War Series: Recent Submarine Cable Attacks, the 1923 Cuba Submarine Arbitration, and Business Considerations

October 25, 2024

The global digital infrastructure relies heavily on a vast network of submarine cables, which carry approximately **95% of international data traffic**. These undersea cables are the lifelines of modern communications, finance, and commerce. However, escalating geopolitical tensions in regions such as the Red Sea, the Hormuz Strait, and the larger Indo-Pacific have exposed these critical infrastructures to increasing risks. Recent incidents have highlighted not only their vulnerability but also the complex legal challenges that private companies face when seeking remedies for disruptions.

Recent Incidents Underscoring Vulnerabilities

In March 2024, amid intensifying conflicts near Yemen, three submarine cables were damaged in the Red Sea. The causes—whether deliberate attacks or collateral damage from naval confrontations—remain unclear. The impact was immediate and significant. **HGC Global Communications reported a 25 percent reduction in data traffic across the Red Sea**, necessitating urgent rerouting to alternative networks. Major cables such as the **Europe India Gateway (EIG)** and the **Asia-Africa-Europe 1 (AAE-1)** network, which are crucial for connecting economies across continents, were affected.

Similar events have occurred elsewhere. In 2023, Taiwan faced the severing of two fiber-optic cables linking it to the Matsu islands, leaving thousands of residents with minimal internet access for months. In the Arctic, Norway discovered in 2021 that 4.2 km of submarine cables had vanished, disrupting essential oceanographic monitoring and satellite communications. Despite investigations, conclusive evidence of intentional damage or attribution of responsibility remained elusive in both cases.

These incidents underscore the profound vulnerability of submarine cables to geopolitical conflicts and raise pressing questions about the legal remedies available to affected private entities.

Historical Legal Precedent: The Cuba Submarine Telegraph Company Case

To navigate the legal complexities surrounding undersea cable disruptions, it is instructive to examine historical precedents, notably the **Cuba Submarine Telegraph Company, Ltd. (Great Britain) v. United States** arbitration of 1923.

During the Spanish-American War of 1898, U.S. naval forces severed submarine telegraph cables operated by the Cuba Submarine Telegraph Company, a British entity. The action aimed to disrupt Spanish communications and was carried out within enemy territorial waters. The company sought compensation for the repair costs, arguing that their property had been unlawfully destroyed.

The tribunal disallowed the claim, offering reasoning that remains pertinent today. It recognized the United States' right to undertake necessary military measures, stating: *"In these circumstances the right of the United States to take measures of admittedly legitimate defense against these means of enemy communication was fully justified."* The company's operations were deeply intertwined with Spanish military interests. The concessions granted by Spain required the company to transmit official correspondence and prohibited any inspection of such communications. The tribunal observed: *“The transmission of the official correspondence of the Spanish Government was obligatory and gratuitous, the managers and directors being appointed by that Government.”* Concluding that there were no equitable grounds for awarding compensation, the tribunal emphasized: *“Not only is there no ground of equity upon which an award should be made against the United States, but equity appears to us to be on the side of the United States in their refusal to pay the damages claimed.”*

This case establishes a pivotal principle: during armed conflicts, actions taken by a state as legitimate acts of war may override private property rights without an obligation to compensate affected entities, especially when those entities are engaged in activities that support enemy military operations.

Navigating the Complex Liability Landscape

In the context of modern submarine cable operations, determining who owes obligations of compensation when cables are disrupted due to conflicts requires a nuanced understanding of international law and the various legal regimes governing the seas.

Submarine cables traverse multiple maritime zones, each with specific legal provisions under international law. The primary legal instruments include the **1884 Convention for the Protection of Submarine Telegraph Cables** and the **United Nations Convention on the Law of the Sea (UNCLOS)** of 1982. UNCLOS delineates the rights and responsibilities of states in maritime zones such as territorial seas, exclusive economic zones (EEZs), continental shelves, and the high seas.

In **territorial seas**, coastal states have sovereignty and extensive regulatory authority over activities, including submarine cable operations. Companies must comply with national laws, which may require permits and adherence to environmental regulations. In the **EEZ and continental shelf**, while coastal states have sovereign rights over natural resources, UNCLOS affirms that all states have the freedom to lay and maintain submarine cables, provided they respect the rights and duties of the coastal state.

However, when disruptions occur due to conflicts, especially in areas beyond national jurisdiction—the **high seas**—the question of liability becomes more intricate. The exclusive jurisdiction of flag states over their vessels on the high seas complicates enforcement measures against entities suspected of intentional damage to submarine cables. UNCLOS Article 97 restricts the arrest or detention of ships to the authorities of the flag state, particularly concerning incidents of navigation involving penal or disciplinary responsibility.

The **Enrica Lexie** arbitration provides valuable insight. The tribunal held that "incident of navigation" refers to events related to the movement or maneuvering of a ship causing serious damage or harm. Intentional acts causing damage, such as deliberately cutting undersea cables, may not be protected under the provisions limiting enforcement to flag states. This opens the possibility, albeit limited, for other states to take action against offending vessels, but practical challenges persist.

Practical Steps for Companies to Seek Recourse

Faced with these complexities, private companies need to explore all available avenues to protect their interests and seek remedies when undersea cables are disrupted due to conflicts.

One critical approach is to **review international investment treaties**. These treaties often contain provisions that protect investments against expropriation and unfair treatment, and they provide mechanisms for dispute resolution between investors and states. Companies should assess whether their investments in submarine cables qualify for protection under such treaties and whether the treaties cover the territories where disruptions have occurred.

In assessing the applicability of investment treaty protections, companies must determine whether the treaty applies to the maritime zones where the damage occurred. Some treaties explicitly include protections in EEZs and continental shelves. It is essential to confirm that submarine cable assets are considered investments under the treaty's definitions. Moreover, companies should evaluate if the state's actions or omissions can be attributed to it under international law, potentially giving rise to a claim.

Another vital step is to **leverage insurance protections**. Companies should thoroughly review their insurance policies to ensure coverage of damages resulting from conflicts. This includes policies that specifically cover losses due to acts of war or terrorism, known as war risk coverage. Business interruption insurance can also provide coverage for financial losses resulting from operational disruptions. Scrutinizing policy terms, exclusions, and conditions is essential to ascertain the extent of coverage and any obligations required to maintain it.

Companies should also **strengthen contractual protections** with partners, suppliers, and customers to mitigate risks associated with undersea cable disruptions. This involves examining and enhancing contractual provisions such as force majeure clauses, which clearly define events that constitute force majeure and the consequences for contractual obligations. Establishing indemnification agreements can set terms where parties agree to compensate each other for specific losses or damages. Additionally, setting caps on liabilities and outlining procedures for dispute resolution can help manage potential disputes and financial exposures arising from disruptions. By proactively addressing these issues in contracts, companies can better safeguard their interests.

Takeaway

The disruption of undersea cables in conflict zones presents complex legal challenges for private companies. Historical precedents like the **Cuba Submarine Telegraph Company** case highlight the difficulties in seeking compensation when state actions during armed conflicts are deemed legitimate military measures. The intricate web of international law governing maritime zones adds further complexity, especially concerning enforcement in areas beyond national jurisdiction.

However, companies are not without recourse. By thoroughly reviewing investment treaties, ensuring comprehensive insurance coverage, and strengthening contractual agreements, they can identify potential avenues for compensation and risk mitigation. Proactive engagement with international legal mechanisms and collaborative advocacy can also contribute to enhancing protections for these critical infrastructures.

Understanding the legal landscape and taking strategic actions are essential for companies seeking to navigate the uncertainties associated with undersea cable disruptions. While challenges persist, informed and proactive approaches can help safeguard interests and support the resilience of the global digital infrastructure.

By integrating these considerations into their strategic planning, companies can better position themselves to respond effectively to undersea cable disruptions and contribute to the stability and security of global communications networks.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
Tier-1 services since 1799.
www.waselandwasel.com
business@waselandwasel.com