRE & GRANNIS LLP

1200 18th Street, N.W., Suite 1200

Washington, D.C. 20036-2516

U.S.A.

+1 202 730 1337 office

+1 202 460 1337 mobile

+1 202 730 1301 fax

kbressie@harriswiltshire.com

www.harriswiltshire.com

**HARRIS,
WILTSHIRE &
GRANNIS LLP**