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International regulation of Submarine cables. An analysis of the different States' practices.

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List of Abbreviations:

ACMA- Australian Communications and Media Authority
CBD - Convention biodiversity 1992
Cs - Continental Shelf
CS - Coastal State
EC- Constitución Española 1978
EEZ - Exclusive Economic Zone
EIA - Environmental Impact Assessment
EPA- Environmental Protection Activity
ICPC – International Cable Protection Committee
ISO- International Organization for Standardization
ITLOS – International Tribunal for the Law of the Sea
MPA- Marine Protected Areas
SPMD- Spanish Public Maritime Domain
UNCLOS - 1982 United Nations Convention on the Law of the Sea
UNEP – United Nations Environment Programme
VCLT- Vienna Convention on the Law of Treaties (1969)

Part I

1.1 Research Problem

It is a well-known fact that globalization is possible due to communication. International communication was recognized as a common good that was the foundation of the increasing globalization and interconnectedness of the world. However, Submarine cables face challenges and conflicts between coastal States and non-coastal states over “incursive uses” of the ocean that benefit the international community and “exclusive uses” of the ocean by coastal States. The submarine cables face a steady boost to globalization facilitating a large volume of voice and data traffic, but they are also used also to transmit electricity.

Most of the world’s international telecommunications, more precisely 95%, are provided by submarine fiber-optic cables¹. Those cables are subject to regulations based on their location. The applicable legislation will be different whether the cable is laid in the Territorial Sea and Archipelagic waters or the Exclusive Economic Zone (hereinafter: EEZ) and Continental Shelf.

The question of how to regulate submarine cables is broadly dealing with the different maritime zones. The environmental impact of the submarine cables and pipelines remains critical, due to there is an existent regulation, there are some residual aspects that require an important modernization incorporating evolved frameworks. The present thesis is focused on the existing regulation based on the United Nations Convention for the Law of the Sea, which is compared with the emerging regulations. Submarine Cables regulation needs to be updated to a newer point of view in accordance with the existing globalization. Submarine Cables regulation refers not only to communication cables, but also refers to energy cables requiring an important distinction between both categories.

The focus of the present thesis is to study the framework of the 1982 UNCLOS, examining and analyzing the state practice under UNCLOS, including national legislation, and researching whether states are in a situation of “creeping jurisdiction”.

¹ Carter L., Burnett D., Drew S., Marle G., Hagadorn L., Bartlett-McNeil D., and Irvine N. (2009). Submarine Cables and the Oceans – Connecting the World. UNEP-WCMC Biodiversity Series No. 31. ICPC/UNEP/UNEP-WCMC. P.3

The considerable regulation regarding Submarine Cables, is, thus, affecting multiple States, as part of public international law. However, the following research is focused on the legal aspect based on the UNCLOS framework and the state practice. Therefore, a geographical approach shall be followed, distinguishing the legislation into the different maritime zones.

Freedoms established in UNCLOS, allow States to lay, repair and maintain submarine cables, however, some of the domestic regulations confront with those freedoms. The state application process establishes requirements before exercising those activities. In light of this, Coastal State may require an application process to conduct this activity in the EEZ and the Continental Shelf.

In this new set up, the “Creeping jurisdiction” situation may emerge with a legal sense, considering and elaborating a comparative frame to understand state practice and how the legislation is managed by States. To be able to answer the following questions, the thesis author will consider the different international legal framework but also the national framework. The legal questions presented are:

- Regulations on the different maritime zones. How are submarine cables regulated in the EEZ and the Continental shelf? What does the freedom of laying submarine cables entail? Can the Coastal State restrict the freedom to lay submarine cables?
- Legal State Practice. What are the real conditions that a coastal state can impose under its sovereign rights? How States are acting according to the UNCLOS? Are those States going beyond the UNCLOS regime?
- What are the mechanisms to enhance consultation and cooperation between states and cable companies? State practice balance and how submarine cables can affect the security of the States.
- Implementation and Enforcement measures, Can the coastal State take the necessary measures to prevent and protect the marine environment? Could those States impose bans, taxes, or fees on the flagged State? Can the submarine cables be laid in Maritime Protected Areas and is there an obligation to conduct an Environmental Impact Assessment before the laying?

1.2 Scope delimitation and Outline

The thesis will focus geographically on two maritime zones, the Exclusive Economic Zone (EEZ) and the Continental Shelf (CS). In this vein, it will apply the UNCLOS regime regarding the Submarine cables definition. It will also rely on UNCLOS Part V and VI.

The current thesis will not discuss the regulation of submarine cables in other maritime zones. Besides, this work will not focus on the different types of submarine cables or pipelines, but it will focus on the telecommunication cables and its legislation. From the perspective of the Coastal States, they have increased the control and regulation, to ensure that its sovereign rights and jurisdiction in the EEZ and Continental shelf are guaranteed. After all, Coastal State jurisdiction shall be established under the International Jurisdiction, in this light an analysis of the different state practice is going to be discussed, to understand whether States regulate and comply with the international legal framework or whether is a case of “creeping jurisdiction”.

Submarine cables in the context of Marine Scientific Research are not going to be considered in the present work.

1.3 Legal Sources and Method

This thesis builds on legal doctrinal methodology to clarify and systematize the current regime applicable to submarine cables in the Economic Exclusive Zone and the Continental Shelf. The first step of the methodology is the identification of the legal sources of international law, as they are stipulated in article 38 of the Statute of the International Court of Justice (ICJ)². Different case studies of selected state practice are going to be analyzed.

In light of this, and accordance with article 38 para. 1(d) of the Statute of the International Court of Justice, the sources used are the international conventions, the international custom and the general principles of law³. However, this work is going to be focused on treaty law based on the UNCLOS and as secondary source sources such as the writing of renowned scholars.

Regarding the interpretation of the treaties, the thesis will apply the rules of interpretation that are set out in articles 31-32 of the Vienna Convention on the Law of Treaties⁴.

² United Nations, Statute of the International Court of Justice, 18 April 1946, Article 38 (1)

³ Ibid.

⁴ Vienna Convention on the Law of Treaties (United Nations [UN]) 1155 UNTS 331

The present work is, based on the United Nations Convention on the Law of the Sea⁵, and how the regulation and balance of the Submarine Cables in the Exclusive Economic Zone and Continental Shelf is addressed by the different state practice. Considering the majority of the following articles 56 and 58 to establish the EEZ regime, articles 77 and 78 to establish the continental shelf regulation, and the analysis article 79 regarding the submarine cables and pipelines regulation on the Continental Shelf. However, to establish the scope of the marine environment protection, the reference to Part XII of the UNCLOS shall be done⁶.

The core of the discussion centers on, The Law of the Sea Convention, as the basis of the legal questions, not only Submarine cables, other sources of law, such as domestic normative frames, are going to be addressed in order to study different state's practices. Among international conventions the author utilizes examples of real states and its domestic legislation and application process, analyzing state implementation and the manner of procedure. Several States, chosen for their particularities surrounding geographical localization or legislation will be analyzed. Firstly Spain, due to its recent relevance in the field of Submarine Cables and the characteristic aspect of their domestic legislation. Then Cyprus, because of the coexistence of different domestic legislations between the north and the south of the State and illustrating the practice of an Island State. Finally, due to the high value of the Pacific marine ecosystem requiring of an environmental approach, the author chose to analyze both the Australian and New Zealand domestic legislations separately, comparing the similarities and differences of these legislations in similar geographical conditions.

⁵ Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. Enacted as: entered into force as the "United Nations Convention on the Law of the Sea" on Nov.

⁶ Ibid. Part XII

2 Part II – Law of the Sea Regulation Concerning Submarine Cables.

2.1 Historical Context.

The Epoque of the cables, correspond also to the “inter wars” period, starting from 1863 until 1913, with the Agenda for protection of the cables and the doctrine “*The national navigation*” written by Sir Travers Twiss⁷. The legal framework in those times starts in Paris in 1884 with the Convention for the Protection of Submarine Telegraph Cables, in advance Cable Convention⁸, this convention was the first international treaty governing submarine cables.

Held in 1958 in Geneva, the United Nations Conferences on the Law of the Sea, contains formulated the submarine cables international regulations regarding the different maritime zones and based on the 1884 Cable Convention. Those articles were drafted by the International Law Commission (ILC)⁹ emerging new disputes due to the incorporation of older provisions.

UNCLOS¹⁰, with 162 states parties, took the basis of the existing submarine cables regulation. Those provisions were considered by the States members as International Customary Law (hereafter ICL) and are formally binding to the states parties due to 1958 purported codified the existing case law in that moment ¹¹.

Provisions from the 1884 Cable Convention¹², regarding Telegraph Cables, were incorporated into the 1958 Geneva Conventions establishing them as submarine cables. The United States, a critical state, recognized the freedom to lay submarine cables on the high seas, as well as the right to take the necessary measures in order to ensure the exploration and exploitation of its natural resources on the Continental Shelf. However, the United States are not part of the 1982 UNCLOS.

⁷ Fitzmaurice A. (2009) The Resilience of Natural Law in the Writings of Sir Travers Twiss. In: Hall I., Hill L. (eds) *British International Thinkers from Hobbes to Namier*. Palgrave Macmillan History of International Thought Series. Palgrave Macmillan, New York. https://doi.org/10.1057/9780230101739_8

⁸ Convention for the Protection of Submarine Telegraph Cables (Paris, 14 March 1884)

⁹“ Articles Concerning the Law of the Sea with Commentaries,” in *Yearbook of the International Law Commission*, Vol. II, Doc. A/3159 (1956).

¹⁰ Tara Davenport (2012) Submarine Communications Cables and Law of the Sea: Problems in Law and Practice, *Ocean Development & International Law*, 43:3, 201-242, DOI: 10.1080/00908320.2012.698922

¹¹Ibid,

¹²Supra note, 8

Provisions regarding to the Exclusive Economic Zone and the Continental Shelf are established in the United Nations Convention on the Law of the Sea, Part V and VI the regulation as it is going to be analyzed in the present thesis.

2.2 United Nations Convention on the Law of the Sea.

The 1982 United Convention on the Law of the Sea is considered the Constitution of the seas under the scope of the International Public Law and the legal framework of the Law of the Sea¹³.

The increasing development of technology and the worldwide connections in the 1960s, created new issues in the fields of underwater cabling that required different solutions. In general, the definition of a submarine cable can be explained as any cable laid between land-based positions that carries information or energy¹⁴. As it was noted, this thesis is focusing on the telecommunication cables between land-based positions, the legal framework that has evolved around them and compare International legislation with real State practice.

Even though the present work is based on the analysis of the applicable legislation, It still considers the importance of the telecommunication cables and their relationship with maritime freedoms. Submarine cables are installed in the seabed and provide worldwide net communications, therefore guaranteeing “*Ius Communicationis*”¹⁵. States have the freedom to lay submarine cables in the EEZ and Continental Shelf, since historically it might be considered as a freedom included in the High Seas regulation. However, a coastal State exercising its jurisdiction may establish legislation to regulate the laying of Submarine Cables on the EEZ and the Continental Shelf subject to determined circumstances and obligations. The following part is going to examine the different regulations that can be found applying to the EEZ and the Continental shelf, raising the concern of what the freedom of laying submarine cables entails, and then discuss the restrictions that can or cannot be imposed by the coastal state.

¹³ Supra note 5, UNCLOS Preamble, Paragraph 1

¹⁴ Definition of Submarine Cable: a submarine communications cable from <https://ininet.org/download/definition-of-submarine-cable-a-submarine-communications-cable.doc>

¹⁵ Simple Messages in the Francisco de Vitoria's *Ius Communicationis* En el 450 Aniversario de las Relecciones Indianas de Francisco de Vitoria, Desantes-Guanter, Jose Maria, Page 191

2.3 Regulation in the Exclusive Economic Zone and Continental Shelf.

2.3.1 Rights and duties of States in the Exclusive Economic Zone.

The Economic Exclusive Zone is considered the area adjacent to the Territorial Sea of the Coastal State and, extending up to 200 Nautical Miles beyond. The Coastal State may exercise sovereign rights over some of the rights such as the exploration and exploitation, conservation and protection of the marine environment and its natural resources¹⁶. The laying of submarine cables, overflight as well as navigation shall be guaranteed to all States. The present work aims to describe and analyze the EEZ provisions based on UNCLOS and will therefore be legally centered and focused on the articles established by the UNCLOS. It is important to provide a starting point to understand the following chapters in order to demonstrate whether real States are practicing activities based on UNCLOS or if it is a case of “Creeping Jurisdiction” acting beyond the Convention.

Firstly Article 55, the introductory provision referring to the specific legal regime of the Exclusive Economic Zone, describes the EEZ as an area beyond and adjacent to the territorial sea, the legislation in this maritime zone, and the rights and jurisdiction in which the coastal State and other states are governed under the provisions of UNCLOS¹⁷.

At the same time, this article does not clarify the specific rights of this maritime zone, since on one hand, as is going to be explained below, Article 56 refers to the Rights, Jurisdiction and Duties of the coastal State¹⁸, while Article 58 refers to the rights and duties of other states in the Exclusive Economic Zone. The EEZ regime grants the aforementioned sovereign rights, not guaranteeing sovereignty¹⁹.

The consideration of the EEZ as a “*Sui generis zone*”²⁰ term used to establish in the Second Committee of UNCLOS III. In the past, Scholars considered the legal status of the Economic Exclusive Zone as not part of the coastal State. As a new maritime zone was defined in 1982

¹⁶ P. Hoagland, M.E Schumacher, Law of the Sea, in Encyclopedia of Ocean Sciences (Second Edition), 2001. Pages 432-442 Accessed: <https://www.sciencedirect.com/topics/agricultural-and-biological-sciences/exclusive-economic-zone>

¹⁷ Supra note 5, Article 55

¹⁸ Supra note 5, Article 56

¹⁹ Supra note 5, Article 58

²⁰ Andreone, G., Cataldi, G, “Sui Generis Zones” from The IMLI Manual on International Maritime Law: Volume I: The Law of the Sea, Oxford, 2014 p.217

UNCLOS, is nowadays still not part of the legal regime established on the High Seas, having the EEZ its maritime regulation.

On the other hand, other Scholars interpreted article 58 considering that some freedoms part of the High Seas regulation, should be preserved and applicable to the Economic Exclusive Zone, in respect with the freedoms established beyond the EEZ²¹. Furthermore, Article 55 defines the legal regime of the EEZ as not being a maritime zone part of the coastal State, which means that the coastal State has limited sovereign rights and jurisdiction over this area and cannot act as freely as it can in the Territorial Sea. Based on this argument, It is considerable that article 55 comes closer to the “*sui generis*” position than the theory of the applicability of the regime coming from the High Seas. The high seas theory does not seem to take into account the complexity of the EEZ regime, since it does not consider the sovereignty, rights, and duties of the coastal State in this maritime zone. However, the EEZ is presenting an economic potential interest for the different states, a “*sui generis zone*” is the theory where the establishment of a especial regime was needed. The coastal State, based on the term of territorialism could impose there some restrictions to protect, preserve, and explore the natural resources in its territory.

Article 56 is the provision included in Part V of UNCLOS that refers to the “Rights, Jurisdiction and Duties of the coastal State in the Exclusive Economic Zone”²². It claims in its first paragraph the following “*Sovereign rights to explore and exploit, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and the seabed and its subsoil*”²³. Once this is established, the EEZ must be connected to the Continental Shelf regime, this is done by the Lybia/Malta Continental Shelf Case, where it was decided by the ICJ, that it is not possible to form an EEZ without a Continental Shelf. In 1985, it was established by the ICJ that: “*The institution of the exclusive economic zone, with its rule on entitlement because of distance, is shown by the practice of States to have become a part of customary law*”²⁴. Under this scope, article 56 refers to the

²¹ Elliot L. Richardson, Power, Mobility and the Law of the Sea, *Foreign Affairs* 58 (1979/80), 902, 907.

²² *Supra* note 5, Article 58 UNCLOS

²³ *Supra* note 5, Article 56 (1) UNCLOS

²⁴ *Libya/Malta Case* (note 5), 33 (para. 34). See also *Tunisia/Libya Case* (note 9), 74 (para. 100); Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 519; Yoshifumi Tanaka, *The International Law of the Sea* (2nd edn. 2015), 128; Robin R. Churchill/Alan V. Lowe, *Law of the Sea* (3rd edn. 1999), 161 et seq., arguing that at least the broad rights of coastal and other States enumerated in Arts. 56 and 58 are part of customary international law.

natural resources without attention to whether those resources are living or non-living and to where those are situated²⁵.

Article 56 (2) establishes that the coastal State may exercise its rights and duties in the EEZ, but it shall also, act with “*Due regards*” to the rights and duties of other States with intention to conduct activities in the maritime zone. The “due regard” obligation is applicable in the EEZ, but also the Continental Shelf and the High Seas. In this context, what is of importance in the EEZ is to facilitate the consultation and cooperation between states. Furthermore, States enter in a balanced situation with the rights, duties and jurisdiction of the coastal State on the one hand and the rights and duties of other user States on the other. Thus, Submarine Cables sometimes are ignored by coastal State legislation emerging disputes between the coastal State and the laying State. Rights and Duties of the coastal State in the EEZ are not considered as absolute, through article 58, the provisions established in article 87 are applicable in the EEZ. Indeed, the coastal State shall respect²⁶ the freedoms of navigation, overflight, and the laying of submarine cables and pipelines. Potential conflicts may arise between the coastal State and flag States due to competing activities and interests in the EEZ. This is going to be analyzed in the upcoming parts of the present thesis.

A cooperation between the coastal State and the other States interested in the EEZ remains essential, as there is a necessary balance between the protection of the maritime zone and the freedoms of action established in UNCLOS. As it was noted, Article 58 based on the Rights and duties of other States in the Exclusive Economic Zone confronts, but at the same time establishes a cooperative regime with article 56²⁷. However, the freedom of navigation can be limited by Art. 60 (6), the coastal State can forbid access to ships in certain areas. In its paragraph 2, Article 58 consent the applicability of article 88 -115 “in so far they are not incompatible with this part” (Part V)²⁸ so there is an existent thin line between the freedom exercisable by others states and the abuse or “*Creeping jurisdiction*” imposed by the coastal State. Experts as Attard²⁹ argued the following: In a situation where the coastal State has

²⁵ Supra note 5, Article 56.

²⁶ Gemma Andreone, The Exclusive Economic Zone, in: Donald R. Rothwell et al. (eds.), The Oxford Handbook of the Law of the Sea (2015), 159, 165.

²⁷ Supra note 5, Article 56.

²⁸ Supra note 5, Article 58 (2)

²⁹ Attard; James Crawford, Brownlie’s Principles of Public International Law (8th edn. 2012), 278 (note 144).

accepted the establishment of a specific activity, other States may conduct an equivalent activity in the EEZ that is concurred in the Territorial Sea. Based on UNCLOS, the coastal State shall not establish the competences to allow those activities having to prove the laying State that the conducted activity in the EEZ has been conducted under the scope of the Law of the Sea³⁰.

Consequently, Article 58 (1) refers to other States jurisdiction, even if those are coastal or land locked. This provision establishes the freedoms given to the States, not private companies or ship companies, referring them as flag State measures. An important right is the “*Jus communications*³¹” also established, on the High Seas to safeguard the communications, is stricter in the EEZ under the context of Article 56³². However, there is no express reference to the rights to conduct marine scientific research, artificial islands, or installation, those freedoms have been considered part of the sovereign rights of the coastal State under the scope of article 56³³.

According to what concerns this thesis, the freedom to lay submarine cables and the guarantee of the “*Jus communicationis*³⁴” is based on article 79, which is the relevant provision in this matter referring to the consent of the coastal State. Article 58 (1) combined with article 79 (3) supports coastal States position, the delineation of the course of pipelines requires of the consent of the Coastal State. In light of this, the delineation, laying, repairing and maintenance of submarine cables shall be granted without the consent of the coastal State³⁵.

To what extent the coastal State rights and jurisdiction are generally, considered compatible with Article 58(1). Furthermore, this article does not clarify the applicability of the High Seas regime in the EEZ for other situations than the aforementioned. There is an important provision that shall be interpreted “*Other internationally lawful uses related to those freedoms*”³⁶ different activities may be conducted under the scope of this sentence, since the maintenance of submarine cables can be considered under the freedom of laying submarine cables. Although, the activities of maintenance and repairing shall be under the freedoms aforementioned. It is

³⁰ Ibid,

³¹ Supra note, 15

³² Supra note 5, Article 56

³³ Ibid.

³⁴ Supra note, 15.

³⁵ Proels A. United Nations Convention on the Law of the Sea: A Commentary, C.H Beck, Hart, Nomos 2017 pp.43

³⁶ Supra note 5.

also mentionable the “*Due regard*” aspect, not prejudicing the existing submarine cables or pipelines.

Article 58 (3) considers that all states shall act according to the sovereign rights of the coastal State while those states are exercising the freedoms aforementioned under the scope of Article 58 (1)³⁷. The coastal State may observe the accomplishment of their legislation in its EEZ by flag state vessels. In this vein, article 58 (3) shows that the freedom of navigation, overflight, and laying submarine cables and pipelines cannot be excluded from the EEZ by the coastal State³⁸. There is a coexistence of rights and jurisdiction between coastal State and Flag State jurisdiction, due to this situation conflicts may arise. In light of this, the mutual obligation of the states makes the state conducting activities in other’s EEZ, shall exercise the aforementioned freedoms under sovereign rights of the coastal State³⁹ as is established in article 58 (1). The national legislation shall take into consideration the sentence “*in terms is not incompatible with this part*” and can be extended to those measures not covered by UNCLOS⁴⁰. All states are entitled to lay submarine cables in the EEZ of the coastal State. However, flag states shall act “*due regard to the rights and duties of the coastal State*”. In this vein, States laying submarine cables may respect the rights and duties established by the coastal State, insofar the legislation is not incompatible with the provisions established in UNCLOS⁴¹. The ITLOS with the case “*Saiga*” in the state of Guinea, has proven the violation of articles 56 and 58, since the application of those articles, allowing other’s states vessels to conduct activities in Guinea’s EEZ that would affect its economy⁴². The coastal State under article 73(1) “*may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the EEZ, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this convention*”⁴³.

³⁷ Proels A. United Nations Convention on the Law of the Sea: A Commentary, C.H Beck, Hart, Nomos 2017 pp.47

³⁸ Supra note 2, Article 58 (3)

³⁹ Proels A. United Nations Convention on the Law of the Sea: A Commentary, C.H Beck, Hart, Nomos 2017 pp.445

⁴⁰ Supra note 5, Article 56

⁴¹ Supra note 5, Article 58

⁴² The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)

⁴³ Supra note 5, Article 73 (1)

The submarine cables shall be protected from the different maritime activities such as fishing⁴⁴ and shipping. In order to satisfy this protection, the laying company shall establish a route analyzing with the scientific methods available, the impact that may be caused by the installation of the submarine cable, notifying the coastal State. The laying of the submarine cables shall be published on the nautical charts, informing the vessels around and establishing a “protection zone” around the cable⁴⁵ not allowing activities that could cause damage to the Submarine Cable.

2.3.2 Submarine Cables Regulation in the Continental Shelf.

Article 77 defines the “*Rights of the Coastal State over the Continental shelf*”⁴⁶. The regulation of the Continental Shelf is different, from the regime of the EEZ, and is established in part VI. In this vein, article 76 constitutes one innovative provision defining the Continental Shelf. The definition is based on the geological concept of the continental margin instead of the limit of 200NM. Although, article 77 establishes the different rights that coastal State can exercise in this maritime zone. Rights are established as “sovereign rights” for the coastal State, but those rights have some limitations since the coastal State has “rights and jurisdiction” but not in an absolute manner. The rights established for the coastal State are exclusive in relation to the exploitation and exploration of natural resources and no other state can exercise them without previous consent. In comparison with the EEZ regime, the freedoms of laying submarine cables and pipelines shall be guaranteed, the Continental Shelf, as is established in paragraph 1, article 77 “*The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources*”⁴⁷. Also, this article defines what jurisdiction of the coastal State is applicable and to what the natural resources are considered under the scope of part VI in paragraph 4.

The sovereign rights that are entitled to the coastal State are limited in article 77 (1), limited to the exploration and the exploitation of natural resources⁴⁸ on the continental shelf. Furthermore, article 77(2) refers to the exclusive rights established in paragraph 1 as exclusive, however Article 78 (2) establishes that “*The exercise of the rights of the coastal State over the*

⁴⁴ W.C Drew and A.G Hopper, “Fishing and Submarine Cables-Working Together”, International Cable Protection Committee, 2009

⁴⁵ M. Miso, “Rights of States Regarding Underwater Cables and Pipelines” University of Zagreb, January 2010, p.14

⁴⁶ Supra note 5, Article 77

⁴⁷ Supra note 5, Article 77 (2)

⁴⁸ Supra note 5, Article 77 (1)

continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this convention”⁴⁹. Thus, the coastal State has the exclusive right to explore and exploit the natural resources of the continental Shelf but shall respect the rights and freedoms of other States, as established in UNCLOS.

The establishment of a Continental shelf does not require “occupation, effective or notional, or on any express proclamation”⁵⁰. While the rights established in the EEZ shall be claimed by the coastal State and cannot extend 200NM as is established in article 57, the rights established in the continental shelf are inherent, and this maritime zone can be extended up to 200NM. This fact is based on the ICJ, the North Sea Continental Shelf Cases. This case considered the right of the coastal State over the continental shelf as an inherent right, it considers that even though some States claimed the territory it does not constitute as a requirement to exert sovereignty over this zone⁵¹.

Article 78 refers to the “*legal status of the superjacent waters and air space and the rights and freedoms of other states*”⁵². Although, this article refers to those rights or freedoms that other states have⁵³. As is established in paragraph 1, UNCLOS consider that the rights of the coastal state do not affect to the superjacent waters or the airspace over house waters⁵⁴.

2.4 Interpretation of Article 79 UNCLOS.

The interpretation of article 79, considered as an important provision regarding the “*Submarine cables and pipelines on the continental shelf*”⁵⁵ establishes in the first paragraph that all the states whether coastals or not, are entitled to lay submarine cables or pipelines. However, there are some restrictions since the coastal State may not impede the laying or maintenance of such cables or pipelines⁵⁶ but this state could take reasonable measures for the exploitation,

⁴⁹ Supra note 5, Article 78 (2)

⁵⁰ Supra note 5, Article 77(3)

⁵¹ ICJ, North Sea Continental Shelf Cases (the Federal Republic of Germany v. Netherlands/Denmark), Judgment of 20 February 1969, ICJ Reports (1969), 3, 22 (para. 19, emphasis added); this subparagraph, therefore ‘codifies the rule established in the North Sea Continental Shelf Cases’, see Heidar (note 2), 36.

⁵² Supra note 5, Article 78

⁵³ Proels A. United Nations Convention on the Law of the Sea: A Commentary, C.H Beck, Hart, Nomos 2017 p.614

⁵⁴ Supra note 5, Article 78 (1)

⁵⁵ Supra note 5, Article 79

⁵⁶ Supra note 5, Article 79 (2)

protection, and preservation of its continental shelf. In this light, paragraph 3 provides for the following: When the laying of pipelines is established, the delineation of those routes is subject to the consent of the coastal State⁵⁷. However, paragraph 4 clarifies that establishing measures for those cables or pipelines entering in the territory or territorial sea of the coastal State, due to this fact has jurisdiction over those structures and installations⁵⁸. In light of this, the coastal State shall guarantee the maintenance and repairing of those submarine cables or pipelines that are already laid without prejudicing those activities.⁵⁹

There is an aspect that shall be mentioned, in that UNCLOS does not consider submarine cables as installation or artificial structures. It is important to remark that the coastal State shall authorize installations and structures, but, as is established in article 79 (1), all states are entitled to lay submarine cables and pipelines⁶⁰. It seems inherent that the activity to repair and maintain submarine cables and pipelines, in base to the wording “laying”, is established for the new submarine cables, a regulation for the already existing submarine cables is established in article 79.

Coastal State shall not impede submarine cables and pipelines construction, in the same manner as maintenance and reparation activities cannot be prohibited as established by the ICJ in the North Sea Continental Shelf Cases as a part of international customary law⁶¹. Article 79 (2) addresses the possibility of damage caused by submarine cables and pipelines and guarantees their reparation and maintenance for marine ecosystem protection.

It is clear that the coastal State may not impede the reparation and maintenance of submarine cables and pipelines. Indeed, the coastal State shall take the necessary measures for the protection and exploration of the continental shelf.

The coastal State may conduct operations to ensure the control of the pollution or damage caused, but just when it comes to submarine pipelines and not submarine cables. This is because pipelines transporting oil and gas are considered a threat to the marine environment. However, this provision does not consider relevant the pollution that submarine cables could cause, not being relevant for environmental matters⁶². While the freedom to lay submarine cables is guaranteed there are also some limitations, according to article 79 (3) “*the delineation of the*

⁵⁷ Supra note 5, Article 79 (3)

⁵⁸ Supra note 5, Article 79 (4)

⁵⁹ Supra note 5, Article 79 (5)

⁶⁰ Supra note 5, Articles 60 and 80

⁶¹ Article 79 UNCLOS, Proelss A. United Nations Convention on the Law of the Sea: A Commentary, C.H Beck, Hart, Nomos 2017

⁶² Supra note 5, Article 79 (2)

*course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State*⁶³ the route is going to be used by pipeline is subject to consent by the coastal State. The freedom to lay submarine cables does not require the explicit consent of the coastal State, neither the delineation, not being mentioned by Article 79 (3). The selection of the route is essential and is covered by paragraph 3 in the case of the pipelines⁶⁴.

Following this, the coastal State is allowed to establish certain measures and conditions for those structures entering in its territory or territorial sea⁶⁵. The coastal State can only forbid the laying of submarine cables or pipelines in the continental shelf based on the reasonable measures for the exploration of the continental shelf and the exploration of its natural resources⁶⁶. However, the jurisdiction over those structures laid in the seabed remains part of the coastal State based on Article 79 (4).

2.5 Environmental aspects. Duty to protect the Marine Environment.

Submarine Cables can be considered as a possible threat in the protection and preservation of the marine environment, increasing the heating, producing electromagnetic fields and effects to the ecosystem. However, there remains some uncertainties concerning the real effect of the submarine cables on the marine environment⁶⁷. Therefore, the general provisions regarding marine protection are described in UNCLOS part XII. Specific regulations related to the marine environment are established by the coastal States domestic laws in accordance with UNCLOS regulations.

Although the notion of pollution is wide, what is considered here as pollution is defined in article 1(4) UNCLOS⁶⁸. Submarine cables activities could cause with harmful effects, Electromagnetic Fields (EMF), however there is no clear evidence of the Submarine cables

⁶³ Supra note 5, Article 79 (3)

⁶⁴ Proels A. United Nations Convention on the Law of the Sea: A Commentary, C.H Beck, Hart, Nomos 2017 p.626

⁶⁵ Ibid. p.627

⁶⁶ Ibid.

⁶⁷ Bastien TaorminaJuan BaldAndrew WantGérard ThouzeauMorgane LejartNicolas DesroyAntoine Carlier, «A review of potential impacts of submarine power cables on the marineenvironment: Knowledge gaps, recommendations and future directions» Renewable and Sustainable Energy Reviews, Elsevier, Volume 96, 2018 Availableat:

<https://reader.elsevier.com/reader/sd/pii/S1364032118305355?token=B37E24E493CFEB659F25BEEFE699BA8C5D6FA6CD4052B8AC62AE74473C19DEBADCF0358166390BAEAF13FCA83D417CD7>

⁶⁸ Supra note 5, Article 1 (4)

affecting the marine habitat, concluding that the fiber-optic cables do not interfere with the habitat of the marine resources⁶⁹.

The Coastal State has sovereignty on the Territorial Sea and archipelagic waters, based on UNCLOS article 2 and 49, and has the authority to determine the necessary measures in order to protect the marine environment. However, in the EEZ and the Continental Shelf the coastal State can only take the necessary measures to protect and preserve the marine environment⁷⁰. Furthermore, no specific provisions are enabling the coastal State to impose Environmental Impact Assessment regulations on cable survey conduction under UNCLOS. Following this, Article 206 provides to the coastal State the jurisdiction to control all those activities that could cause a major pollution to the marine environment⁷¹. On the other hand, Submarine cables are not considered as a pollutant activity under article 208.

The provision concerning seabed pollution is found in article 208 UNCLOS, not considering Submarine cables as “pollution” and the conduction of submarine cables on the EEZ and Continental shelf is not considered as “seabed activities”⁷². Hence, freedom of laying submarine cables and the inconsideration of pollution under UNCLOS shall be respected by the coastal State. Furthermore, Article 79 (2) UNCLOS considers that environmental aspects on the submarine cables shall not be taken into account under the environmental provisions of UNCLOS⁷³.

There is a clear difference between submarine cables and pipelines. The coastal State can only take reasonable measures related to the “exploration and exploitation of the Continental Shelf”. However, pipelines are subject to pollution control. While conducting the laying of the submarine cables, States or Private companies shall act “due regard” to the coastal State rights concerning the marine environment. The coastal State may not impose, based on 194 (4), environmental measures since the freedom of laying submarine cables shall be respected as is established in the Convention⁷⁴. The requirement of an Environmental Impact Assessment, (hereafter: EIA) on the EEZ and Continental shelf, shall be imposed when the coastal State has jurisdiction in that maritime zone. Regarding the EEZ and Continental Shelf, Coastal State has

⁶⁹ Submarine cables: the handbook of law and policy / edited by Douglas R. Burnett, Robert C. Beckman, Tara M. Davenport. Martin Nijhoff Publishers, Leiden-Boston 2014 p.196

⁷⁰ Supra note 5, Article 56 (b) III

⁷¹ Supra note 5, Article 206

⁷² Supra note 5, Article 208

⁷³ Supra note 5, Article 79 (2)

⁷⁴ Supra note 5, Article 194 (4)

no jurisdiction to impose this requirement⁷⁵. However, companies or other States should avoid sensitive areas to not cause damage to the marine ecosystem.

Referring to the Submarine cables in Marine Protected Areas (hereafter: MPA)⁷⁶ Coastal states may restrict submarine activities only when those are conducted under their jurisdiction. In comparison, IMO restricted the navigation freedom through MPA's. Although, there is no equivalent normative frame for restricting the freedom of laying submarine cables in the EEZ or Continental Shelf.

The jurisprudence covers both examples, on one hand, the United Kingdom and the United States controlled the routing cable system for the protection of the MPA. On the other hand, Australia allowed the deployment of submarine cables but also created different levels of protection⁷⁷.

There is no clear answer on how the acoustic mechanism of the cables affects the marine species. However, some species such as whales emit frequencies that could interfere with survey-conduction ones. Once the cable is laid in the seabed the current and waves may affect the submarine cable generating action in the seabed. The cable in movement could provoke a displacement of sediments and pieces of sand or stones could be moved to places where they should not be. In addition, this movement may disturb or damage the structure of the cable due to the abrasion. Besides, once submarine cables are laid in the seabed, they are exposed to the whole marine ecosystem causing or inviting that encrusting organisms find an artificial place to live. This would be depending on the seabed substrate and its composition⁷⁸. On one hand, submarine cables laid in the sand would generate sustentation of sediments, on the other hand, for those situated on rocky seabed, the abrasion of the cables is major and, may also generate an ecosystem with encrustation of coral or algae. In addition, if submarine cables are not considered as pollution for the marine ecosystem, it is observable that affect the marine habitat in the seabed. Therefore, the coastal state, can choose to impose certain constraints on the basis of protection of the marine environment. For instance, it can decide on an EIA procedure

⁷⁵ Submarine cables: the handbook of law and policy / edited by Douglas R. Burnett, Robert C. Beckman, Tara M. Davenport. Martin Nijhoff Publishers, Leiden-Boston 2014 p.199

⁷⁶ Ibid, p.204

⁷⁷ Ibid, p.205

⁷⁸ Supra note, 67

imposing that a submarine cable cannot be placed in an existing Marine Protected Area, as well as establishing environmental fees and taxes.

2.6 Duties of the foreign-flagged vessels laying cables on the Exclusive Economic Zone and Continental Shelf.

Laying submarine cables is an activity that relies upon different states jurisdiction, hence rules of procedure of state regimes confront with states practice. In this vein, coastal States may establish some limits and requirements guaranteeing the laying, maintenance, and protection of the submarine cables. However, the relation between the private companies, representing the cable industry, and the Coastal State can cause a situation of “creeping jurisdiction” as is going to be explained in Chapter III of the present thesis. Other states might exercise freedoms established in UNCLOS, while the Coastal State exercises its sovereign rights⁷⁹ to protect and preserve the marine ecosystem. The application of those permission processes on the Exclusive Economic Zone (EEZ) and Continental Shelf are different as explained hereafter.

Cable laying companies are conducting those activities under their national flag, into the EEZ or Continental Shelf of the coastal State. This activity is conducted to ensure the “*Jus communicationis*”⁸⁰ however, the main purpose is to exploit and obtain an economic benefit from this activity.

Different steps need to be completed, in the beginning the route of the cable survey shall be established, ensuring that cable companies are not causing any damage or laying the cable in a zone with a high level of anchoring or existent cables. In other words, the cable company shall notify after the route planning the coastal State ensuring that the conduction of those activities are not prejudicial to the marine environment and thus, the sovereign rights of the Coastal State⁸¹. Submarine cables cannot be conducted without a pre-laying survey, which means that the freedom of laying of Submarine cables is limited by Article 79.

There is a thin line regarding the duties of the foreign-flagged vessels laying cables on the EEZ and Continental Shelf where the Coastal State “may not impede the laying or maintenance of the submarine cables”⁸² but can “take the reasonable measures for the exploration and

⁷⁹ Tara Davenport (2012) Submarine Communications Cables and Law of the Sea: Problems in Law and Practice, Ocean Development & International Law p. 122

⁸⁰ Supra note 15.

⁸¹ Roach and Smith, Submarine Cables: The Handbook of Law and Policy, edited by Douglas R. Burnett, Robert Beckman, Tara M. Davenport p. 122

⁸² Sugadev, Anjali, Submarine Cables and Pipelines, National University of Singapore.

exploitation of the continental shelf”⁸³. Those duties shall be “reasonable”, for the “exploration” and for the “exploitation” whether flagged state vessels do not affect those duties as is the freedom of laying submarine. Indeed, can the laying of submarine cables be considered as “exploration and exploitation of the continental shelf”? Based on the technical aspects of the question, there is a difference with the submarine cables activities and the deep seabed activities, establishing measures for the coexistence of both activities and a general consensus of the respect to the freedom of the submarine cables but no freedom to conduct seabed mining without the consent of the coastal State⁸⁴.

The maritime space in some areas is very crowded, meaning that Coastal States shall be notified to ensure the safety of navigation of other vessels transiting through the Exclusive Economic Zone (EEZ). In light of this, the notification of the survey shall be done by the cable company before the start of the activities. However, cable companies do not need to notify the Coastal State if it does not interfere with Coastal State activities⁸⁵.

Cable Companies shall allow coastal State’s observers to conduct observation measures on board of the vessels conducting laying activities, making sure to that the sovereign rights of the Coastal State are being respected. While those activities are subject to this requirement, the flag State do not usually comply with it putting forward their freedoms as stated in article 79(4)⁸⁶. At this point, it is observable that the economic interest confronts the freedoms established in the maritime zones aforementioned.

In conclusion, the coastal State has established rights and duties to protect and preserve the marine ecosystem in those maritime zones. However, the freedom of laying submarine cables and the conduction of previous surveys to determine the future laying shall be respected. The discussion and analysis of the following are the basis to understand the State’s practice jurisdiction. After having presented the core legislation itself, the author will see how it is employed in the practices of different States. The upcoming chapter intends to compare the legislation and the state practice and see if coastal States do it properly or are in a case of “Creeping jurisdiction”.

⁸³ Supra note 5, Article 79.

⁸⁴ Submarine Cables and Deep Seabed Mining, Advancing Common Interests and Addressing UNGLOS “Due Regard” Obligations, Technical Study: No. 14 ISA TECHNICAL STUDY, International Seabed Authority, Kingston, Jamaica, 2015

⁸⁵ Ibid

⁸⁶ Supra note 5, Article 79(4)

3 Part III – The Law of the Sea and the “Creeping Jurisdiction” of the Coastal States.

3.1 “Creeping jurisdiction” over marine protected areas.

In part II of the present thesis the legal regime of the submarine cables in the Economic Exclusive Zone and the Continental Shelf was defined and analyzed based on the United Nations Convention on the Law of the Sea provisions. Hence, it concluded based on the different provisions described in UNCLOS that the freedom of laying submarine cables shall be preserved. It also clarified what the regime for laying submarine cables under UNCLOS is and what coastal states are allowed to do in relation to submarine cables.

Thereafter, the present chapter is intended to analyze the practice of selected states and examine if the domestic legislation they have regarding submarine cables, is done according to the regulation established in UNCLOS or not. Analyzing national legislation will provide the real situation of States Practice, concluding whether these states are complying with their obligations under UNCLOS or going beyond what UNCLOS allows them to, thus configuring a situation of “Creeping coastal jurisdiction”. The selection of the different States to be study next is based according different criteria: Mainly on their important geographical scope, on the environmental measures taken in those States and on the impact, they can have on the submarine cables.

3.2 What does the coastal State “Creeping jurisdiction” entail?

The definition of the term “*Creeping jurisdiction*”⁸⁷ comes from Scientist Dr. John Craven, from the United States. This theory originated in 1958 with the Convention on the Continental Shelf, because it was considered as an open-door Convention. The 1982 United Nations Convention on the Law of the Sea establishes a definition for the Exclusive Economic Zone (EEZ) and the continental shelf⁸⁸, establishing the sovereign rights of the coastal States in the mentioned maritime zones⁸⁹. However, this part intends to analyze the different state practices of the most predominant states involved in the submarine cables manner. The measures imposed by a coastal State beyond the UNCLOS, limiting other States rights and freedoms in order to obtain a benefit for itself is what can be considered “Creeping jurisdiction”.

⁸⁷ Esters, Nicole, *Creeping Jurisdiction and its Challenges to the Equal Implementation of the Law of the Sea Convention*. King’s College London.

⁸⁸ Supra note 5, Part V and VII

⁸⁹ Alencar Victor, Feitosa Ventura Mayer, *Environmental Jurisdiction in the Law of the Sea: The Brazilian Blue Amazon*. P165

3.3 Spanish legislation and normative frame.

Spain is a State member of UNCLOS and member of the European Union since 1 January 1986⁹⁰. This State has a wide number of cables in their waters. However, the cable “Marea” is the most recent and modern submarine cable connecting Sopelana, Vizcaya with Virginia Beach in the U. S⁹¹. Furthermore, this concrete Spanish scenario has established its starting point connecting South America with Europe. Spain used to be one of the most important States regarding the laying of Submarine Cables, however, in the past years, states such as France or Portugal had more predominance than Spain. Considering that Spain has one of the newest submarine cables, it is important to analyze its domestic regulation and determine whether it is obsolete or is not, following the UNCLOS regulation, or if it is a concrete case of “Creeping jurisdiction”. Nonetheless, the recent laying of the “Marea” cable confronts with a 1980s regulation as is going to be explained and analyzed below.

The 1958 Geneva Conventions and 1982 UNCLOS established the regime on the high seas, existing the freedom of laying, repairing, and maintenance of submarine cables. Although, on the Continental Shelf, the coastal State shall not impede the freedom of laying and maintenance submarine cables. Coastal states only can take the necessary measures for the protection and exploration of the Continental Shelf⁹².

Spanish domestic legislation in the Economic Exclusive Zone is regulated in the “*Law 15/78, of 20th February, about the EEZ regime*”. In this vein, the regulation in the Territory and Territorial Sea of the Spanish State is regulated in its Constitution, article 149.2 EC providing the centralized competence for the Spanish Constitution⁹³. However, in paragraph 24 it establishes that “those public structures with general interest passing through different autonomies” and this would be applicable regarding to the submarine cables. However, the different autonomies will have the competence in environment protection, technical and scientific analysis of the submarine cables⁹⁴.

⁹⁰ Tratado de adhesión de España y de Portugal (1985) [DO L 302 de 15.11.1985](#)

⁹¹ Blogthinkbig.com. 2020. *MAREA: 6.000 Km De Viaje Submarino - Blogthinkbig.Com*. [online] Available at: <<https://blogthinkbig.com/peoplefirst/marea-el-cable-submarino>> [Accessed 3 August 2020].

⁹² Supra note 2, Article 79

⁹³ Constitución Española. Boletín Oficial del Estado, 29 de diciembre de 1978, núm. 311, pp. 29313 a 29424 Cita en texto: (CE 1978)

⁹⁴ Ibid. Article 149 (2) 24^a

Based on the EEZ regulation, the “*Law 15/1978, of 20th February about the Exclusive Economic Zone*” establishes in paragraph 1, in the same scope as UNCLOS, the competences in this maritime zone. The measures established by the Spanish Government shall be done according to International Law⁹⁵. Paragraph 5 considers the establishment of an Exclusive Economic Zone not affecting to the freedoms of: Navigation, Overflying, and Laying of submarine cables and pipelines⁹⁶. In this light, there are applicable limits to the freedom of navigation-related to fishery vessels having to comply with the Spanish dispositions. However, this law does not establish the application process that other states shall comply regarding to the laying of submarine cables in the Spanish EEZ.

Law 22/1988, of 28 of July, of Coasts. This regulation defines the concept of the “Spanish Public Maritime Domain” (Hereafter: SPMD), considered as the public maritime domain, the territorial Sea, Internal Waters and the natural resources of the EEZ and Continental Shelf, as well as the beaches and Coasts⁹⁷. It is considered in Article 3(4) of the mentioned Law, that the natural resources of the EEZ and Continental Shelf, will be defined and redirect to its own specific Law. Following this, Article 7⁹⁸ refers to Article 132 (1) of the Spanish Constitution⁹⁹, considering that the goods of Maritime-Land Domain cannot be vulnerated by any chance. In article 27, is observable and understandable that the submarine cables at some point must be attached to the land¹⁰⁰. This article refers to the right of transit in the public maritime domain, guaranteeing this right even in the land. This legislation makes a difference between the SPMD and the “Protection Bondage” being that the first one is Public while the second one is Private Domain under the Spanish Administration¹⁰¹. In addition, Article 44(3) requires a basic study of the coast dynamic and the effects caused by the activity¹⁰².

Regarding the laying of Submarine Cables, it may consist as an occupation of the Spanish Maritime Domain, thus this article 32(3) establishes that the occupation of a maritime territory of public domain will be under the consent of the administrative title. If the laying company does not comply with the administrative title, it will concur in a “caducity” act and will not have a valid license for laying submarine cables. If the laying company continues with the

⁹⁵ Ley 15/1978, de 20 de Febrero, Sobre Zona Económica Exclusiva. Paragraph 1

⁹⁶ Ibid. Paragraph 5

⁹⁷ Ley 22/1988, de 28 de julio, de Costas BOE número 181 de 29/7/1988, páginas 23386 a 23401 (16 págs.)

⁹⁸ Ibid, Article 7

⁹⁹ Supra note 93, Article 132(1)

¹⁰⁰ Supra note 97, Article 27

¹⁰¹ Ibid, Article 25(1)

¹⁰² Ibid, Article 44(3)

activity this would lead to the appropriate sanction¹⁰³. Furthermore, the expedition of the administrative title to concur those activities in the SPMD does not mean that the Spanish State loses the right over this maritime zone. The laying company would be responsible for the damage caused by the cables, having to comply with the responsibilities and consequences of the Spanish State¹⁰⁴. Continues article 37(2), the laying company must inform all the incidences to the Spanish Administration due to the fact that Spain still has the reserved supervision and control over the occupied maritime zone. Paragraph (3) establishes that Spain will control annually the accomplishment of the accorded activities and the effects caused by the laying company. Those registers will be public being possible to establish certifications and requirements after those controls¹⁰⁵.

The requirements to lay submarine cables in the Spanish public domain shall be requested to the competent Administration deriving with the specified project in which will be fixed the characteristics of the installations and constructions. Indeed, the extension of the SPMD occupied and the reglementary specifications shall be specified. Before the laying of the Submarine Cables, the project shall be done and handed in to the public authorities with the correspondent application¹⁰⁶. In the same way, the projected activities that could cause a major detriment in the SPMD, will require of an evaluation of the possible caused effects¹⁰⁷. Also, an economic-financial analysis may be required by the competent authority¹⁰⁸. The laying activities will be done according to the general, specific and technical specifications depending of where those activities are located¹⁰⁹.

A characteristic fact of the Law of Coasts is the principle of “publicity”. Projects management shall be done in public attached with a study of the determined departments and organisms. In this case, the laying company may modify the project, with the previous communication to the authorities¹¹⁰.

¹⁰³ Ibid, Article 32(3)

¹⁰⁴ Ibid, Article 37(1)

¹⁰⁵ Ibid, Article 37 (2)(3)

¹⁰⁶ Ibid, Article 42 (1)

¹⁰⁷ Ibid, Article 42 (3)

¹⁰⁸ Ibid, Article 42 (4)

¹⁰⁹ Ibid, Article 44 (1)

¹¹⁰ Ibid, Article 45(1)

Activities with special circumstances of intensity, danger or rentability in the Maritime Public Domain will require an administrative authorization¹¹¹. They will be considered as removable installation according to Article 51 (2) being part of those requirements the submarine cables¹¹². Article 64 (1) establishes that all the occupation of the public maritime Domain with constructions or installations not removable will be under the express consent of the State Administration¹¹³. Following, the laying company or State will be able to use those maritime zones, guaranteeing the control, access and transit of the corresponding authorities under circumstances of national defense, safeguard, maritime security and public protection¹¹⁴. However, the laying State shall apply for the consent of the Spanish Administration and accept the terms and conditions. Without the acceptance, the application will not be approved, being published the correspondent resolution¹¹⁵.

Article 76, describes all the requirements and conditions with public character in which shall be established the occupation, project construction, times of use of the seabed, taxes, public or private use, benefits obtained by the submarine cable, conditions and affection to the environment, maritime signals and alerts and the obligations for the laying state or company¹¹⁶. In the same line, the end of usage of the Spanish public domain will be the following circumstances described in article 78¹¹⁷.

The payment of taxes corresponding to the usage of the Spanish Public Maritime Domain will be in favor of the State Administration¹¹⁸. The quantity of the taxes is established in the “Spanish Coast Law” being mandatory to comply with the payment by the laying State or private company¹¹⁹, taking into consideration the different level of usage and occupation of the Public Maritime Domain¹²⁰. Consequently, the percentage and exact quantity of the taxes will be calculated under the requisites established in article 84 and followings. Spain will be able to impose fines, bans and prohibition to exercise activity in the Spanish Public Domain depending

¹¹¹ Ibid, Article 51 (1)

¹¹² Ibid, Article 51 (2)

¹¹³ Ibid, Article 64 (1)

¹¹⁴ Ibid, Article 64 (2)

¹¹⁵ Ibid, Article 67

¹¹⁶ Ibid, Article 76

¹¹⁷ Ibid, Article 78

¹¹⁸ Ibid, Article 84 (1)

¹¹⁹ Ibid, Article 84 (2)

¹²⁰ Ibid, Article 84 (3)

of the level of the infringement¹²¹. The quantity of the fines is established in article 94, making reference to the articles 97 and 98 of the Spanish Coast Law¹²².

One characteristic of the Law is the obligation to repair the damage caused, the damage originator will be required to pay a fine but indeed, must repair what have been caused and it is possible to prosecute criminally if the infraction requires it¹²³. The quantity of the fines is established in article 97 and following as well as the restauration, reposition and compensation of the damage caused¹²⁴.

3.3.1 Spanish State's practice – EIA's requirement.

Spanish State's practice is not specific concerning the requirement of an Environmental Aspect Assessment (EIA). The resolution of January 20, 2010, of the Secretary of State for Climate Change, on the environmental impact assessment of the project fiber optic submarine cable from Europe to India Gateway, segment 2 (Spanish waters). The laying of the cable through Spanish waters involves different maritime zones, crossing through the Spanish EEZ in different regions¹²⁵. Those regions are the Atlantic coast of Galicia and Huelva, crossing through the Gibraltar Strait in the Mediterranean Sea. It also involves Territorial waters and Protected Fishing Zones before entering in Algerian waters. This analysis is based on the Royal Legislative Decree 1/2008, January 11¹²⁶.

It establishes in paragraph 3 (2), that the requirement of an EIA shall be stated only if the environmental competent authority considers it¹²⁷. However, in this resolution different opinions are starting from the Spanish Oceanographic Institute (IEO), this institution refers to the Atlantic waters of Galicia, considering them as an important and affected coast regarding this project¹²⁸.

The arguments were the following: 1-Galician waters were in process to be considered as a Marine Protected Area, 2-The high level of sedimentary species living in the seabed of the EEZ

¹²¹ Ibid, Article 92

¹²² Ibid, Article 94

¹²³ Ibid, Article 95 (1)

¹²⁴ Ibid, Article 100

¹²⁵ Resolución de 20 de Enero de 2010, de la Secretaría de Estado de Cambio Climático, Sobre la evaluación de Impacto Ambiental del Proyecto Cable submarino Fibra óptica Europe India Gateway, segmento 2 (Aguas españolas).«BOE» núm. 34, de 8 de Febrero de 2010, páginas 11592 a 11596 (5 págs.)

¹²⁶ Real Decreto Legislativo 1/2008, de 11 de enero, por el que se aprueba el texto refundido de la Ley de Evaluación de Impacto Ambiental de proyectos. «BOE» núm. 23, de 26/01/2008. Ministerio de Medio Ambiente.

¹²⁷ Ibid. Paragraph 3 (2)

¹²⁸ Spanish Oceanographic Institute (IEO) available at: <http://eurogoos.eu/member/ieospanish-oceanographic-institute-ieo/>

and Continental Shelf could be affected. However, there is no consistency in this argument because there is no proof how the movement of this cable could affect those species. 3-The submarine cable should deal with the sunk body of the “Prestige” which is even nowadays causing pollution in this area. On the other hand, the other competent authority is The Underwater Archeology Center of the Andalusian Institute of Historical Heritage of the Ministry of Culture of the Junta de Andalucía, and even knowing the existence of natural resources in the zone, does not consider the necessity of establishing an EIA there. In this light, the fisheries authorities of Algeciras, consider the opposite because the activity of the vessels while conducting fisheries activities may be affected. The third implied part is the one regarding the Mediterranean Sea (Mediterranean Institute of advanced studies) and establishes that they have a lack of information and refers to the analysis conducted on the bay of Algeciras. Under this case, the Spanish General Directorate for Quality and Environmental Assessment, and according to the analysis, considered that the submarine fiber optic cable project in its water route is going to produce significant adverse impacts, so decided to resolve to not submit the aforementioned project to the environmental impact assessment procedure¹²⁹.

3.3.2 Spanish State’s practice – Telefonica v. Spain.

Another example of state practice is the “*Sentencia del Tribunal Supremo (STS)*” June the 16, 2008 N° 1341/2004 confronting the General Spanish Administration against the private Company “Telefonica S.A” because of the laying of submarine cables in the Exclusive Economic Zone, Continental Shelf, and Territorial Sea¹³⁰. This case scenario is relevant because it addresses the first stage of the submarine cables. The basis is the delineation and the route survey conduction.

In this case scenario, the route passes through the different Spanish maritime territories. The competence in the matter is exclusive for the Spanish Authorities as is proven in the Spanish Coasts Law¹³¹. Moreover, some of the aforementioned aspects are competence of the Province Government¹³². On the other hand, “*Telefónica*” and its infrastructure company “*Telxius*”, are interested in investing with cooperation of Internet Companies such are “Facebook or Microsoft” in the laying of submarine cables all over the world. This is due to the constant

¹²⁹ Resolución de 20 de enero de 2010, de la Secretaría de Estado de Cambio Climático, sobre la evaluación de impacto ambiental del proyecto Cable submarino fibra óptica Europe India Gateway, segmento 2 (aguas españolas).«BOE» núm. 34, de 8 de febrero de 2010, páginas 11592 a 11596 (5 págs.)

¹³⁰ STS, 16 de Junio de 2008, Tribunal Supremo - Sala Tercera, de lo Contencioso-Administrativo N° 1341/2004.

¹³¹ Supra note 97

¹³² Supra note 95

evolution and the necessity of higher speed and data volume making necessary new ways and underwater nets.¹³³

First of all, the dispute concerns the extension of the Exclusive Economic Zone and the Continental Shelf. The natural resources included in those maritime areas are part of the public terrestrial maritime domain, based on article 132.2¹³⁴ of the EC and 3.3 of the Coastal Law¹³⁵. However, according to the aforementioned precepts, the claim is based on the Spanish natural resources included in the EEZ and Continental Shelf and not on the territorial sea of Spain.

The importance in this case is the exploration and exploitation of natural resources being here in cooperation with the autonomic authorities. This case proves the importance of the natural resources in the aforementioned zones and the intervention of the State Administration in order to safeguard the natural resources. Keeping in mind that article 132.2 EC provides that "*the natural resources of the exclusive economic zone and the continental shelf are assets of the public state domain...*"¹³⁶ referencing to the "Coasts Law". Analyzing this, If the constituent had wanted to include the continental shelf, and not only its resources, as a Coastal Demand, it would have advanced its mention, along with the maritime land area, the beaches, and the territorial sea, before citing natural resources¹³⁷.

The opposite solution that the State Administration postulates, goes against the requirements derived from the literal tenor of the mentioned provision. In this sense, the laying of submarine cables through the economic zone and the continental shelf is not subject to the consent of the coastal State, according to article 79.3 and 4 of the cited United Nations Convention on the Law of the Sea¹³⁸. That is, the route delineation for laying "will be subject to the consent of the State", which can establish conditions for the entry of cables or pipes into its territory (fourth section of article 79 of the Convention¹³⁹). This consent subject to conditions is specified in Spanish legislation in the provision of the authorizations and concessions established in the Coastal Law¹⁴⁰.

¹³³Valero, C. «Telefónica participará junto a Orange en el nuevo cable submarino de Google», publicado 19-02-2020 Accessed 12-09-2020, Available at: [Adslzone.net/2020/02/19/telefonica-telxius-orange-cable-submarino-google-dunant/](https://adslzone.net/2020/02/19/telefonica-telxius-orange-cable-submarino-google-dunant/)

¹³⁴ Supra note 93, Article 132 (2)

¹³⁵ Supra note 97, Article 3(3)

¹³⁶ Supra note 93, Article 132 (2)

¹³⁷ Supra note 125,

¹³⁸ Supra note 5, Article 79 (3) and (4) UNCLOS

¹³⁹ Ibid.

¹⁴⁰ Supra note, 125

This case decided to not enter into a consideration of the sovereignty of the Spanish State, establishing the correspondent fee to occupy the Continental Shelf and the EEZ but including the Territorial Sea and the Beach as well. The tribunal considered that the laying of submarine cables in those zones affected the natural resources, citing the resolution of October 27, 1999¹⁴¹ where it took into account the pollution caused by the exploitation of oil and gas in the sea not being this case scenario due to the difference between Submarine Cables and Pipelines.

In summary, international regulations establish the “due regard” mutual respect between the laying State and the Flag State in establishing measures to conduct the delineation of the cable routes in the exclusive economic zone (EEZ) and the Continental Shelf. This freedom is respected under the UNCLOS normative frame confronting in this scenario, UNCLOS with Spanish Constitution and the Autonomic legislation regarding to the aforementioned matters.

The Spanish legislation considers Submarine Cables as a structure part of the public domain due to the fact that affect the different natural resources of the aforementioned areas and the public benefit. This case scenario considered that the occupation requires express concession¹⁴² when it comes to talk about the entering of the submarine cable in the Spanish Territorial Sea, being subject to the Spanish Public Domain. Furthermore, following the interpretation of the case is necessary, under UNCLOS the occupation of these maritime zones cannot be taken into account for the establishment of the canon established in the application process¹⁴³. Unless that the submarine cables affect natural resources, which, as already it has been considered by Spain¹⁴⁴.

On the other hand, the flag State, considered that the submarine cable will not affect the marine ecosystem, not being considered as a threat. Telefonica’s argument is based on the “non-significant disruption to the sea habitat” recognizing that the submarine cable will affect to the natural resources. Indeed, the route of the submarine cable shall evade the sunk prestige all over the Galician Coast and the Marine Archaeologic Zone of the Gibraltar Strait¹⁴⁵.

To conclude, even though the Spanish legislation considers that it affects the natural resources of its coast, following the provisions stated in the UNCLOS, the fixing of the canon insofar, as defined as an occupied surface that passes through these areas, must be canceled since Spain

¹⁴¹ STS, 16 de Junio de 2008, Tribunal Supremo - Sala Tercera, de lo Contencioso-Administrativo Nº 1341/2004.

¹⁴² Supra note, 97

¹⁴³ Supra note, 125

¹⁴⁴ Ibid.

¹⁴⁵ «España autoriza el cable submarino que unirá Europa, África y Asia. Europa Press/Madrid 2010 Accessed: 12/09/2020 Available at: europasur.es/gibraltar/Espana-submarino-europa-Africa-Asia-0-349466609.html

does not have the sovereignty to decide whether to allow the company “Telefonica” to lay those submarine cables or not. If Spain did choose to take this decision by itself, Spain would be faced with what is considered “Creeping Jurisdiction” since it is going beyond its rights and jurisdiction. The resolution of the case ended allowing the flagged State, to lay the Submarine Cable all over the Spanish Coast, with the major argument of the compatibility between the existence of the cable and the exploration and exploitation of the natural resources. Spanish State safeguard the installation of the Submarine Cable during the laying time laid assuming that will not produce several impacts to the natural and non-natural maritime resources.

This is a good example to prove the economic interests vs protection of the marine ecosystem. Spain’s intentions are to harbor as much submarine cables as possible because its intentions are to emerge as a potential State in this filed, based on the argument that will affect but not enough to be considered as a threat. On the other hand, private companies are interested on laying as much submarine cables as possible to safeguard the communications.

3.4 Cyprus Regulation and State Practice

Cyprus is an Archipelagic State and a member of the European Union (UE) since the 1 May 2004¹⁴⁶. Moreover, it is also a state member of UNCLOS, being under the normative framework of the UNCLOS. The national regulation on submarine cables is established in the Submarine Cables Regulations of 2014 (578/2014)¹⁴⁷. This national regulation applies to the Exclusive Economic Zone and the Continental Shelf of the State but also applies to the submarine cables passing through those maritime zones. The intention to analyze this State comes from its geographical situation, as Cyprus can be considered as an archipelagic State. However, there are territorial and political disputes occurring with Turkey for the North part of the island that may affect the Law of the Sea. This analysis is not going to address the different international territorial disputes that do not concern the sea.

¹⁴⁶ Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded - Protocol No 10 on Cyprus. Official Journal L 236, 23/09/2003 P. 0955 - 0955

¹⁴⁷ Republic of Cyprus 2016 - 2020, Ministry of Foreign Affairs <http://www.mfa.gov.cy/mfa/mfa2016.nsf/All/624BCCF30941FAA5C2258051003F2FCB?OpenDocument&print>

Cyprus national regulation does not allow any state in the EEZ or continental shelf of Cyprus to lay or maintain submarine cables or construct artificial installation without the obtaining of a prior license. This license is edited by the Minister of Transports, and Communications, and work and is supervised by the Submarine Cables Committee, composed by diverse ministers. This license establishes that the activity ensures the safety of navigation as well as presenting the capacity to repair existing cables and other installations. The application of the license will previously ensure that the state of Cyprus can conserve and protect its marine ecosystem but also that can exploit and explore the natural resources in its sovereign maritime territory¹⁴⁸.

The regulations established by Cyprus concerning Submarine Cables were established in 2014, by representatives of the different ministers in the Submarine Cables. It establishes in its paragraph 4 the competences that the committee enhance. The committee will examine the application of the laying, use or operation that are intending to be conducted in the EEZ/Continental Shelf of the State of Cyprus¹⁴⁹, the participants in the meeting will hear the content of the application and analyze it. In this vein, it will be decided whether it is necessary to take external measures to ensure the decision. It is established in paragraph 5 that it is mandatory to apply for a license for conducting submarine cables activities in the maritime zones aforementioned. The applicant shall apply and pay a fee of five thousand Euro (€5000) by the evaluation of the committee. This application shall be done with a minimum of 4 months before conducting the activities¹⁵⁰. The Republic of Cyprus requires under the Assessment of Impacts on the Environment from Certain Projects Law of 2005, the conduction of an Environmental Impact Assessment.

Paragraph 7 establishes the reasons for rejecting the application, this rejection being done by the Committee aforementioned and considers whether the information provided in the application is false, inaccurate or differs from the national security or public interests. Moreover, paragraph 7(c) establishes that submarine cables entering to the territorial sea or the territory of the republic following to what is established in the UNCLOS. The regulation on the territory or territorial Sea is the sovereignty of Cyprus, but what the coastal State in those zones

¹⁴⁸ Ministry of Foreign Affairs of the Republic of Cyprus is an English translation of the Submarine Cables Regulations of 2014 (No. 578/2014) (E.E. Παρ. III(I), Αρ. 4840, 23.12.2014, Κ.Δ.Π. 578/2014), issued by the Exclusive Economic Zone and the Continental Shelf Laws, 2004 and 2014 (Laws 64(I)/2004 and 97(I)/2014).

¹⁴⁹ Submarine Cables Regulations of 2014 (578/2014) paragraph 4

¹⁵⁰ Ibid. paragraph 5

(EEZ and Continental Shelf) may require is a license and the conduction of an EIA to prevent and protect the marine environment. Cyprus has the right to inspect the activities, while the company must inform Cyprus of the conducted activities as is established in the license¹⁵¹.

This case scenario is a clear case of creeping jurisdiction, as following the UNCLOS provisions established in Part II of the present thesis, the coastal State may not impede the freedom of laying submarine cables in the EEZ and the Continental Shelf. As is explained above, Cyprus is requiring an application from the flagged State plus a tax or deposit to grant the authorization. In this vein, the freedom concerning conducting submarine surveys as the first step followed by the conduction of the laying, maintenance or repair of submarine cables, shall not be preceded by an application process as is recognized by UNCLOS. To sum up, Cyprus shall adapt their national legislation insofar as it is not incompatible with UNCLOS provisions. This coastal State is obtaining an economical benefit coming from a freedom that should be granted under the international legal framework.

3.5 Australian Regulation.

Australia has been a state member of UNCLOS since its ratification in 1994 and, the importance of analyzing this state is because of their implication in the protection and preservation of the marine environment. Their marine ecosystem is unique due to the coral reef and Maritime Protected Areas. Hence their pro-environment position as they decided in 2007 to create new Maritime Protected Areas, consisting in different micro reserves. Those areas are considered at different levels of protection, having different types of restrictions on tourism and fishing. In this light, submarine cables are considered under Australian legislation as a critical structure¹⁵² while UNCLOS considers them as a low impact structure¹⁵³. Furthermore, Australia is an island a and unique geographical position to analyze.

¹⁵¹ Ministry of Foreign Affairs of the Republic of Cyprus is an English translation of the Submarine Cables Regulations of 2014 (No. 578/2014) (Ε.Ε. Παρ. ΙΙΙ(Ι), Αρ. 4840, 23.12.2014, Κ.Δ.Π. 578/2014), issued under the Exclusive Economic Zone and the Continental Shelf Laws, 2004 and 2014 (Laws 64(I)/2004 and 97(I)/2014).

¹⁵² Submarine cables: the handbook of law and policy / edited by Douglas R. Burnett, Robert C. Beckman, Tara M. Davenport. Martin Nijhoff Publishers, Leiden-Boston 2014 p.206

¹⁵³ Supra note 5, Article 79 (2)

The application procedure of the government of Australia is based under Schedule 3A of the Telecommunication Act 1997¹⁵⁴. This provision was modified in 2005 to be considered since then as (Australian Act, and Schedule 3A) replacing the existing legislation (1963 Australian Act). It establishes the requirements for laying submarine cables in Australian waters and their policies for the application process.

The submarine cables under the Australian legislation require a permit. All the cables that are passing through a protected zone (MPA or Australian Territorial Sea) require permission to be there.

Australian authorities established different types of permits and, depending on the situation of the cable will require a different type of permit. Even those cables that are being laid in non-protected areas or non-Australian Territorial Sea require a permit of “non-protection zone permit for installation”¹⁵⁵.

The application for permission is accompanied by a fee and a deposit. The Australian government separates the permits between the “Protection zone permit” with a 4040\$ as “Application Charge Per Cable” and the “Non-protection zone permit” with a 5959\$ as “Application Charge Per Cable” and a “Consultancy Deposit” of 25000\$. This application also requires timeframes for processing the application. It is established that the ACMA (which is the public organization in charge) may access or refuse the application within 25 days for protected areas and 60 days for non-protected areas, as those require more information for the application to be allowed under the Australian procedure. This organization has the “right” to consult the Department of Environment, the Department of Defence and the State/Territory Government bodies such as ports and environment authorities¹⁵⁶.

The permit is valid for 18 months after the permit is accepted. However, after the expiration of the permit, if the flagged state requires an extension an additional fee of 1414\$¹⁵⁷ is required to be granted this extension. The applicants may explain the reasons and the place where the

¹⁵⁴ TELECOMMUNICATIONS ACT 1997 - SCHEDULE 3A Protection of submarine cables available at http://classic.austlii.edu.au/au/legis/cth/consol_act/ta1997214/sch3a.html

¹⁵⁵ “Telecommunications and another legislation amendment (Protection of Submarine Cables and Other Measures) Bill 2005, The parliament of the Commonwealth of Australia, House of Representatives, Circulated by the authority of the Minister for Communications, Information Technology and the Arts, the Senator the Hon. Helen Coonan)

¹⁵⁶ TELECOMMUNICATIONS ACT 1997 - SCHEDULE 3A Protection of submarine cables available at http://classic.austlii.edu.au/au/legis/cth/consol_act/ta1997214/sch3a.html

¹⁵⁷ *ibid.*

submarine cables are planned to be laid, and if the flagged States violate any of the conditions established in the application form, it may result in a suspension or cancellation of the permit.

The freedom of laying submarine cables shall be respected even if those cables are passing through MPA's, as established in UNCLOS and the basis for MPAs under Article 194 (5). It shall be noted that under this article the restrictive measures adopted by the coastal State shall not interfere with the freedom to lay, repair and maintain Submarine Cables in the EEZ and Continental Shelf. Australia decided to have a wide number of MPA because different opinions consider acceptable the establishment of a permit in Marine Protected Areas,¹⁵⁸ as is established in Part II, 2.4 regarding the duty to protect the marine environment. Jurisprudence considers at some point the necessary conditions to establish a permit to conduct submarine cables in Marine Protected Areas, the United Kingdom established Special Areas of Conservation (SACs) outside of the Territorial Sea. However, there is a conflict between the coastal State and the imposition of measures on submarine cables activities, this is due to the freedom of laying submarine cables that shall be respected, while at the same time the protection and preservation of the marine environment set out in Part XII has to be preserved. The strongest position is that a coastal State may not impose measures on submarine cables based on Part XII because there is not considered as a pollutant activity under Article 1 of UNCLOS. Moreover, the UNEP/ICPC Report also stated that submarine cables cause a minimum impact on the seabed¹⁵⁹. In addition, the submarine cables activities are not considered as operations under Article 208 because they are recognized as freedoms in the EEZ and the Continental Shelf.

In conclusion, it seems that Australia is in a clear case of creeping jurisdiction. There is no provision under UNCLOS that allows the Coastal State to require a permit for laying submarine cables if those are not in the Territorial Sea. In this case, Australia asks for a required authorization even if the cables are not laid in the Territorial Sea under the argument of the creation of different MPA's. Furthermore, the requirement of the payment for "Protection zone permit" of 4040\$ per cable and the payment in a "Non-protection zone permit" of 5959\$ per cable with the 25000\$ as a Consultancy Deposit is a clear case of creeping jurisdiction since

¹⁵⁸ Submarine cables: the handbook of law and policy / edited by Douglas R. Burnett, Robert C. Beckman, Tara M. Davenport. Martin Nijhoff Publishers, Leiden-Boston 2014 p.206

¹⁵⁹ Convention on the High Seas, 29 april 1958, 450 U.N.T.S 11 (entered into force 30 September 1962) from Tara Davenport (2012) Submarine Communications Cables and Law of the Sea: Problems in Law and Practice, Ocean Development & International Law, 43:3, 201-242, DOI: [10.1080/00908320.2012.698922](https://doi.org/10.1080/00908320.2012.698922)

Australia shall not require any payment neither any permission for the conduction of the laying of Submarine Cables. This is a freedom established and recognized in UNCLOS that Australia, as a State member, shall respect.

3.6 New Zealand Regulation.

New Zealand legislation concerning submarine cables in the Exclusive Economic Zone and Continental Shelf is established in different acts. Those provisions contain the respective measures and application process of other States in the aforementioned maritime zones. Analyzing this state's practice is relevant in understanding the legislation of a defined state similar to the Australian one previously studied and featuring similar geographical conditions and protected areas. In this context, the legislation of Australia has been addressed in the previous point of this work. Following this spirit, this point will examine the legal status of New Zealand being the basis of the following point to compare and analyze the similarities and differences between Australia and New Zealand in the handling of their maritime areas.

The starting point shall be established with the definition by the New Zealand authorities of what can be considered a cable. This definition is found in Section 2 of the Electricity Act 1992¹⁶⁰ and Section 5 of the Telecommunication Act 2001¹⁶¹. In this context, this thesis is focused on the Economic Exclusive Zone and the Continental Shelf of New Zealand, maritime zones being defined in the 1977 Act¹⁶². However, the definition of what is considered a submarine cable under New Zealand legislation is established in the Submarine Cables and Pipelines Protection Act 1996, this provision defining it as the "*cable that lies beneath the high seas or Territorial sea or the International Waters of New Zealand*"¹⁶³ and therefore providing no difference between submarine cables and pipelines.

Under Section 5A of Submarine Cables and Pipelines Protection Act 1996, it establishes the payments and contributions concerning the exploitation of the Continental Shelf beyond 200 Nautical Miles, this provision refers to the exploitation of the non-living resources on this

¹⁶⁰ Electricity Act 1992 (1992 No 122) Public Act 1992 No 122, Date of Assent 17 December 1992, Reprint as at 7 August 2020, New Zealand Legislation.

¹⁶¹ Telecommunications Act 2001, Submarine Cables and Pipelines Protection Act 1966 (1966 No 5) (RS Vol 13, p 629)

¹⁶² Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, Public Act 1977 N0 28, Date of Assent 26 September 1977, Reprint as at 15 December 2005, New Zealand Legislation.

¹⁶³ Submarine Cables and Pipelines Protection Act 1996, Public Act 1996 No 22, Date of Assent 16 May 1996, Reprint at 1 March 2017, New Zealand Legislation.

maritime zone. The responsibility of the decision on the application to obtain the license needed to operate in the seabed of the aforementioned zones comes from the New Zealand Ministry of Energy. Applying for those licenses requires a payment of Crown Royalties¹⁶⁴. However, this Act considers that all the payments regarding the license shall be made under Article 82 of UNCLOS¹⁶⁵.

Thus, Section 3 relates to the exploitation and exploration of the Continental Shelf, reserving all the rights on this Maritime Zone to the Crown¹⁶⁶. Considering to this section, the submarine cables are strictly protected from fishing or vessel anchoring under 1996 Act. New Zealand legislation imposes fines and sanctions based on the level of damage caused¹⁶⁷.

Once general provisions concerning the EEZ and Continental Shelf are defined, the provisions regarding the submarine cables in those maritime zones are regulated in the “Exclusive Economic Zone and Continental Shelf (Environmental Effects – Permitted Activities) Regulations 2013 (SR 2013/283)”¹⁶⁸. This Act establishes in Section 8 the necessary measures that shall be taken into account by another State or a private company placing submarine cables in the aforementioned maritime zones. In this context, the New Zealand legislation allows other States to lay, maintain and repair submarine cables in its EEZ and Continental Shelf under 8 (1)¹⁶⁹. This would be interpretable as according to UNCLOS if the section 8 (2) would not exist. Indeed, the freedom of laying submarine cables is conditioned by this provision, requiring complying with an EPA (Environmental Protection Activity), this fact transforms the New Zealand legislation into a clear case of Creeping Jurisdiction. Nevertheless, maintenance and reparation of existing submarine cables is respected in 8 (3) according to what is established in UNCLOS.

Once it seems clear that the freedom of laying submarine cables is not respected, the pre-activity requirements are scheduled in 4A, following this is described as “*The person undertaking the activity must provide the EPA (...)*”¹⁷⁰ being subject to the consent of the coastal State. This freedom is guaranteed if the laying state complies with the requirements established in 8(2), as

¹⁶⁴ Supra note 162, Section 3

¹⁶⁵ Supra note 5, Article 82

¹⁶⁶ Supra note 162.

¹⁶⁷ Supra note 163

¹⁶⁸ Exclusive Economic Zone and Continental Shelf (Environmental Effects—Permitted Activities) Regulations 2013 (SR 2013/283)

¹⁶⁹ Ibid. 8 (1)

¹⁷⁰ Supra note 163, Schedule 4A

is established in 4(A) the word “must” emphasize in the compliance of those requirements as the previous step for the consent. New Zealand legislation refers to the freedom of laying submarine cables, however this freedom is under the requirement of an EPA. In this context, it remains critical to comply with the EPA whether the laying State intends to exercise the freedoms recognized under UNCLOS.

3.7 Australia and New Zealand State Practice – Compared Law.

Working with Australian and New Zealand legislations, compared to other countries, have a clear importance due to their geographical situation and the high value of their natural and non-natural resources. Orography can establish a series of common measures but also differences between States. The lack of comparisons between those states prove the interest in analyzing the different state practices in a similar scenario. Hence, the Australian application system has been already explained. On the other hand, New Zealand State Practice based in the different New Zealand Acts¹⁷¹, shall be noted and compared with the Australian Act from 2007. New Zealand is a State member of UNCLOS, ratifying its union in 1996 having to set its Continental Shelf in the base of article 76¹⁷².

New Zealand Acts written “in posteriori” to the Australian Acts have similarities but at this point is considerable that the Australian Normative framework is more extended but at the same time more debatable. Starting with the common characteristics, both states have established MPA’s all around their coasts. Those protection areas have been established regarding the laying of submarine cables for protected zones, as it is explained previously that the establishment of MPAs by Australia has been used as an argument to instore the requirement of a permit for flagged States in the EEZ and the Continental Shelf, with the “Australian regulatory measures”¹⁷³. The protected marine areas may restrict freedoms to “protect the submarine cables”¹⁷⁴, in this vein, New Zealand Legislation does not allow anchor or fishing in those MPAs. However, it appears that the New Zealand Act in comparison with the Australian Act is more limited, because their Act seems to just affect nationals, citizens or New Zealand

¹⁷¹ Submarine Cables and Pipelines Protection Order 2009 (SR 2009/41)

¹⁷² Gns.cri.nz. 2020. *Article 76 Unclos New Zealand - Law Of The Sea*. [online] Available at <<https://www.gns.cri.nz/static/unclos/>> [Accessed 4 August 2020].

¹⁷³ Note that the existing declarations on protection zones have a provision on the application of the declaration (“This Declaration applies to the extent that it is consistent with Australia’s jurisdiction under international law”). ACMA considers that this provision has the effect of qualifying the application of the administrative orders made under Schedule 3A. ACMA. If future declarations extending protection zones to the high seas have the same saving clause, then there will be no inconsistency with the international law of the sea

¹⁷⁴ Clause 18, Schedule 3A, Telecommunications Act 1997

flagged vessels. Nevertheless, regarding the submarine cables, the restriction stipulated in the EEZ and the Continental Shelf shall be respected by foreign-flagged vessels¹⁷⁵.

The breaking or damaging of a submarine cable is a common feature in both States. It is established in the Australian Act, that whether the commitment of the offense on the cable is intended or accidental, if those actions are conducted in an MPA, it will then be considered as an offense. In this vein, the New Zealand Act, considers an "offense" if it is intentional committed but considering that the New Zealand Act refers mostly to the nationals, citizens, and vessels flying its flag, due to the Act it does not apply to all those foreign vessels beyond the Territorial Sea¹⁷⁶. However, the jurisdiction is extended beyond the territorial sea to the EEZ and Continental Shelf of New Zealand for both vessels flying New Zealand Flag and other State flagged vessels¹⁷⁷.

The Australian Act, in comparison, considers as an offense the laying of submarine cables in a protected area, even if those waters are beyond the territorial sea of Australia.¹⁷⁸ Even if the situation of the submarine cable is not in a protected area, the requirement of a permit of "non-protected area" remains¹⁷⁹. In this vein, as is explained in the previous point of the present chapter, on the EEZ and the Continental Shelf the laying, repair, and maintenance of submarine cables shall be granted by the coastal State. Australia, under the Australian Communications and Media Authority, established the rules for operating around submarine cables, this organization considers that the data and telecommunications in Australia cannot be stopped defining zones to protect the submarine cables that grant the communications¹⁸⁰. This organization found that in some protected areas such as "*New South Wales*" are inconsistent

¹⁷⁵ Yoshinobu TAKEI (2012). Law and Policy for International Submarine Cables: An Asia-Pacific Perspective. *Asian Journal of International Law*, 2, pp 205-233 DOI:10.1017/S204425131200001X

¹⁷⁶ 1996 New Zealand Act, supra note 73, s. 11. Note 73 above is not the 1996 New Zealand Act but rather Roach book. Where are you copying this reference from? Also, it looked like the relevant act for submarine cables was from 2009 so why 1996 now?

¹⁷⁷ Ibid.

¹⁷⁸ Australian Telecommunications Act 1997, Schedule 3A, supra note 73, clause 84.

¹⁷⁹ Ibid.

¹⁸⁰ Australian Communications and Media Authority. 2020. *Rules For Operating Around Submarine Cables*. [online] Available at: <<https://www.acma.gov.au/rules-operating-around-submarine-cables>> [Accessed 4 August 2020].

according to Australia 3A act and UNCLOS¹⁸¹, the problems found were the excessive number of submarine cables laid in the zone and the problems that could cause in case of incident¹⁸².

In conclusion, the Australian legislation in cooperation with ACMA¹⁸³, have allowed the establishment of protected areas to prevent damage to the submarine cables. This organization analyses the importance of the submarine cable in question and establish the measures and banning to protect them¹⁸⁴, prohibiting a vast number of activities in the cable surroundings. On the other hand, New Zealand has a simpler legislation, prohibiting the cable protected areas the fishing and shipping activities being specified in the New Zealand Act, the offenses, and the enforcement measures established regarding this matter. Davenport considers the management of the zones by New Zealand and Australia as an example of “*integrated approach management of competing ocean uses through zoning*”¹⁸⁵ In this vein, the establishment of maritime zones for the protection of the submarine cables under UNCLOS is questionable. The coastal States is restricting activities in a protected area that under UNCLOS shall guarantee the freedom of laying, repairing, and maintenance of submarine cables. Besides, the freedom of navigation is allowed to all states in the EEZ and Continental Shelf and the coastal State does not have jurisdiction to prohibit those freedoms. Furthermore, the requirement of a permit to conduct activities in those zones is a clear case of “creeping jurisdiction” since there is a freedom that shall be granted, but in this case, through the establishment of marine protected areas it creates a legal framework that does not facilitate the activities in those areas.

4 Part IV – State Practice Balance.

The International Cable Protection Committee (hereinafter ICPC) establishes a number of Recommendation guiding private companies and users of the seabed. This committee intends to safeguard and guarantee the cooperation and safety concerning the submarine cables

¹⁸¹ ACMA, The report was presented to the Minister for Broadband, Communications and the Digital Economy in September 2010 and it was subsequently tabled in Parliament on 18 November 2010. See ACMA, “Review of Submarine Cable Regulation”, online: ACMA /www.acma.gov.au/WEB/STANDARD/pc5PC_311993S.

¹⁸² Yoshinobu TAKEI (2012). Law and Policy for International Submarine Cables: An Asia-Pacific Perspective. Asian Journal of International Law, 2, pp 205-233 DOI:10.1017/S204425131200001X

¹⁸³ *ibid.*

¹⁸⁴ Australian Telecommunications Act 1997, Clause 10, Schedule 3A

¹⁸⁵ Charles Anthony, *Integrated Ocean Management and the Fisheries Sector: Interactions, Economic Tools and Governance Structures*, Saint Mary’s University, Halifax Canada. March 2011

environment¹⁸⁶. The existence of recommendations does not mean they are mandatory to comply with. In other words, the recommendations are not binding rules or normative frameworks and the States members does not accept any responsibility for being part of it. In addition, the recommendations are established under the normative framework of UNCLOS and follow them as a guideline for the States¹⁸⁷. Flying States parties may act accordingly.

The recommendations are established under the International Organization for Standardization (ISO) based on ISO 9000 and ISO 9001 standards. Those quality provisions are enacted in order to benefit and manage the cable industry¹⁸⁸ in coordination with UNCLOS part XII concerning the duties to protect and preserve the marine environment¹⁸⁹. However, UNCLOS does not require observations for the laying action. Furthermore, the ICPC recommends based on the guarantee and control of the good faith of the industry and the good intention of the laying¹⁹⁰.

Provisions established in UNCLOS are general, codifying Customary International Law, built from previous conventions. Indeed, it contains provisions that were entirely negotiated during UNCLOS III. In this light, there are some matters related to the protection of the submarine cables that remain unregulated or not covered enough.

On the other hand, the over regulation in the matter such are “the rights and duties” of the coastal State has been proven in the Part III of the present work. The “creeping jurisdiction” and “territorialization” makes front with the freedoms established in UNCLOS. In the same way, the ICPC establishes recommendations with peaceful purposes to cooperate and solve with good faith the disputes that may arise. The Laying of the submarine cables in the EEZ and Continental Shelf constitutes an occupation in those maritime zones, an occupation regulated under the international framework. However, states overregulated those aspects extending their interests with their rights and jurisdiction. This is what is going to be analyzed in this section, to what can be the State Domestic regulation extended in order to over-protect their sovereign rights and jurisdiction in connection with their interests. Following this, the private companies own the vast majority of the submarine cables and tend to obtain an economic benefit once the

¹⁸⁶ ICPC Recommendations 17-10-2019 Accessed: 12-09-2020 Available at: Iscpc.org/publications/recommendations/

¹⁸⁷ Ibid.

¹⁸⁸ Carter L., Burnett D., Drew S., Marle G., Hagadorn L., Bartlett-McNeil D., and Irvine N. (2009). Submarine Cables and the Oceans – Connecting the World. UNEP-WCMC Biodiversity Series No. 31. ICPC/UNEP/UNEP-WCMC.

¹⁸⁹ Supra note 5, Article 192

¹⁹⁰ Supra note 186, UN Cable Protection Committee, (UKCPC, 2009)

cable is laid. This freedom is not absolute as is going to be analyzed below and shall be taken into consideration with the necessary limitations derived from them.

4.1 Different ways to resolve a dispute between States.

The last 20 years, the vast number of submarine cables has arisen as well as the number of marine shipping. This is part of the rapid increase of the economy guaranteeing the shipping coming from China and India as well as the worldwide connections. In connection, cables are laid in the seabed with depth up to 1.500m¹⁹¹. This recommendation is done by the ICPC with the intention to protect the submarine structures as the Submarine Cables are from the human activity. Indeed, not only the human activity can affect the submarine cables, the physical interaction and the sea habitat may affect being exposed to waves and different actions. This point aims to describe the interests and rights of the Coastal State, the non-Coastal State and the Submarine Cable industry.

Submarine cables shall be considered nowadays as a critical structure, fiber-optic cables are vital for the global economy and the national and particular security of all States¹⁹². State's balance shall be explained by analyzing the different actors: The Coastal State exercising their sovereign rights and jurisdiction of exploring and exploiting the EEZ and the Continental Shelf. Although, the laying State enjoys the freedom to lay submarine cables in the afore-mentioned Maritime Zones¹⁹³ under UNCLOS provisions. Meanwhile, this freedom shall be respected, the acts of laying, repairing and maintaining the submarine cables are considered as "Reasonable uses" in relation to this freedom having to be granted in the same way as the laying act.

Coastal State will apply the domestic Law when it comes to talk about the Culpable Negligence, as said in 1882, Cable Convention and has been adopted in UNCLOS. States may take into consideration the existing cables to avoid damage and protect them from a potential impact caused by a fishing vessel. Legislation makes a difference between Submarine Cables and Pipelines considering that it exists the freedom to lay submarine cables on the Continental Shelf, but Pipelines are subject of this consent by the coastal State¹⁹⁴. This is due to the fact that

¹⁹¹ Ibid, Page 30

¹⁹² U.N. General Assembly Resolution No. A/Res/65/37, Oceans and Law of the Sea, adopted at the 59th Plenary Meeting of the General Assembly, 7 December 2010, U.N. Division for Ocean Affairs and the Law of the Sea (DOALOS), available at www.un.org/depts/los/index.htm.

¹⁹³ Supra note 5, Article 79(4)

¹⁹⁴ Supra note 5, Article 79(3)

Pipelines could cause a major damage compared to Submarine Cables. Meanwhile, Pipelines are considered as Pollution, Submarine Cables are considered as a way of disruption to the marine ecosystem. Indeed, not only it can be considered as a disruption to the Sea habitat, it could be considered as a disruption to the population that is benefited of that Submarine cable with the interruption of the data traffic¹⁹⁵.

UNCLOS provisions are general, with the intention to guarantee the communications and the legal order of the oceans. This action is promoted with peaceful purposes and the legal balance between the coastal State and the laying company. There are different interests between them, Coastal State wants to enact their sovereign rights and jurisdiction with the intention to show their power in that maritime zone. It establishes requirements and application process, as has been proven in Part III of the present thesis. On the other hand, laying states are exercising their freedoms to lay submarine cables, however, this freedom cannot be considered as absolute. The absolutistic conception of the international Law of the Sea may proceed to claims and actions by the coastal State¹⁹⁶.

Limitations require of an equitable balance with the utilization of the space and the protection of the living resources. Firstly, the environmental aspect of Article 192 UNCLOS, provides a clear balance with the economic interests and the environmental aspects¹⁹⁷. States, both laying and non-laying shall take measures, observing, analyzing with scientific methods the risk and effects those Submarine Cables may cause to the marine environment¹⁹⁸.

Finally, one of the problems of the Law of the Sea is the balance between the interests and the rights of the different States. The vast regulation of the coastal State with no general legal framework in areas with sovereignty and without sovereignty. What has been explained and considered as “creeping jurisdiction” or “territorialization” being expanded by the coastal State their jurisdiction in different fields such as cable operations. On the other hand, the protection of the submarine cables is not very broad. The protection provisions come from 1882 with the Cable Convention, States overregulated their rights and duties over the maritime zones but not regulated in the protection of those structures. Nowadays, guaranteeing the communications provides an upper position so the intentional damage can be taken into a consideration.

¹⁹⁵ Supra note 181, p.27

¹⁹⁶ Supra note, 155, p.284

¹⁹⁷ Supra note 5, Article 192.

¹⁹⁸ Supra note 5, Article 204

Traditionally, the dispute arises with the “coastal State” against “non-coastal States” the coastal State cannot always be considered as the “culpable” because it wants to preserve the sovereign rights, the responsibility under UNCLOS is part of the Laying State being the one that shall guarantee that the rights and obligations of the Submarine Cables are being accomplished.

On the other hand, Cable companies has been dismissed from their freedom because of the coastal State traditional role. For this the ICPC is leading and coordinating the recommendations between coastal State and Laying State, preserving the rights and interests established in the International legislation. The most important step is to ensure the consultation and cooperation between states and private companies. Seminars and meetings can be arranged with the parts to establish mutual confidence in the matter, dealing with them, encouraging the formation and showing the possible and relevant issues may arise.

4.2 Duty to Cooperate and the implication of the term “Due regard” between States.

Submarine cables laying companies are mostly owned by the biggest data companies, consisting of all installations in the warranty the world’s international telecommunications network¹⁹⁹. The examples of coastal State regulation on cable operations in the EEZ and the Continental Shelf have been explained and analyzed in the Part III of the work. The ambiguity of UNCLOS open for a debate some of the relevant provisions such as “other internationally lawful uses of the sea related to these freedoms”²⁰⁰ associating some freedoms to the submarine cables and its relation. Another point of view is what can be considered as “reasonable measures for the exploration of the continental shelf”²⁰¹. The state position is in relation with the interests in these maritime zones, establishing the legislation in order to obtain a major profit. This thin line is going to be explained in the following point to prove the manner on how states can impose their interests without imposing too restricting legislation contravening UNCLOS but guaranteeing the international telecommunications²⁰².

UNCLOS regulates relations between States. The relation between the coastal State and the flag State remain based on the “due regard” obligation²⁰³. It refers to the rights and duties of

¹⁹⁹ Tara Davenport (2012) Submarine Communications Cables and Law of the Sea: Problems in Law and Practice, Ocean Development & International Law, 43:3, 201-242, DOI: [10.1080/00908320.2012.698922](https://doi.org/10.1080/00908320.2012.698922)

²⁰⁰ Supra note 5, Article 58(1)

²⁰¹ Supra note 5, Article 79(2)

²⁰² Supra note 199, p.15

²⁰³ Ibid, The term «Due Regard» is used in UNCLOS in different articles.

the coastal state in the EEZ but also makes an express recognition to the rights, jurisdiction and duties of the coastal State balancing others states in this maritime zone²⁰⁴.

The term “due regard” is an interpretable and indeterminate concept, established in UNCLOS and based on this, a State shall have due regard to the rights, duties and freedoms of other states when it is exercising its own rights and freedoms²⁰⁵. In this case, the term “due regard” is based on the different interests between the parties concerning submarine cables meaning this that the flag State entails the freedom of laying, repairing and maintenance in respect “due regard” to the coastal State.

Vienna Convention on the Law of Treaties (VCLT) in its articles 31(1) and 32 are applicable for interpreting UNCLOS²⁰⁶. Article 31(1) sets out that a treaty law shall be applied with “good faith” taking into consideration the relevant circumstances of each case²⁰⁷ also, it is followed in 31(2) that the “Context” in this case of the submarine cables, shall be analyzed in order to determine the intention of the general rule²⁰⁸. Meanwhile, Article 32 takes into account the “supplementary” works, including the negotiations set out in the treaty²⁰⁹. ITLOS, uses in different case scenario those preparatory provisions to understand the “Context” and why those decisions were taken²¹⁰. In this context, article 31 and 32 are taken from a “*ius positivist*” point of view, meaning that the predominance is the literal interpretation of those provisions²¹¹. Following this affirmation, the positivism of the word “Context” established on VCLT shall not be interpreted as a principal source, being considered as a “supplementary” provision, due to there is no clear provision. The clear application of the matter can be understood in the “*Chagos Marine Protected Area Arbitration*” (Mauritius v. U.K) (2015) (Chagos) considering that the United Kingdom shall have “due regard” to the Mauritius duties, rights and freedoms. In this case, the tribunal considers the further circumstances in the case. In other words, the

²⁰⁴ Convention on the High Seas, 29 April 1958, 450 U.N.T.S 11 (entered into force 30 September 1962) from Tara Davenport (2012) Submarine Communications Cables and Law of the Sea: Problems in Law and Practice, Ocean Development & International Law, 43:3, 201-242, DOI: [10.1080/00908320.2012.698922](https://doi.org/10.1080/00908320.2012.698922)

²⁰⁵ M.H Belsky et al., «Due Regard,» in Definitions for the Law of the Sea: Terms not Defined by the 1982 Convention, ed. G.K Walker (Leiden: Martinus Nijhoff Publishers, 2011): 179-188, p.187

²⁰⁶ Vienna Convention on the Law of Treaties, 22 May 1969, 1155 United Nations Treaty Series 331 (entered into force 27 January 1980) (VCLT)

²⁰⁷ R.K. Gardiner, Treaty Interpretation (New York: Oxford University Press, 2008), p.161

²⁰⁸ VCLT Article 31(2)

²⁰⁹ Gaunce, J. «On the Interpretation of the General Duty of Due Regard» Ocean Yearbook vol. 32 (Leiden 2018)

²¹⁰ Ibid, based on: A. Aust, Modern Treaty Law and Practice, 2nd ed. (Cambridge: Cambridge University Press, 2007) p.220

²¹¹ Ris and J. Crawford, Brownlie’s Principles of International Law, 8th ed. (Oxford: Oxford University Press, 2012) p.379

United Kingdom is not entitled to act as wishes, it shall take into a consideration the special circumstances of Mauritius and cooperate between them in order to understand and respect the “due regard” reciprocity²¹². In this Arbitration the tribunal stated that the United Kingdom went beyond the “due regard” limits balancing their own limits and interests with Mauritius rights in the MPA creation²¹³. The balance of the “due regard” in the submarine cables is based on the “equality principle” providing both States of a mutual benefit avoiding potential conflicts²¹⁴. Some experts such as Churchill and Lowe pronounced in the past, that in a situation of potential conflict, the case shall be analyzed and take into consideration the “most reasonable” solution²¹⁵. However, the most reasonable solution is not the result that makes profit for one of the parties. Both shall, under the international standards, cooperate and articulate. Following this, the *south China Sea Arbitration (Philippines v. China)* followed the same interpretation. The “due regard” is an obligation that shall be balanced between the states in conflict. The geographical characteristics of the South China Sea and the different status of the States in conflict concluded with the fact that China, did not prevent their vessels from exploiting the living resources in the EEZ of Philippines²¹⁶

There is no doubt with the consideration that the coastal State shall consider other state’s intentions in the first step. However, the second step provides which State entails a higher position. Some authors consider the coastal State in at an upper position due to its EEZ rights. However, it is stated that the Coastal State is only in a stronger position when it comes to talk about the rights established in UNCLOS, opening the contragrediently aspect of the international legislation²¹⁷.

In this light, the term cooperation is formulated in UNCLOS preamble, ensuring the consideration by the state’s members of a level of cooperation and respect to avoid conflicts. There is no provision referring to the obligation of cooperation, however there is implicit provision in the “due regard” requirement. This is proven in the MOX/Plant Case²¹⁸ and the

²¹² PCA, The Chagos Marine Protected Area Arbitration (Mauritius v. U.K) Award of 18 March 2015, n.16 above, paragraph 519.

²¹³ Ibid.

²¹⁴ Supra note, 199, p.7

²¹⁵ R.R. Churchill and A. V. Lowe, The Law of the Sea, 3rd ed (Manchester University Press, 1999) Page. 206

²¹⁶ PCA, the outh China Sea Arbitration (Philippines v. China) Award of 12 July 2016, n. 16 above, para 717

²¹⁷ Ren Xiaofent and Senior Colonel Cheng Xizhong «A Chinese Perspective» Marine Policy 29 (2005): 145

²¹⁸ MOX/Plant case (Ireland v. United Kingdom) (Provisional Measures). Order of 3 December 2001 (2002) 41 I.L.M 405

Land Reclamation case²¹⁹, where the International Tribunal in Law of the Sea (ITLOS) established in both of those cases that the cooperation was as a necessary tool in order to prevent and protect the marine environment, referring to the part XII of UNCLOS. In the same way the Tribunal legislated that, in the Guyana Suriname case, the consultation and cooperation between states was required to negotiate and solve the dispute with good faith²²⁰.

Once explained the cooperation between States, the Submarine cables matter the coastal State and Laying cable company or State shall take into consideration the legislation of each other and guarantee the rights and duties establishes in UNCLOS. Both states shall cooperate and inform in order to minimize conflicts. Part III established some State's practice and the application form for the permission of activity in their EEZ and Continental Shelf. The route must be notified to the coastal State under Customary International Law based in the cases mentioned before. However, there is no necessity of consent by the coastal State based on UNCLOS provisions²²¹. The laying State shall comply with the principle of cooperation and consultation informing the coastal State of the activities and intentions, exchanging information with good faith intention and avoiding conflicts.

4.3 The relation between private companies and States.

The interactions of submarine cables companies and State turned in 1980's from nationalized companies to private telecommunication companies. An example is Telefonica, being entirely privatized in 1999²²². This is product of the interest of entrepreneurs to obtain a benefit instead of the public interest. During those times, the Submarine cables were under the property, generally of, telecommunication companies, being possible to be public or private, a non-telecommunication private company and investors. The intention of the private companies is in fact to provide and ensure communication and data to people²²³. During this work, has been

²¹⁹ Land Reclamation Case by Singapore In and Around the Straits of Johor (Malaysia v. Singapore) (Provisional Measures), Order of 8 October 2003, International Tribunal for the Law of the Sea (ITLOS), available at [www.itlos.org/fileadmin/itlos/documents/cases/case no 12/ Order.08.10.03.E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case%20no%2012/Order.08.10.03.E.pdf)

²²⁰ Supra Note 176, Guyana Suriname Case, 17 September 2007, paragraph 478, Permanent Court of Arbitration, available at www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf

²²¹ Robert Beckman and Tara Davenport, «CIL Workshop Report» prepared for the Workshop on Submarine Cables and Law of the Sea, 14-15 December 2009, Singapore, 16, CIL, available at: cil.nus.edu.sg/wp/wp-content/uploads/2009/10/Workshop-Report-29-Jan-2010.pdf.

²²² Telefónica, del monopolio público a la competitividad global (Madrid, 2016) Diario ABC Accessed 13-09-2020 Available at: abc.es/economia/abci-telefonica-monopolio-publico-competitividad-global-201603291509_noticia.html?ref=https:%2F%2Fwww.google.com%2F

²²³ Douglas R. Burnett, Robert Beckman and Tara M. Davenport - 978-90-04-26033-7 Downloaded from Brill.com05/14/2020 10:44:31AM via Peace Palace Library. P. 41

explained the importance of the previous and past steps after the laying moment. There is a substantial group of suppliers in charge to organize, plan, built the cable itself and finally complete the installation of the submarine cable. Other connected groups are the one in charge to investigate and modernize the existent submarine cables. This modernization indeed requires the increasing capacity of the submarine data using less space²²⁴.

The cooperation is the key word for the submarine cables and the States parties. The flying State shall respect with the obligation of “due regard” the existent submarine cables and the duties, freedoms and rights of the coastal State. Meanwhile, there are some other rights the flying State shall respect, such as the requirement to establish a safer route, commercially and environmentally, avoiding hazard zones or zones with important ecological impact²²⁵.

Other relevant aspect is the use of specialist vessels to conduct the laying act. Those vessels shall lay the Submarine Cable all over the established route having to mark their position in order to prevent an accident and protect the submarine cable from an accidental damage. Those vessels are also, in charge of repair and maintenance of the previous cables²²⁶.

The Impact of the International Cable Protection Committee (ICPC) play an important role, guiding private companies with issues in relation to the security. There are 136 members from 63 countries, those members are submarine cable companies, investors, governments, owners and operators²²⁷. The ICPC establishes recommendations due to the fact that the major part of the cables underwater are owned by ICPC members, those requirements are in connection with the UNCLOS working together to compliance and apply the practical issues that could arise around the security of the Submarine cables²²⁸.

The ICPC report is the result of the collaboration with the United Nations Environmental Program (UNEP) establishing the recommendations for the states and companies’ members in connection with UNCLOS legislation. Those recommendations make front with issues that

²²⁴ Ibid, P.42

²²⁵ Submarine Cables and BBNJ, Preparatory Committee established by General Assembly Resolution 69/292: Development of an internationally binding instrument under the United Nations Convention of the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. The International Cable Protection Committee. Accessed: 12-09-2020 Available at: [un.org/dept/los/biodiversity/propcom_files/ICC-Submarine_Cables_&_BBNJ_August_2016.pdf](https://www.un.org/dept/los/biodiversity/propcom_files/ICC-Submarine_Cables_&_BBNJ_August_2016.pdf)

²²⁶ Ibid, Page 43.

²²⁷ Ibid, page 43.

²²⁸ Ibid, Page 43.

UNCLOS does not make, such as the Environmental Impacts of the Submarine cables. The UNCLOS as has been explained in this thesis not to consider as pollution the submarine cables. However, the ICPC report explain in many forms the effect to the marine ecosystem and the existing many reasons to minimize this impact.

5 Part V – Final Recommendations, Suggestions, and Conclusions.

As it can be seen from the discussions above, UNCLOS establishes different provisions regarding to submarine cables in the EEZ and Continental Shelf. Those articles impose the restrictions and obligations for the coastal State and the laying State. The different rights, duties and freedoms are established by UNCLOS²²⁹.

First and foremost, the analysis of the Economic Exclusive Zone comes from the articles established in UNCLOS Part V, mainly from Articles 55, 56, 57 and 58²³⁰. In those articles is established the specific legal regime of the EEZ, the rights, jurisdiction and duties of the coastal State. It also contains, the other State's rights and duties in the EEZ. In the same way, it is established in Part VI, the rights, duties and freedoms of the States in the Continental Shelf. In this vein, Article 78²³¹ is mentionable with regard to the freedoms and rights of others States in the Continental Shelf. Furthermore, establishes that the coastal State shall not prejudice the navigation and other State's freedoms. Article 79 establish some of the most important provisions in the submarine cables matter²³². It refers to the "take reasonable measures for the exploration and exploitation of the continental shelf" considering that the coastal State shall not prejudice the flying State in the freedom of laying, repairing or maintaining submarine cables. However, it has been proven in the State's practice part that States' interpret this provision for their benefit, managing their rights to restrict UNCLOS recognized freedoms. In addition, 79(3) establishes one of the important aspects, referring to the consent for the delineation of the Pipelines on the continental shelf²³³. While the whole article is referring to submarine cables and pipelines with the same provisions, this is the distinction point by not determining that the submarine cables require the consent of the coastal State for the delineation.

²²⁹ Supra note 5, Part V and VI and Part XII

²³⁰ Supra note 5, Articles 55,56,57 and 58

²³¹ Ibid, Article 78

²³² Ibid, Article 79

²³³ Ibid, Article 79(3)

When it comes to talk about the submarine cables entering into the territorial sea of the coastal State, it is established in the paragraph 4 that the coastal State “shall establish conditions”²³⁴ for submarine cables but also for pipelines. Furthermore, paragraph 5 established the term “due regard” being one of the most important and interpreted provisions in the submarine cables matter. This term shall be considered as an open-door because it obliges the different States to have a mutual respect of their duties, rights and freedoms²³⁵. This reciprocity has been used by ITLOS and arbitral tribunals for solving cases such as “*South China Arbitration*”²³⁶ or “*Chagos case*”²³⁷. Not only the cooperation and the mutual respect, also the consultation and information between the different authorities uses it.

Meanwhile, the EEZ and Continental Shelf legislation have been established under UNCLOS, the consideration of the marine environment protection under Part XII shall be done. It is clear, that the laying of submarine cables on the seabed affects and disrupt the marine habitat. However, recent studies concluded that it cannot be considered as pollution²³⁸. Furthermore, during the route survey conduction the laying company shall avoid important and protected marine ecosystem and zones with traditional marine heritage. The obligation of the coastal State is to ensure the respect of the freedom of laying submarine cables and that those activities are not disrupting in excess and are not affecting the guarantee of the protection of the marine environment. The protection and preservation of the marine ecosystem in the such mentioned maritime zones is under the sovereign rights of the coastal State. It has been discussed that the submarine cables are considered as disruptor of the sea habitat but under the international law and the recent studies is not considered as a threat for the marine ecosystem. However, in the present author’s view, State’s practice interprets UNCLOS provisions in its own benefit, not due regard to the marine ecosystem.

Even though it might seem UNCLOS is clear. The State’s practice is way different. States use the different treaty provisions to regulate the application process, establishing measures beyond UNCLOS. Some States, as explained above, are in what is considered “Creeping jurisdiction”. This actuation of the coastal State is based on the wrong or miss-interpretation of UNCLOS. The laying, repairing and maintaining of the submarine cables is a freedom for the flying State,

²³⁴ Supra note 5, Article 79(4)

²³⁵ Supra note 5, Article 79(5)

²³⁶ Supra note 209, South China Sea Arbitration

²³⁷ Supra note 205, Chagos case

²³⁸ UNEP-WCMC Biodiversity Series No. 31. ICPC/UNEP/UNEP-WCMC

so the coastal State can only restrict this freedom if it is considered to affect the exploration and exploitation of the afore-mentioned maritime zones, and on the case that it affects the marine environment.

Once the limits have been explained, the freedoms shall be respected. However, States such as New Zealand or Australia, created MPA's around their coast in order to protect and prevent a possible damage caused by a Submarine Cable. In light of this, those States imposed also a "fee" for the use of that maritime zone. In theory, if it is a freedom guaranteed under part V and part VI of UNCLOS, it shall not be applicable to pay any "fee". To avoid this, instead of calling "fee" the application process defines this payment as a "deposit" for the possible damage that could be caused in the future. This is a clear case of "Creeping Jurisdiction" not only by going beyond the Law of the Sea. They are also making economic profit of harbor submarine cables. It is called "deposit" but if the private company does not pay that "tax" it is not entitled to lay submarine cables in the EEZ, and Continental Shelf and those mentioned States are restricting the freedom to lay submarine cables insofar the payment is not done.

In the same line, Cyprus called their legislation "respects" the freedoms established in UNCLOS but for the "grant" of the freedom of laying submarine cables there are some requirements. There is an application process to communicate that an activity is going to be concurred in the EEZ and Continental Shelf. However, for the laying of submarine cables and in this case pipelines too, this State's practice requires an application process. The application process consists in a formulary for which the private company consents Cyprus to be informed of all the activities but also to observe if those activities are affecting to the marine ecosystem²³⁹. For the protection of the marine ecosystem, this State established a payment to suffer all the costs of a possible accident, considering under UNCLOS that submarine cables are not a pollutant²⁴⁰, the establishment of a payment could be considered as going beyond what is established in UNCLOS. In addition, the application process can be considered under the "due regard" obligation informing with "good faith" the route planned and cooperating between States, but the payment for the granting of the permission is a clear case of "Creeping Jurisdiction".

²³⁹ Ministry of Foreign Affairs of the Republic of Cyprus is an English translation of the Submarine Cables Regulations of 2014 (No. 578/2014) (E.E. Παρ. III(I), Αρ. 4840, 23.12.2014, Κ.Δ.Π. 578/2014), issued by the Exclusive Economic Zone and the Continental Shelf Laws, 2004 and 2014 (Laws 64(I)/2004 and 97(I)/2014).

²⁴⁰ Supra note 5, Article 1(4)

Other State's such as Spain entails an obsolete legislation in the matter. In this light Spain considered the submarine cable "India Gateway" as part of the public general benefit and thus, this is regulated in the Spanish Coasts Law. This Law establishes the payment of a Fee or Deposit²⁴¹, which is not established in UNCLOS as a requisite to consent the laying activity²⁴². Furthermore, Spanish legislation considered they have exclusive rights in the matter understanding that the cable was entering into the Territorial Sea and indeed that could affect the Marine Environment. Spanish legislation confers some of the rights and jurisdiction to the Province Government. In this case scenario, one of the governments considered that the delineation of the cable should be modified because it could be too close to the sunk vessel, the "Prestige", meanwhile the other authorities considered that the laying activity and further maintenance and reparation activities would not affect the navigation freedom and fisheries of the Gibraltar Strait. Furthermore, if this is a freedom recognized under UNCLOS Thus, why is Spain having to resolve the dispute between Telefónica and their authorities? Spain was in a clear conflict of interests, between the different authorities and the requirements of the flying State, this being considered as a clear case of "Creeping Jurisdiction".

Some of the issues and wrong State's practice are done because of the interpretation of UNCLOS provisions. The term "due regard" has been considered as an obligation that shall be respected by all States members²⁴³. This term is linked to the cooperation between States. The laying, repairing and maintaining of the submarine cables is a freedom respected and guaranteed under UNCLOS. However, as it is proven above, some States do not respect this freedom and conflicts may arise. To avoid this, this term intends to make an "open door" provision to invite States parties to cooperate and act with "good faith" but disputes still arise as in the arbitration cases mentioned by the author in the present thesis.

The proposals to avoid States of going beyond UNCLOS can be, in one way, to have a better and structured extrajudicial jurisdiction. Some of the case such are "*Chagos*"²⁴⁴ or "*South China Sea*"²⁴⁵ have been solved in an arbitration, promoting the "due regard" and the cooperation and consultation between States.

²⁴¹ Supra note 97, Spanish Coast Law

²⁴² Supra note 5, Article 79, freedom to lay submarine cables.

²⁴³ Supra note 202

²⁴⁴ Supra note 205

²⁴⁵ Supra note 209

First, it is clear that the coastal State entails rights, duties and freedoms over the EEZ and Continental Shelf. However, the flagged State also entails rights, duties and jurisdiction in those zones. This double taxation shall be protected from a mutual agreement and a reciprocal benefit respecting each other standards. Secondly, the term “reasonable measures” is also interpretable because the coastal State is entitled to take the “reasonable measures” in order to protect and prevent the marine ecosystem²⁴⁶ UNCLOS should establish a clear definition to what can be considered “reasonable measure” avoiding States to add domestic legislation in the matter and thus going beyond the treaty Law.

As another mode of trying to resolve the problem, the author suggest that a possible way forward would be to create a unified application process for all States members, being granted the freedom by an independent organism. This independent organization would not be politized or benefited by any private company and would not require the payment of any “deposit” or “fee”, analyzing only the preservation of the marine environment and how the submarine cable in the suggested route would affect to the marine diversity. The author in this section, has suggested to increase the cooperation and consultation, based on Davenport’s “due regard” theory²⁴⁷. The application process suggested would be public safeguarding the transparency and good faith of the implied parts, protecting both States rights, duties and freedoms.

The work research has pointed out some of the important aspects such as the marine protection and preservation of the marine environment and the different State’s practice, dealing with different issue areas such are the freedoms and their application by the States. The regulation of the Submarine cables is under-developed and somehow obsoleted by having to analyze and put into context laws coming from the 80’s and 90’s when the world did not require of a worldwide connection. Some of the regulations shall be improved and modernized, even though some organizations such as the ICPC and the UNEP are establishing recommendations²⁴⁸ that are useful because they are studied and contrasted by scientist to contribute as much as possible to the field, making from a recommendation a solution of the arisen challenges of the globalization.

²⁴⁶ Supra note 5, Article 79(2)

²⁴⁷ Tara Davenport (2012) Submarine Communications Cables and Law of the Sea: Problems in Law and Practice, *Ocean Development & International Law*, 43:3, 201-242, DOI: 10.1080/00908320.2012.698922

²⁴⁸ Carter L., Burnett D., Drew S., Marle G., Hagadorn L., Bartlett-McNeil D., and Irvine N. (2009). *Submarine Cables and the Oceans – Connecting the World*. UNEP-WCMC Biodiversity Series No. 31. ICPC/UNEP/UNEP-WCMC. P.3

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