

**Fridtjof Nansen Institute**

**The World Ocean in Globalization: Challenges for Marine Regions  
Contemporary Issues for Semi-enclosed Seas Surrounding Europe**

*Baltic Sea: Gas pipeline – international law for geostrategic issues*

**by**

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Distinguished colleagues,

Allow me first of all to thank the Fridtjof Nansen Institute for inviting me to address you on this occasion. I remember vividly the conference that the Institute organised ten years ago at its 40th anniversary and in connection with the UN-proclaimed International Year of the Ocean – ‘Order for the Oceans at the Turn of the Century’.

On that occasion, I addressed the conference in my capacity as Under-Secretary-General for Legal Affairs of the UN on the question of oversight of the implementation of the global ocean regime and the role of the United Nations.<sup>1</sup>

On this occasion, I have been asked to deal specifically with the international law aspects of the contemplated gas pipeline in the Baltic Sea. Having retired from public service, I now do not even have to make the usual disclaimer; it is clear from the outset that I speak in my personal capacity only.

In my presentation I will make three points:

- The question of the admissibility of the gas pipeline is regulated by the United Nations Convention on the Law of the Sea (the LOS Convention ) and other relevant international law.
- Whether the enterprise is permissible is basically depending on the transboundary environmental impact assessments that must be made in accordance with the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention).
- Seen in a geopolitical perspective there could also be security concerns for states that are dependent on delivery of gas through the pipeline. But that is a political issue rather than a legal matter.

I will conclude with a few general remarks related to the recent events in Georgia.

### **The admissibility of the gas pipeline**

The point of departure is obviously the LOS Convention and its rules on the territorial sea, the Exclusive Economic Zone and, by reference, the continental shelf. All Baltic coastal states are parties to the LOS Convention.

The Baltic has an area of 386 700 km<sup>2</sup> (for comparison: Sweden’s territory is about

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<sup>1</sup> H. Corell, ‘Oversight of the Implementation of the Global Ocean Regime: The Role of the United Nations’ in D. Vidas and W. Østreng (eds.) *Order for the Oceans at the turn of the Century* (Oslo: Fridtjof Nansen Institute, 1999), pp. 337-342.

450 000 km<sup>2</sup>) and flows into the Kattegat through three narrow straits: Öresund, Store Bælt and Lille Bælt. From the Kattegat the sea continues through the Skagerrak, 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’. It is also ‘consisting entirely - - - of the territorial seas and exclusive economic zones of two or more coastal States’. Consequently, Articles 122 and 123 of the LOS Convention on enclosed or semi-enclosed seas are 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, which has its Headquarter in Zug, Switzerland, is a joint venture 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 a 1220-kilometre-long off-shore natural gas pipeline stretching through the Baltic Sea, from Vyborg in Russia to Greifswald in Germany. It is to be built by Nord Stream AG and is scheduled to be completed in 2011 and to deliver the first gas after a test phase in the same year. According to plans the pipeline will run through the Exclusive Economic Zones of Russia, Finland, Sweden, Denmark and Germany and also through the territorial waters of Russia and Germany.



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

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

Initially one pipeline will be built with a transport capacity of around 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 around 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.

In the Russian territory, a 917-kilometre-long on-shore connection is being built by Gazprom, to connect Nord Stream to the Russian gas transmission system.

Two on-shore connections from Greifswald to the south and west of Germany with a total length of 850 km will be built by WINGAS and E.ON Ruhrgas.

Nord Stream will carry gas to Germany, from where it can be transported onwards to Denmark, the Netherlands, Belgium, the UK, and France. The project is open for planning peripheral pipelines to other European countries and regions in the North and West.

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 Exclusive Economic Zone and presented the matter as if it can be determined with regard to Swedish interests only – not least security policy interests.

However, the pipeline has given rise to concern also in other quarters. One way of summarising these concerns is to refer to a recent resolution by the European Parliament, to which I will revert.

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, this freedom applies also in the Exclusive Economic Zone 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 the Exclusive Economic Zone, 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 vis-à-vis other states when it comes to the question how the Exclusive Economic Zone may be used. Correspondingly, when other states exercise their rights in the zone they shall have due regard to the rights and duties of the coastal states and respect the rules adopted by those states in accordance with the Convention and other rules of international law.

From the LOS Convention follows that states bordering an enclosed or semi-enclosed sea have an obligation to cooperate with each other 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 shall endeavour, directly or through an appropriate regional organisation, to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment.

### **The permissibility of the enterprise depends 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 not a party, it should however be noted that Russia has signed the treaty and has also pledged to respect it in this context. This 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 thorough transboundary environmental impact assessments are made in accordance with the Convention.

Two provisions of the Espoo Convention deserve to be mentioned in particular in this context. 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, its abandonment.

Also the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area, to which all Baltic coastal states and the European Community are parties, is relevant. 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.

But also other conventions can come into play, e.g. the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention).

In December 2007, Nord Stream AG presented its application to the Swedish government.<sup>2</sup> On 12 February 2008, the government requested clarifications in several respects.<sup>3</sup> In particular, the government 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 whole length of the pipeline. The result from the transboundary consultations should also be included. Furthermore, the government requested an elaborate description of the purpose of the activity and a presentation of alternative routes for the pipelines in their entirety including the alternative that the enterprise would not be realised.

When this material is available, the application will be examined further under the relevant Swedish legislation. Similar examinations will have to be made under the national legislation of the other states concerned. I am led to believe that an impact assessment for the whole enterprise may not be presented until late 2008. According to Nord Stream's website the final transboundary environmental impact assessment report shall be published for public consultation in early 2009 but the exact date of submission will depend on the outcome of consultations with authorities.

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

The LOS Convention is often referred to as one of the most significant agreements that 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 presently 155 parties to the Convention, including the European Community. Its importance for the strengthening of peace and security in the world is perhaps not so easily understood by

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<sup>2</sup> <http://www.nord-stream.com/en/>

<sup>3</sup> <http://www.sweden.gov.se/content/1/c6/09/80/19/bf4d8ad6.pdf>

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 is applied scrupulously by all parties.

This argument carries particular weight these days in view of the dramatic changes that we are presently experiencing in the Arctic. The predictions are that, due to global warming, the Arctic Ocean may be ice-free part of the year within a near future. The basic 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.

Against this background I have made the point in the internal Swedish debate that it is counterproductive for Sweden to invoke security policy arguments against the pipeline.<sup>4</sup> In case a dispute over the issue would 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, the acceptance of such an approach would open up for all kinds of frivolous objections. Furthermore, for reasons that are not necessary to develop in this context, the contemplated pipeline would really 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 international law. The most significant element in this examination will obviously be the environmental aspects. Concern has been expressed with respect to the impact among other on fisheries. Another issue that has been raised is that the gas pipeline risks interfering with munitions that have been dumped in various places after the Second World War.

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

### **Security concerns for states that are dependent on delivery of gas through the pipeline– a political issue rather than a legal matter**

However, the environmental concerns and also the security policy concerns that have been expressed must be taken very seriously. Allow me therefore to describe this scenario briefly.<sup>5</sup>

<sup>4</sup> <http://www.havc.se/res/SelectedMaterial/20071221corellinsvdenglishtranslation.pdf>

<sup>5</sup> See also K. Hober, 'The EU – Russia Energy Dialogue: The Legal Dimension', *The Uppsala Yearbook of East European Law*, 2006, pp. 107-173, in particular pp. 153-173.

A recent resolution by the European Parliament can be used to illustrate these concerns. I refer to the resolution on the environmental impact of the planned gas pipeline in the Baltic Sea to link up Russia and Germany, adopted by the Parliament on 8 July 2008 with 542 votes in favour, 60 against and 38 abstentions.<sup>6</sup> 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 who fear that the planned pipeline could harm marine eco-systems, the resolution calls on the 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 the question whether the implementation of the project is in keeping with Community 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, in this case an analysis of overland routes for the gas pipeline. It also voices its opposition to the carrying out of an investment 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 merely be limited to 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'.

It should be mentioned in this context that on 12 February 2008, the Swedish Defence Research Agency (FOI) provided a memorandum to the European Parliament's Committee on Foreign Affairs entitled 'Security Implications of the Nord Stream Project'.<sup>7</sup> 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.

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<sup>6</sup> P6\_TA-PROV(2008)0336.

<sup>7</sup> [http://www.foi.se/upload/nyheter/2008/security\\_implications\\_of\\_nord\\_stream\\_robert\\_larsson.pdf](http://www.foi.se/upload/nyheter/2008/security_implications_of_nord_stream_robert_larsson.pdf)

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.

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

The environmental issues will obviously have to be dealt with in accordance with existing law and the environmental argument is very important – maybe decisive.

The security policy concerns expressed are of a completely different nature. I recall that in the Swedish domestic debate I had made the point that it is counterproductive to invoke security policy arguments against the pipeline being laid in the Swedish Exclusive Economic Zone. This applies to Sweden for the simple reason that it is not contemplated that gas would be imported into Sweden from the pipeline.

However, with respect to states that are 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 carefully assessed. The concerns expressed cannot be disregarded, and some of the issues raised by FOI should be carefully examined by the states that will be dependent on gas delivery through the pipeline.

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 is just as easily shut off as a pipeline on the sea floor. And Russia's behaviour in relation to Ukraine some time ago and now latest 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 delivery from Russia is not a legal matter but rather a policy question which falls outside the scope of this presentation.

An additional question that has been raised by many and which was also debated by the European Parliament is to what extent the gas pipeline will contribute to increased carbon dioxide emissions through the burning of fossil fuel. But also this question 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 so called Bali Action Plan. Consequently, it is for the parties to the United Nations Framework Convention on Climate Change to discuss the question in the general context of the Climate Change Conference in Copenhagen in December 2009.

### **Concluding remarks related to the recent events in Georgia**

Allow me now to close on a very serious note by pointing to the obvious link between our conference and the recent events in Georgia. I have already mentioned the Baltic connection. But the linkage is much more complex than that.

The title of my topic refers to 'international law for geostrategic issues'. At first reading this reference can be understood as pointing to the solution of a particular matter. But it can also be read as a general imperative.

A common denominator in the remarks on the topics that we are discussing in this conference is that, to effectively address the problems we are facing, states must act together at the global level. It is suggested that a holistic approach is the way forward. The geopolitical aspects of these matters require that they are elevated to the highest echelon at the national level and that states act together in confidence.

Against this background, one 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 is made of the course of events. Who started the armed conflict? Even if it turns out 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 specially 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 the 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 U.S. And rightly so! But we must ask the question: 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 a clear authorisation by the Security Council.

Yes, it is true that Georgia has a democratic government while Iraq was governed by a dictator. But from the viewpoint of the UN Charter this is irrelevant in this particular context. And while the European Union is now speaking up, they were divided and their criticism was meek back in 2003. Some EU members 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 over the past couple of weeks it is obvious that many have reacted with disbelief to the latest news from Georgia. The Russian Federation stands to be criticised. But in my view the criticism should be directed also to others, including in particular all 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!* A moment ago I mentioned the Arctic. In the debate there have been articles suggesting that the quest for the resources in the Arctic may lead to armed conflict. Such ideas must be vigorously rebutted.<sup>8</sup> The solutions are there if the LOS Convention is followed in the same manner as the Convention is expected to be followed in the Baltic.

We live in the 21<sup>st</sup> 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 simply must get together and talk. This applies in particular among states that may view each other as adversaries.

In many observations in this conference the need for concerted global action has been mentioned. But this will not materialise without a 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 needs reiterating: those entrusted with this responsibility must demonstrate statesmanship!

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<sup>8</sup> See e.g. S. Borgerson, 'Arctic Meltdown' in *Foreign Affairs* at <http://www.foreignaffairs.org/20080301faessay87206/scott-g-borgerson/arctic-meltdown.html> and H. Corell, 'The Arctic is not the Wild West' in *Globe and Mail* at <http://www.theglobeandmail.com/servlet/story/RTGAM.20080428.wcoarctic28/BNStory/specialComment/>