

Baltic Sea Gas Pipeline: International Law for Geostrategic Issues¹

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In this chapter I will discuss three main points:

First, the question of the admissibility of the planned Baltic Sea gas pipeline in terms of the United Nations Convention on the Law of the Sea (the LOS Convention) and other relevant international law.

Second, whether the enterprise is permissible in view of the transboundary environmental impact assessments required in accordance with the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention).²

Third, the political (rather than legal) issue of security concerns for the states dependent on delivery of gas through the pipeline.

I conclude with a few general remarks related to the events in the first half of 2008 in Georgia.

ADMISSIBILITY OF THE BALTIC SEA GAS PIPELINE

The point of departure is clearly the LOS Convention and its rules on the territorial sea, the exclusive economic zones (EEZs) and, by reference, the continental shelf. All Baltic coastal states are parties to the LOS Convention.

¹ This chapter is based on author's presentation at the FNI conference on 'The World Ocean in Globalization: Challenges for Marine Regions', held in Oslo, 21–23 August 2008, with some additional factual updates as of April 2009.

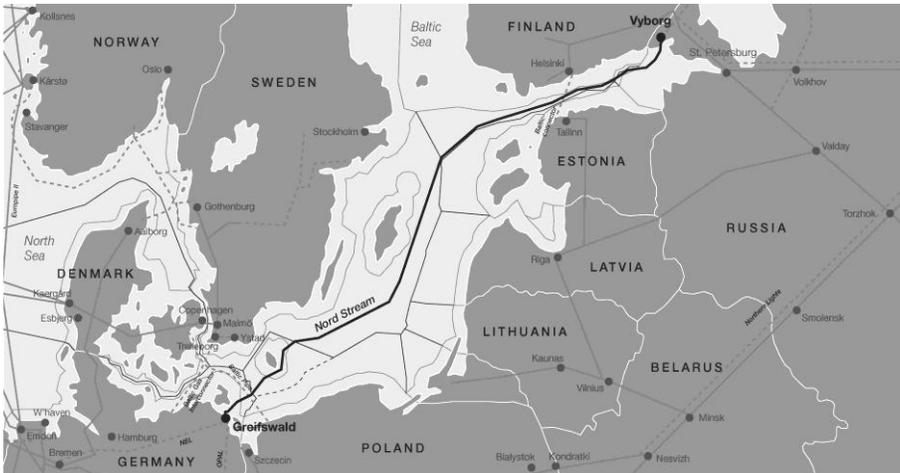
² Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, Finland, 25 February 1991; entered into force on 10 September 1997), text in UNTS, Vol. 1898, pp. 310ff.

The Baltic has an area of 386 700 km² (for comparison: the total territory of Sweden is about 450 000 km²) and flows into the Kattegat through three narrow straits: Öresund, Store Bælt and Lille Bælt. From the Kattegat the sea continues through the Skagerrak and the North Sea into the Atlantic Ocean.

This means that the Baltic is a ‘sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet’.³ It is also ‘consisting entirely ... of the territorial seas and exclusive economic zones of two or more coastal States’.⁴ Consequently, Part IX of the LOS Convention (Articles 122 and 123) on ‘Enclosed or Semi-enclosed Seas’ is applicable.

The gas pipeline is to be built by Nord Stream AG, a joint venture company established in 2005 with the purpose of carrying out a feasibility study and building the Nord Stream Pipeline. Nord Stream AG, with headquarters in Zug, Switzerland, is owned by Gazprom (51 per cent), BASF/Wintershall (20 per cent), E.ON Ruhrgas (20 per cent), and Gasunie (9 per cent).

According to Nord Stream AG, the gas pipeline is conceived as a 1220-km-long offshore natural gas pipeline stretching through the Baltic Sea, from Vyborg in Russia to Greifswald in Germany. It is scheduled for completion in 2011, with delivery of the first gas after a test phase in the same year. The pipeline is planned to run through the EEZs of Russia, Finland, Sweden, Denmark and Germany and also through territorial waters of Russia and Germany.



Source: <www.nord-stream.com/en/project/route.html>

³ See Art. 122 of the LOS Convention.

⁴ Ibid.

Further, Nord Stream AG has announced the following with respect to the intended project:

Initially, one pipeline will be built with a transport capacity of roughly 27.5 billion cubic metres of natural gas per annum. In the second phase, a parallel pipeline will be laid to double the annual transport capacity to roughly 55 billion cubic metres. The second pipeline is planned to come on stream in 2012. The total investment for the offshore pipeline is estimated to be 7.4 billion euros.

A 917 kilometre-long onshore connection in the Russian territory is being built by Gazprom, to connect Nord Stream to the Russian gas transmission system.

Two onshore connections from Greifswald to the south and west of Germany, with a total length of 850 kilometres, will be built by WINGAS and E.ON Ruhrgas.

Nord Stream will transport gas to Germany, where it can be transported onwards to Denmark, the Netherlands, Belgium, the UK, France and other countries.⁵

The contemplated pipeline has caused considerable debate, in particular in Sweden. In the domestic Swedish debate, some have focused on the fact that the pipeline will pass through the Swedish EEZ, and have presented the matter as if it could be determined with regard to Swedish interests only – security policy interests not least.

The pipeline has given rise to concern in other quarters as well. One way of summarising these concerns is to refer to a recent resolution by the European Parliament, to which I return below.

A fundamental rule laid down in the LOS Convention is that the high seas are open to all states, whether coastal or land-locked. In principle, that applies also in exclusive economic zones, and entails among other things the freedom to lay and maintain submarine cables and pipelines.

The delineation of the course for the laying of submarine pipelines is subject to the consent of the respective coastal states. In case it is necessary to establish and use installations and structures in an EEZ, the respective coastal states have an exclusive right to determine whether this should be allowed. If so, the coastal state has exclusive jurisdiction over such arrangements.

The conclusion to be drawn from this is that coastal states have obligations towards other states as to how the EEZ may be used. Correspondingly, when other states exercise their rights in the zone, they shall show due regard to the rights and duties of the coastal states and respect the rules adopted by those states in accordance with the LOS Convention and other rules of international law.

⁵ See <www.nord-stream.com/en/the-pipeline/pipeline-route.html> (accessed on 2 April 2009).

From the LOS Convention it follows that states bordering an enclosed or semi-enclosed sea have an obligation to cooperate in the exercise of their rights and in the performance of their duties under the Convention. Reference is made to Article 123, which reads:

States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:

- (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
- (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
- (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
- (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

Of particular interest in this context is subparagraph (b), according to which the states are to endeavour, directly or through an appropriate regional organization, to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment.

PERMISSIBILITY DEPENDENT ON TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENTS

In this context the Espoo Convention, to which all Baltic coastal states (except Russia) and the European Community are parties, comes into the picture. Even if Russia is not a party, it has signed the Espoo Convention and has also pledged to respect it in this context. The Espoo Convention requires that assessments be extended across borders between parties to the Convention when a planned activity may cause significant adverse transboundary impacts. A necessary requirement is here that in-depth transboundary environmental impact assessments be made in accordance with the Convention.

Two provisions of the Espoo Convention are particularly relevant. Article 2(1) requires that the parties, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.

Furthermore, according to Article 5, a party of origin shall, after completion of the environmental impact assessment documentation, enter into consultations with affected parties concerning, *inter alia*, the potential transboundary impact of the proposed activity and measures to reduce or

eliminate its impact. Such consultations may relate to possible alternatives to the proposed activity, including the no-action alternative – in other words, dropping the planned activity.

Also relevant is the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area,⁶ to which all Baltic coastal states and the European Community are parties. According to this convention, the parties shall ‘individually or jointly take all appropriate legislative, administrative or other relevant measures to prevent and eliminate pollution in order to promote the ecological restoration of the Baltic Sea Area and the preservation of its ecological balance’. Specifically, Article 12 requires the parties to take all measures in order to prevent pollution of the marine environment of the Baltic Sea area resulting from exploration or exploitation of the seabed or from any associated activities.

Additionally, other conventions can come into play, among them the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention).⁷

In December 2007, Nord Stream AG submitted its application to the Swedish government.⁸ On 12 February 2008, the government requested clarifications in several respects.⁹ In particular, it emphasised that all parties to the Espoo Convention affected by the planned activity had agreed that the company should present an environmental impact assessment for the whole enterprise covering the entire length of the pipeline. The result of the trans-boundary consultations should also be included. Furthermore, the government requested a more detailed description of the purpose of the activity and a presentation of alternative pipeline routes in their entirety – including the alternative that the enterprise would not be realised.

When this material is available, the application will be examined further in terms of the relevant Swedish legislation. Similar examinations will have to be made under the national legislation of the other states concerned. According to the Nord Stream website:

[N]ational application documents were submitted in Sweden in December 2007 and complemented in October 2008. German authorities received the application documents in December 2008. EIA reports under national application procedures in Russia, Finland

⁶ Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 9 April 1992; entered into force on 17 January 2000). Text of the Helsinki Convention with Annexes and amendments available at <www.helcom.fi>.

⁷ See <www.unece.org/env/pp/treatytext.htm>.

⁸ See <www.nord-stream.com/en/>.

⁹ See <www.sweden.gov.se/content/1/c6/09/80/19/bf4d8ad6.pdf>.

and Denmark were submitted in early 2009 in accordance with the particular legislation of each country.¹⁰

However, in this context the national legislation is perhaps of less interest. Obviously, such domestic legislation must be compatible with and fulfil the requirements that flow from a country's international obligations. The focus in this chapter is, as the title states, on 'international law for geostrategic issues'.

The LOS Convention is often referred to as one of the most significant agreements to have been negotiated under UN auspices. The value of having broad agreement on the matters regulated by this Convention cannot be stressed enough. There are currently (as of 8 June 2009) 158 parties to the Convention, including the European Community. Its importance for strengthening world peace and security is perhaps not so readily grasped by the general public, but to all familiar with the potential for disputes in this area the impact of the Convention is obvious. It is therefore in the interest of all states that the LOS Convention be applied scrupulously by all parties.

That argument carries particular weight nowadays, in view of the dramatic changes underway in the Arctic. The latest predictions are that, due to global warming, the Arctic Ocean may be ice-free part of the year in the near future.¹¹ The basic international legal regime governing the Arctic Ocean is the LOS Convention. It is therefore of great importance to all states that the Arctic coastal states respect the Convention. Precisely for this reason the Convention must be respected also when it comes to the Baltic.

It is against this background that I have made the point in the Swedish public debate that it is counterproductive for Sweden to invoke security policy arguments against the pipeline.¹² Should a dispute over the issue be brought before an international tribunal, it is difficult to imagine that the tribunal would reject an application on the basis of such deliberations. Evidently, seen in a global perspective, acceptance of such an approach could open up for all kinds of frivolous objections. Furthermore, for reasons not necessary to dwell on here, the contemplated pipeline would in fact not make much of a difference for Sweden from a security-policy point of view.

What must now follow is a careful examination of the application in accordance with national legislation based on the LOS Convention, the Espoo Convention and other relevant rules of international law. The most

¹⁰ See <www.nord-stream.com/en/environmental-impact-assessment-permitting/national-permitting-processes.html>.

¹¹ On climate change and the oceans, see Part II in this book.

¹² *Svenska Dagbladet*, 21 December 2007; for English translation see: <www.havc.se/res/SelectedMaterial/20071221corellinsvdenglishtranslation.pdf>.

significant element in this examination will obviously be the environmental aspects. Concern has been expressed with respect to the impact, *inter alia*, on fisheries. Another issue that has been raised is that the gas pipeline might interfere with munitions dumped in various places after the Second World War.

This is not the place to venture into the details of such an assessment. The point here is that there already exist detailed international rules on the basis of which a decision can be made, a decision that should be acceptable to all. And, if disputes arise, there are rules for solving such matters. From a geostrategic perspective, this is no small achievement.

SECURITY CONCERNS FOR STATES DEPENDENT ON DELIVERY OF GAS THROUGH THE PIPELINE – A POLITICAL ISSUE

The environmental concerns and also the security policy concerns that have been expressed must be taken very seriously.¹³

Here we should take a look at a recent resolution by the European Parliament on the environmental impact of the planned Baltic Sea gas pipeline.¹⁴ From the resolution it appears that the planned Nord Stream pipeline is of concern to members of the European Parliament, not only for environmental reasons but also for geopolitical reasons.

As a point of departure, the European Parliament recognises that Nord Stream in accordance with Decision 1364/2006/EC (incorporating the TEN-E guidelines) is a project of European interest that would help to meet the EU's future energy needs.

Based on a report responding to two petitions by Polish and Lithuanian environmental associations that fear that the planned pipeline could harm marine ecosystems, the resolution calls on the European Commission and the Council to be more actively involved in evaluating the potential environmental impact of the gas pipeline and to conduct a thorough assessment of whether implementation of such a project is in keeping with Community law and international law.

The Parliament points to the requirement of the Espoo Convention that every project of this kind should be preceded by an analysis of its alternatives, covering in particular implementation costs and environmental safety,

¹³ See also K. Hobér, 'The EU – Russia Energy Dialogue: The Legal Dimension', *The Uppsala Yearbook of East European Law*, 2006, pp. 107–173, in particular pp. 153–173.

¹⁴ Resolution was adopted by the European Parliament on 8 July 2008, with 542 votes in favour, 60 against and 38 abstentions; doc P6_TA(2008)0336. Text of the resolution available at <www.europarl.europa.eu>.

in this case an analysis of overland routes for the gas pipeline. It also voices its opposition to investments on the proposed scale without first having a positive environmental impact assessment.

At the same time, the European Parliament expresses the opinion that Nord Stream is an infrastructure project with a wide political and strategic dimension for both the EU and Russia. In that context it emphasises that energy security must be regarded as an essential component of the overall security of the European Union. The definition of ‘energy security’ should not focus solely on the lack of internal EU production but should also ‘take into account the geopolitical aspects of dependency on imports and the potential therein for politically motivated interruptions’.¹⁵

On 12 February 2008, the Swedish Defence Research Agency (FOI) submitted a memorandum to the European Parliament’s Committee on Foreign Affairs, titled ‘Security Implications of the Nord Stream Project’.¹⁶ In this memorandum FOI maintains *inter alia* that:

- Nord Stream is primarily being driven by Russian commercial and political interests. Russia thus considers it of *vital strategic interest*. It goes against the priorities of several EU members and might affect the EU negatively.
- Since Russia has strong ambitions of again becoming a great power and uses all available means in its endeavours, it is pivotal that the EU and its members assess the Nord Stream project in this light and act accordingly.¹⁷

Among the recommendations in the FOI memorandum is that a thorough assessment should be made of all land-based alternative stretches of a gas pipeline from Russia to Europe that are technically feasible, including ‘Amber’ and ‘Yamal I/II’. Nord Stream’s own assessment should be made public, and new assessments by independent experts should be used for verification. If any of these should prove better from an environmental and security-political point of view, it should be promoted, according to the FOI.

The environmental issues will have to be dealt with in accordance with existing law, and the environmental argument is very important – perhaps decisive. However, the security policy concerns expressed are of a completely different nature. As noted above, I have argued that it is counter-productive to invoke security policy arguments against the pipeline being laid in the Swedish EEZ – for the simple reason that it is not contemplated that gas would be imported into Sweden from the pipeline.¹⁸

¹⁵ Ibid., AP(4).

¹⁶ See <www.foi.se/upload/nyheter/2008/security_implications_of_nord_stream_robert_larsson.pdf>.

¹⁷ Ibid., p. 2.

¹⁸ *Svenska Dagbladet*, 21 December 2007.

However, with respect to the states that will be directly affected by the scheme in the sense that they will be dependent on delivery of gas through the pipeline, the security element is a matter that must be assessed thoroughly. The concerns expressed cannot be disregarded, and some of the issues raised by the FOI should be carefully examined by precisely those states.

One could of course argue that the suggestion made in the FOI memorandum that a land-based alternative may be better from a security-political point of view is somewhat peculiar: a land-based pipeline can be shut off just as easily as a pipeline on the sea floor. And Russia's behaviour in relation to Ukraine and, more recently, towards Georgia certainly does not generate confidence.

Be that as it may, whether Germany and other members of the EU would make themselves dependent on gas deliveries from Russia is not a legal matter: that is a policy question which falls outside the scope of this chapter.

An additional question raised by many and also debated by the European Parliament is to what extent the gas pipeline will contribute to increased carbon dioxide emissions through promoting the combustion of fossil fuels. But also this is a different matter which must be dealt with separately. At present and seen in a global context this subject matter falls within the scope of the Bali Action Plan. Consequently, it is for the parties to the United Nations Framework Convention on Climate Change¹⁹ to discuss the question in the general context of the Climate Change Conference in Copenhagen in December 2009.

CONCLUDING REMARKS: RECENT EVENTS IN GEORGIA

The obvious link between the matters discussed in this book and the events of 2008 in Georgia deserves some mention. While I have already discussed the Baltic connection, it needs to be recognised that the linkage is much more complex than that.

The title of this chapter refers to 'international law for geostrategic issues', which at first reading might be understood as pointing to the solution of a particular matter. But it can also be read as a more general imperative.

A common denominator in the remarks on the topics discussed in various chapters in this book is that effectively addressing the problems we are facing requires that states act together at the global level. It is frequently indicated that a holistic approach is the way forward. The geopolitical aspects of

¹⁹ United Nations Framework Convention on Climate Change (New York, 9 May 1992; entered into force on 21 March 1994); text in UNTS, Vol. 1771, pp. 164ff; text reprinted in ILM, Vol. 31, 1992, pp. 849ff.

these matters require that they should be elevated to the highest echelons at the national level, and that states act together in confidence.

Against this background, we must sadly conclude that what happened in Georgia is simply unacceptable from an international law point of view. It is important that a thorough investigation be made of the course of events. Who started the armed conflict? Even if it emerges that the responsibility for the initial events has to be laid at the feet of the Georgian government, the actions in response taken by the Russian Federation are unacceptable.

What makes the armed incursion into Georgian territory especially serious is that it was committed by a permanent member of the United Nations Security Council.

This body has been entrusted by all UN members to take primary responsibility for the maintenance of international peace and security. If there were concerns on the part of the Russian Federation, the Russian government should have brought this matter to the attention of the Security Council.

Russia is now being criticised by many, in particular by the European Union and the USA. And rightly so! But we must also ask: what about the legitimacy of the critics? What is the difference between attacking Georgia in 2008 and attacking Iraq in 2003? In both cases, armed force was used without clear authorisation by the Security Council.

Yes, it is true that Georgia has a democratic government while Iraq was governed by a dictator. But in terms of the UN Charter, that is irrelevant in this particular context. And while the European Union is now speaking up, its members were divided and their criticism was meek back in 2003. Some even sided with the aggressor.

Therefore, the criticism against the Russian Federation is weakened by a stain of *double standards*. The criticism would have been much more credible and legitimate if the critics themselves had taken the moral high ground when the Berlin Wall came down. When this happened, the West had an unprecedented opportunity of demonstrating that international law must be scrupulously observed. Instead, we saw the remaining superpower act with arrogance, unilaterally and with disrespect for the system of collective security that was established through the UN Charter.

Judging from many editorials and comments in the media, it was clear that many reacted with disbelief to the news from Georgia. The Russian Federation stands to be criticised. But in my view the criticism should be directed also at others, not least the permanent members of the Security Council. Their inability to act even in the most obvious situations does not bode well for the future.

It goes without saying that states must abide by the law. *Pacta sunt servanda!* Regarding the Arctic, views have been expressed that the quest

for the resources in the Arctic may lead to armed conflict. Such ideas must be vigorously rebutted.²⁰ The solutions are there, if only the LOS Convention is followed in the same manner in the Arctic as the Convention is expected to be followed in the Baltic.

We live in the 21st century. Have we not learned enough from history to know that if there are problems in interstate relations, these problems must be solved through negotiations and other peaceful means? Representatives of the states in question must get together and talk. This applies in particular among states that may view each other as adversaries.

Various contributions to this book mention the need for concerted global action. But this will not materialise without more responsible behaviour on the part of the major players on the world arena. The members of the Security Council have a special responsibility here. It has been said many times before but it still needs reiterating: those entrusted with this responsibility must demonstrate statesmanship!

²⁰ See, e.g., S.G. Borgerson, 'Arctic Meltdown', *Foreign Affairs*, March/April 2008 (<www.foreignaffairs.org>); and H. Corell, 'The North is Not the Wild West', *Globe and Mail*, 28 April 2008, available at <www.theglobeandmail.com>.