

Further Legal Considerations Regarding Telecom-Marine Data Cables

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Roadmap

1. Key legal conclusions
2. Implications of current legal-regulatory regime
3. A cautionary note about the Tampere Convention
4. Concluding observations

Note: This presentation assumes familiarity with concepts and terms discussed in the report *Using submarine cables for climate monitoring and disaster warning – Opportunities and legal challenges* (UNESCO-IOC/WTO/ITU, 2012), available at http://www.itu.int/dms_pub/itu-t/oth/4B/04/T4B040000160001PDFE.pdf.

1. Key legal conclusions

The United Nations Convention on the Law of the Sea (“UNCLOS”) and customary international law do not classify dual purpose telecom-marine data cables definitively as marine scientific research (“MSR”).

UNCLOS does not support the conclusion that telecom-marine data cables are MSR by definition

- UNCLOS does not define “submarine cable” or “MSR.”
- To the contrary, 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.
- The intense dispute over the Argo Guidelines serves as only the latest example of the absence of a common understanding in this area.

Customary international law does not support treating telecom-marine data cables as MSR

- Such a position satisfies neither of the requirements of the classical definition of customary international law, stated as “international custom, as evidence of a general practice accepted as law.”
- There is no evidence of a general practice, as there is no precedent of such actual regulation of an in-service cable by a coastal state.
- In the absence of such precedent, there can be no concurrence of such precedents, much less general acceptance thereof, or a recognition of an obligation to abide by such a precedent.

Neither UNCLOS nor customary international law extends submarine-cable freedoms to any additional functionality in, or connected to, a cable

- UNCLOS and earlier treaties do not define the term “submarine cable,” though the objective, purpose, and interpretation of this term and subsequent agreements strongly suggest that the term refers to cables used to transport voice, data, and Internet traffic between system end points.
- Attempts to extend submarine-cable freedoms to such additional functionality could be interpreted as an abuse of rights granted by UNCLOS and/or contribute to industry fears about a more general erosion of those freedoms.

2. Implications of current legal-regulatory regime

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High seas

- The deployment of scientific sensors on submarine cables on the high seas and in the Area raises few, if any, legal or regulatory issues.
 - Not within the jurisdiction of any coastal state.
 - Not within the jurisdiction of the International Seabed Authority unless deemed MSR, in which case only minimal obligations apply.
 - Deployment of sensors on the high seas and in the Area would not render the entire submarine cable—including portions of the cable without sensors—to be within the jurisdiction of a coastal state whose waters the cable transits or on whose shore the cable lands.

EEZ and continental shelf areas

- The real challenges lie here:
 - Uncertainty and disputes over treaty interpretation and coastal-state regulation of marine data collection create potential regulatory burdens and risks, though particulars vary with each coastal state.
 - Jurisdictional creep: Coastal states have incentives to maximize their jurisdiction over adjacent marine areas (e.g., permitting, customs duties, taxes, royalty payments, and vessel restrictions).
 - Sovereignty concerns: rightly or wrongly, some coastal states worry that dual telecom-marine data cables will be used for covert energy exploration or surveillance.

EEZ and continental shelf areas (cont'd)

- Erosion of treaty protections?
 - Submarine telecommunications cables have historically enjoyed a unique status under international law, afforded rights and protections accorded to no other activity on the sea bed.
 - Some operators worry that attempts to exercise these rights and protections for more varied activities could lead to their erosion.
- Extended continental shelf claims will increase the marine areas subject to coastal-state jurisdictional claims.

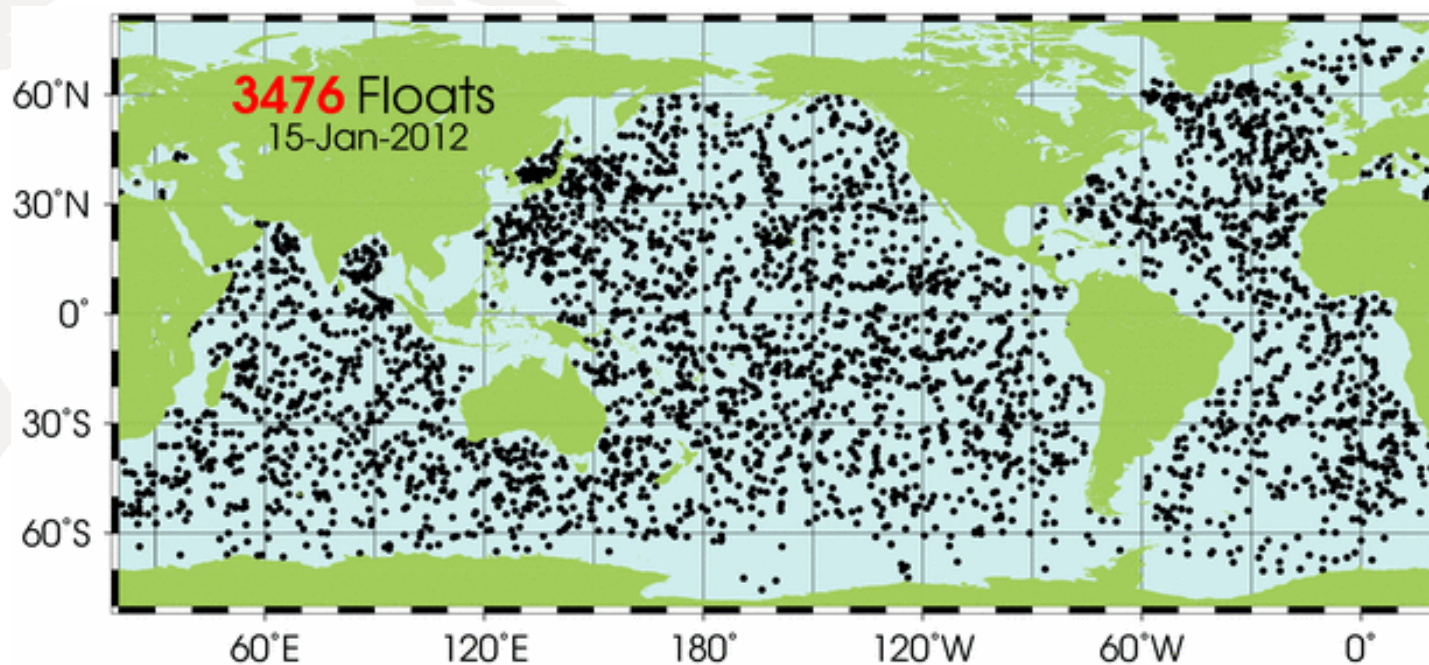
How might these issues be resolved?

- The concept of a telecom-marine data cable—including the technology, potential business cases, and legal-regulatory treatment—is still at an early stage.
 - Parties should view project-by-project or regional experimentation as a positive development—or even as a key way forward.
 - Technological innovations rarely fit easily into existing legal-regulatory regimes.
- Some states—particularly the United States—have articulated policies (including those for “operational oceanography”) that would permit telecom-marine data cables in their EEZs and continental shelf areas.

Easier cases vs. harder cases

- Parties should acknowledge that there are easy cases (high seas) and hard cases (EEZ and continental shelf areas) when it comes to legal-regulatory treatment of dual telecom-science cables.
 - “All-bad” view denies that there are opportunities for cable operators and scientists, as coastal states take different approaches to marine data collection.
 - “All-good” view denies the legal complexities, as underlying 40-year jurisdictional disputes are unlikely to be resolved quickly.

Example of the Argo floats



- Argo is a global array of more than 3,000 free-drifting floats used to measure ocean temperature, salinity, and velocity to a depth of 2,000 meters, with recorded data transmitted periodically via the Argos and Iridium satellite systems; 23 countries participate in program.

Argo (cont'd)



- As floats could drift into EEZ and continental-shelf zones, many coastal states (particularly Peru and Argentina, but also with support from Japan) objected that advance notice or consent is required with respect to floats that might drift into their EEZs or continental shelf areas.
- Argo Guidelines developed by UNESCO's Intergovernmental Oceanographic Commission remain extremely controversial.
 - A coastal state may require notice of floats that might drift into its EEZ and may restrict dissemination of data if it is of significance to natural-resource exploration.
 - The U.S. and the U.K. believe that the Guidelines infringe the freedoms of navigation and overflight.
- Commentators also continue to debate whether the floats are vessels, installations, or equipment.

3. A cautionary note about the Tampere Convention

Invocation of the Tampere Convention on the Provision of Telecommunications Resources for Disaster Mitigation and Relief Operations does not resolve the legal challenges arising with dual-purpose telecom-marine data cables

Tampere Convention has a narrow focus

- State parties negotiated the Convention to reduce technical barriers encountered by international disaster responders in importing and using telecommunications in disaster relief, including:
 - Customs requirements and duties
 - Burdensome licensing requirements and fees
 - Lack of access to radio spectrum
 - Absence of legal protections for personnel importing and using such equipment
- Convention focuses on facilitating temporary relief operations, not long-term deployment of infrastructure or scientific equipment
- Interpreting the Convention to provide that climate change constitutes a “natural hazard” or “disaster” could prove controversial.

Tampere Convention does not supplant the jurisdictional rules in UNCLOS

- Convention does not limit the sovereign rights of coastal states to exercise rights and freedoms under UNCLOS within adjacent marine areas, particularly with respect to submarine cables.
- Although Convention postdates UNCLOS, Article 10 states that “this Convention shall not affect the rights and obligations of States Parties deriving from other international agreements or international law.” See also VCLT Article 30.

Tampere Convention's general provisions would not trump specific submarine-cable and marine-data provisions of UNCLOS

- Under the principle of *lex specialis*, which provides that the specific treaty provision governs instead of the general one, it would be difficult to argue that the governs.
- Convention does not mention submarine cables, infrastructure to be installed on a permanent basis, or marine or ocean areas.
- In fact, the references to “terrestrial and satellite telecommunication equipment” in Article 3(2)(a) could be read to exclude submarine cables.

Tampere Convention does not grant specific rights or freedoms that could be invoked to cover telecommarine data cables

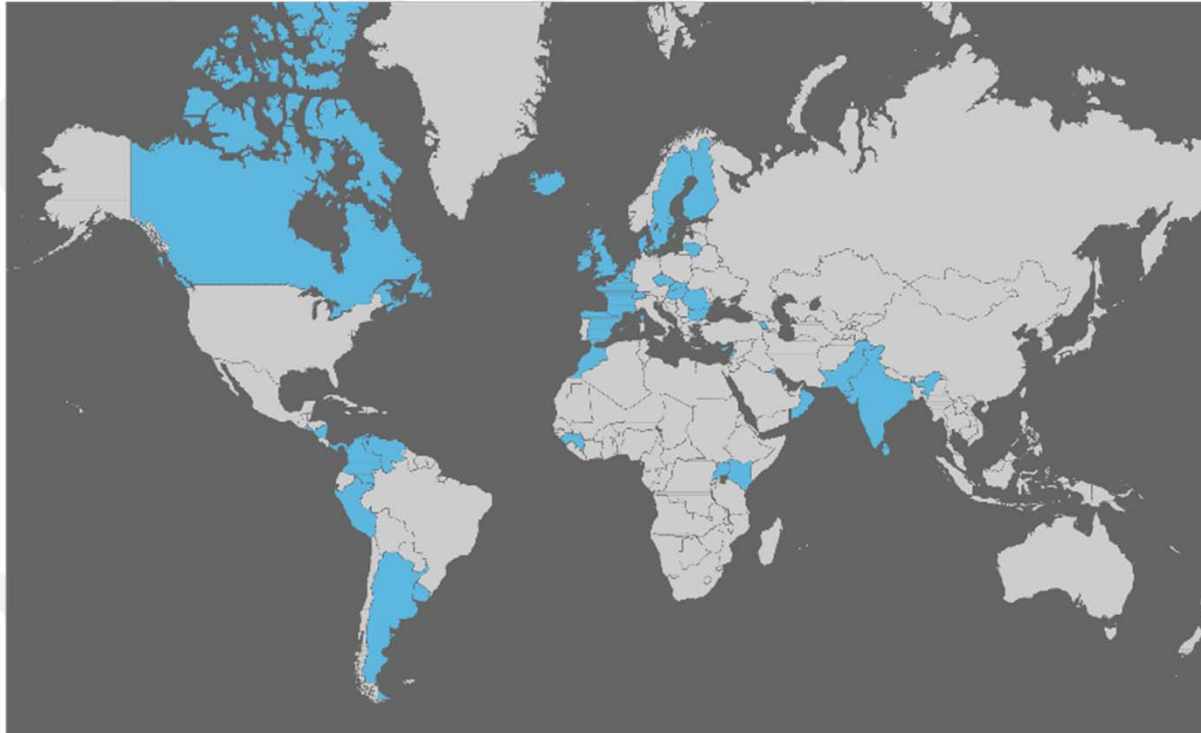
- Article 3(1) provides that states shall “cooperate... to facilitate the use of telecommunication resources for disaster mitigation and relief.”
- Article 3(3) further provides that “to facilitate such use, the States Parties may conclude additional multinational or bilateral agreements or arrangements,” confirming that the Convention itself does not impose specific obligations.

Tampere Convention reinforces existing jurisdictional rules

- Article 4 affirms sovereignty of state parties, including coastal states, by requiring that a requesting state party grant consent to an assisting state party and prohibits non-state entities from requesting assistance.
- Article 9 provides that “States Parties shall, *when possible, and in conformity with their national law*, reduce or remove regulatory barriers to the use of telecommunication resources for disaster mitigation and relief, including to the provision of telecommunication assistance.”
- If the Tampere Convention provided the remedy that some believe it does, the Tampere Convention would have been invoked in the IOC experts’ group discussions regarding the Argo Guidelines. They were not invoked.

Tampere Convention currently has limited geographic reach

- The state parties that have ratified the Tampere Convention account for very few of the world's coastal states.



4. Concluding observations

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Existing legal-regulatory regimes— and intense disagreements about what they permit—likely makes global consensus and standards unrealistic at this time

- The disagreements over marine jurisdiction and marine data collection are longstanding and unlikely to be resolved any time soon.
 - Attempting to achieve consensus on these disputed issues to enable telecom-marine data cables would simply take too long.
 - For new agreements or standards for such-dual purpose cables, certain states would likely insist on curtailing the rights and freedoms currently granted to submarine cables—exactly the erosion of freedoms that industry fears, and which could provoke industry opposition and, perversely, deter development of such cables.

Significant opportunities remain

- Experimentation remains the best hope for the dual-purpose telecom-marine data cable, with industry and the scientific community exploiting technological advancements, commercial opportunities, and regional variations in legal-regulatory regimes.
- By focusing on the implementation of the first such cable—particularly in one of the easier-case scenarios—governments, scientists, and industry would prove the viability of the concept in particular circumstances.

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