

## **Policy Department External Policies**

# **LEGAL IMPLICATIONS OF THE NORD STREAM PROJECT**

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## **Executive Summary**

The research explains the legal status of territorial waters, economic exclusion zones (EEZs) and international waters in the context of the development of a gas pipeline in the Baltic Sea. With reference specific concerns such as the security of proposed platforms in the territorial waters or EEZ waters, the paper identifies the right of coastal states to authorise and regulate such platforms including control over working conditions and other matters such as health safety and immigration laws. Such states will have the power to take reasonable measures of enforcement of its rights and jurisdiction in the EEZ in accordance with both the standards of general and more specific international law. The paper considers environmental issues likely to be identified through environmental impact assessment during both construction and operation of the pipeline and considers the overlapping international, regional and domestic law requirements in relation to EIA. The study offers an opinion of the legality of the project having EU TEN status, where the majority stakeholder is a national company of a third country and Nord Stream is registered in Switzerland, EEA Member State. It finds that little that would invalidate TEN status, particularly where there is the firm backing of an EU Member State in whose jurisdiction reception facilities for the gas are located. The paper analyses, as requested alternative mechanisms to manage the pipeline, based, for example, on the model of the International Commission for the Protection of the Rhine. It concludes that the Helsinki Convention already provides an effective mechanism which could be utilised.

## **Legal Implications of the Nord Stream Project**

This paper is prepared to assist in the preparation of an opinion on the environmental impact of the planned gas pipeline in the Baltic Sea linking Russia and Germany (now known as the Nord Stream project). It addresses only issues specifically demanded in its commissioning. It is based on information available in the public domain regarding the proposed pipeline and its intended construction and operation.

### **1. Legal status of the relevant waters**

The United Nations Convention on the Law of the Sea 1982 (UNCLOS) sets down the legal status affecting territorial waters, exclusive economic zones and also international waters. All countries identified in the Nord Stream Project are signatories of UNCLOS, however, to have legal effect within the territory of each of the identified countries, national laws must be passed.

#### **1.1 Territorial Sea**

A coastal state has full sovereignty over its territorial waters (Art. 2), which extends to a limit of 12 nautical miles (Art. 3) from an identified baseline of the coastal state<sup>1</sup>. However, a coastal state must allow a right of innocent passage through its territorial sea (Art. 17) of ships of all States whether coastal or land-locked.

Under Article 21(1), a coastal state may adopt laws and regulations relating to innocent passage<sup>2</sup> through the territorial sea with respect to the safety of navigation, the protection of navigational aids and facilities and other facilities or installations, the protection of cables and pipelines and the conservation of the living resources of the sea.

In the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag (Art.20), this may relate to any underwater vehicles used in any maintenance operations on the pipeline.

#### **1.2 Exclusive Economic Zone (EEZ)**

An EEZ is a special maritime zone that is outside but contiguous with a coastal State's territorial sea. It is therefore not part of a State's territory, however under UNCLOS a legal regime has been established for EEZs and outlines a coastal State's rights, duties and jurisdiction of a coastal State as well as other States in the EEZ.

##### **1.2.1: *Rights***

Under Part V of UNCLOS a coastal state has the right to declare an EEZ around its coast to the extent of 200 nautical miles (Art. 57). In an EEZ, all States enjoy the freedoms of the High Seas – navigation, over-flight, laying of submarine cables and pipelines, construction of artificial islands and other installations permitted under

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<sup>1</sup> The extent of the territorial sea is measured in accordance with the Convention.

<sup>2</sup> Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law (Art. 19(1)).

international law (Art. 58). A coastal State therefore, has more limited sovereignty within its EEZ, the scope of these sovereign rights are for the purpose of exploring and exploiting, conserving and managing the natural resources whether living or non-living (Art. 56) and the control of pollution of any of these resources and will be held liable for damage caused by violation of their international obligations to combat such pollution.

In exercising any of these rights under Article 56, the coastal State must have due regard to the rights and duties of other States and should act in a manner which is compatible with UNCLOS. In addition, a coastal State cannot regulate or prohibit passage or loitering above, on or under the surface of the sea, whether innocent or belligerent, within the portion of its EEZ beyond its territorial sea.

These rights will only be possible according to international legislation if the coastal state has established an EEZ around its territory. Russia, Germany, Denmark, Finland and Sweden have all established EEZs and this also exists as EEZ legislation within the respective States.

### *1.2.2: Artificial Installations and Structures*

Article 60 sets out the rights of coastal States in relation to these structures, providing the coastal State with the exclusive right to construct and to authorise and regulate their construction (Art. 60(1)(a)). Coastal States also have exclusive jurisdiction over these structures, including jurisdiction over fiscal, health, safety and immigration laws and regulations (Art. 60(2)). UNCLOS provides that the coastal State may establish safety zones around these artificial installations or structures. Within the safety zone, the coastal State may take appropriate measures to ensure the safety both of navigation and of the artificial structure, this allows the coastal State to legislate relevant control measures within these zones, for example the prohibition of vessels. However and significantly, Article 60(4) states that the safety zone *must be necessary*. The zone should not exceed 500 metres around the structure. All ships must respect these safety zones and are required to comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.

However, safety zones may not be established where interference may be caused with the use of recognised sea lanes essential to international navigation (Art. 60(7)).

### *1.2.3: Enforcement Powers*

The coastal State has the power to take reasonable measures of enforcement of its rights and jurisdiction in the EEZ in accordance with both the standards of general international law and the applicable provision under UNCLOS. Under Article 73(1), a coastal State may, in exercising its sovereign rights under Part V, board, inspect, arrest and commence judicial proceedings in order to ensure compliance of laws and regulations adopted by it in accordance with UNCLOS.

#### 1.2.4: *Duties*

A coastal State's rights under Part V must be compatible with its general duties under Article 192 to protect and preserve the marine environment and under Article 194 to take measure to prevent, reduce and control pollution of the marine environment. This Article reflects the customary international principle of the prohibition of trans-boundary pollution as held in the Trail Smelter case<sup>3</sup>.

#### 1.2.5: *Security Issues*

Potential security issues for consideration are:

- Terrorist threats;
- Natural Disasters;
- Hazards from the dumped munitions in the Baltic Sea; and
- Pollution or other hazardous substances.

Current security rights likely to fall under the jurisdiction of the State in which the platform is located, as under UNCLOS, the EEZ falls under national jurisdiction.

### **2. Legal status – questions of national jurisdiction**

As under UNCLOS, EEZs fall under national jurisdiction (extending to the construction and operation of pipelines) the operations within the Baltic Sea are therefore obliged to comply with any national legislation passed by Member States under their rights as signatories to UNCLOS.

#### 2.1: Denmark

Denmark established an exclusive economic zone on 1 July 1996 and passed the Danish EEZ Act (Executive Order No. 584). Inspection powers in the Act relate to ships suspected of polluting

In case of infringements of the Danish Act for the Protection of the Marine Environment in this zone, Denmark shall enforce anti-pollution regulations as laid down in the Act (which is based on the regulations of the MARPOL Convention) as far as they are in line with international law towards both the Contracting Parties to the Convention irrespective of their nationality and to the Non-contracting Parties.

#### 2.2: Finland

In accordance with the Act on the Finnish EEZ (1058/2004) Section 17, Finnish law is applied to devices and other structures constructed in accordance with the Act.

#### 2.3: Germany

Under Proclamation of 1125/94, Germany established its EEZ.

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<sup>3</sup> 33 AJIL (1939)



## 2.4: Sweden

Sweden established its EEZ in 1993 by the Exclusive Economic Zone Act 192:1140. Surveillance and control of the EEZ lies with the Swedish Coast Guard.

### 3. Pan-regional agreement and EU competence

#### 3.1: Helsinki Convention 1974

Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland, Russia and Sweden are all parties to the Helsinki Convention. The Convention aims to reduce pollution of the Baltic Sea area caused by discharges through rivers, estuaries, outfalls and pipelines, dumping and shipping operations as well as through airborne pollutants. Under the Baltic Legal Manual<sup>4</sup> Baltic Sea States have the right and the duty, pursuant to international law, to prosecute violations of anti-pollution regulations up to 200 nautical miles from the baselines, in their internal waters, territorial seas and exclusive economic zones. The significance of this Convention is considered further below.

#### 3.2: EU Legislation impact on EEZ

In the judgement of the case *Commission v UK* (2005)<sup>5</sup> on the transposition of the Habitats Directive<sup>6</sup>, the European Court of Justice held that EC law applies to all maritime areas over which a Member State has jurisdiction and to the extent that the Member State has jurisdiction, therefore the Habitats Directive applies to all EEZs of Member States.

When Ireland alleged that the UK has failed to protect the marine environment from radiation resulting from the manufacture of MOX fuel and requested the establishment of an arbitral tribunal under the dispute resolution provisions of the UN Convention on the Law of the Sea, the European Commission argued<sup>7</sup> that Ireland had violated Articles 10 and 292 EC Treaty and Articles 192 and 193 Euratom. The ECJ ruled that: "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein".

### 4. Environmental Impacts

This section provides an outline description of a number of environmental considerations in the context of the Nord Stream Project. It begins with a brief overview of the potential environmental impacts of the project before discussion of two material legislative frameworks, the Espoo Convention and the Helsinki Convention. Comment on possible legal environmental challenges to the project is given before final discussion of the impact of limited recourse financing options for the project.

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<sup>4</sup> No. 77, 2000 – Information on Anti-Pollution regulations at sea and the prosecution and violations thereof in the Baltic Sea Area

<sup>5</sup> Case C-6/04

<sup>6</sup> Council Directive 92/43/EEC

<sup>7</sup> Case C-459/03

## 4.1 Environmental Impacts

Given the nature of the Nord Stream project, the potential environmental impacts are widespread and require careful consideration. The actual assessment ought to provide for detailed discussion of these impacts, but attention is drawn to the following:

### 4.1.1 *During project construction*<sup>8</sup>

Engineering of the pipeline during construction may include seabed levelling works, trenching, seabed deepening, backfilling, and groundworks and have the potential for impacts to a number of environmental media, including the physical impact and destruction of local flora and fauna, temporary spatial isolation resulting in disruptions to fishing and navigation, fuel emissions to air, localised water quality deterioration, damage to or destruction of cultural heritage sites such as shipwrecks and risks associated with dumped WWII chemical and other munitions.

### 4.1.2 *During project operation*

The possibility of pipeline damage due to internal and/or external corrosion, sea operations (nets, anchors etc), natural threats such as storms and pipeline cross-section faults has the potential to generate a number of hazards. These include sea surface gas explosions endangering human health and the environment, the possible increased toxicity in the marine environment and additional thermal impacts.

## 4.2 Espoo Convention and EIA

The United Nations Economic Commission for Europe 1991 Convention on Environmental Impact Assessment in a Transboundary Context (commonly referred to as the Espoo Convention) sets out the obligations of the Parties to assess the environmental impact of certain activities at an early stage of planning. It also lays down the general obligation of States to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across boundaries. All of the Baltic States are parties to the Espoo Convention, although Russia has yet to ratify it.

At a meeting between the appropriate environmental impact assessment (hereafter, "EIA") authorities in Germany, Denmark, Sweden, Finland and Russia on 19 April 2006, it was agreed that the Nord Stream project falls within the auspices of the Espoo Convention and thereafter the corollary notification obligations were complied with. We understand that the project company, Nord Stream AG, is seeking to finalise an Espoo Convention EIA for the project describing environmental factors as well as transboundary effects and investigated alternatives in April 2008.

We would draw your attention to two additional factors as regards EIA outwith the context of the Espoo Convention. The first requires consideration of national legislation in each of the Baltic States relating to environmental impact assessment. In those States members of the European Union, the legislation should be similar<sup>9</sup> but

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<sup>8</sup> Similar considerations apply during the decommissioning of the project.

<sup>9</sup> Following transposition into national law of the European Directive 85/337/EEC of 27 June 1985 on assessment of the effects of certain public and private projects on the environment (as amended)

may not be identical. The second matter relates to the impact on the project's EIA due to bilateral or multilateral agreements on environmental assessment between various Baltic States.<sup>10</sup>

### 4.3 Helsinki Convention

Entering into force on 17 January 2000, the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area (commonly known as the Helsinki Convention) obliges the Contracting Parties<sup>11</sup> to 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. HELCOM, the governing body of the Helsinki Commission, works to protect the marine environment of the Baltic Sea from all sources of pollution through intergovernmental co-operation between the Contracting Parties and acts as both environmental policy maker and supervisory body.

In the context of the Nord Stream project, and as an outcome of the VIII International Environmental Forum "Baltic Sea Day" in June 2007, 92 representatives from 9 states in the Baltic region agreed on a Roundtable Resolution recommending, among other matters, the following:

- Maintenance of inter-governmental co-operation as regards the project's EIA;
- The taking into account of responses from the official bodies and stakeholders, including the public, that have been received in reply to the Nord Stream project Notification within the framework of the Espoo Convention; and
- The making of a provision that in the final decision on the project, due account is taken of the outcome of the environmental impact assessment, including the environmental impact assessment documentation, as well as the comments thereon received.

## 5. Possible legal challenges

### 5.1 Member State challenge

As the potential environmental impacts of the Nord Stream project are debated, assessed and managed, there exists a corollary potential for legal challenge. Both the Espoo Convention and Helsinki Convention detailed above contain dispute resolution mechanisms that may come into play. In addition, the littoral Member States of the European Union and the European Union institutions may bring, or be the subject of, proceedings under Articles 226, 227 and 232 of the EC Treaty in relation to the pipeline.

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<sup>10</sup> For example, the Agreement between the Government of the Republic of Estonia and the Government of the Republic of Latvia on Environmental Impact Assessment in a Transboundary Context, March 14, 1997 (Pärnu) or the bilateral treaty between Finland and Estonia on EIA (Finnish Treaty Series 51/2002)

<sup>11</sup> Denmark, Estonia, the European Community, Finland, Germany, Latvia, Lithuania, Poland, Russia and Sweden.

## 5.2 Third Party Challenge

As regards legal challenges by other parties, and in addition to possible national legislation in each of the Baltic States, the third pillar of the UNECE 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (commonly referred to as the Aarhus Convention) aims to provide access to justice on environmental matters in three contexts:

- review procedures with respect to information requests;
- review procedures with respect to specific (project-type) decisions which are subject to public participation requirements, and
- challenges to breaches of environmental law in general.

## 6. Project Financing and Environmental Matters

The limited recourse financing used for the Nord Stream project will have an impact on the way in which environmental considerations are approached and managed. At a European Union level, the *European Principles for the Environment* aim at the promulgation and implementation of the guiding environmental principles in the EC Treaty and the practices and standards incorporated in EU secondary environmental legislation in the financing of projects. Where financing projects outside of the EU (or with a mixed EU/non-EU element), the signatories<sup>12</sup> are expected to comply with the appropriate EU environmental principles, practices and standards (and with regard to EU financing, due respect for the European Neighborhood Policy and the EU policy towards Russia), subject to local conditions.

Attention is also drawn to the Equator Principles, a set of ten voluntary, framework principles adopted by over 50 financial institutions aimed at assessing environmental and social issues related to certain project financings. The Equator Principles Financial Institutions (“EPFIs”) seek to avoid, where possible, negative impacts on project-affected ecosystems and communities, and where such impacts are unavoidable, appropriately reduce, mitigate and/or compensate for them. EPFIs commit to not provide loans to projects in the event of non compliance by the borrower with the respective social and environmental policies and procedures of each EPFI that implements the Equator Principles. The independent review undertaken of the environmental assessment, action plan and of the consultation process, in accordance with Principle 7 of the Equator Principles, prior to funding is a significant process of scrutiny. Whether these will apply to this project is as yet uncertain and will only become more clear as plans for the financing of the project emerge.

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<sup>12</sup> The Council of Europe Development Bank, European Bank for Reconstruction and Development, European Investment Bank, Nordic Environment Finance Corporation and Nordic Investment Bank

## 7. Trans-European Energy Networks

### 7.1 Nature of TEN-E projects

The European Community Guidelines for Trans-European Networks - Energy (TEN-E) were adopted for the first time in the year 1996, comprising the list of projects of common interest in line with Article 154 of the Treaty which establishes the objective of: "contributing to the establishment and development of Trans-European networks in the areas of transport, telecommunications and energy infrastructures." The list of projects has been revised three times, in 1997, 1999 and 2003 and the project then referred to as the North European Gas Pipeline (and now known as Nord Stream) was declared to be part of the TEN-E and this status remains as confirmed in the latest revision of the TEN-E Guidelines issued in mid 2006 (Decision 1364/2006/EC).<sup>13</sup>

That 2006 Decision annexes projects relating to the development of Trans-European energy networks, and it highlights certain schemes as priority projects, which are said to be of particular significance for the operation of the internal energy market or the security of energy supply. As a project of 'common interest'<sup>14</sup> in accordance with Article 6 and Annex II of the Decision, it is eligible for Community financial aid in line with recently revised rules for financial support of TENs (Regulation 680/2007/EC).<sup>15</sup>

The extent to which the project company will wish to seek financial support and the amounts and nature of any such support is not clear, but it is the case that the Company has given prominence on its website and in promoting its activities to its priority status under TEN- E. This is not only seen to add legitimacy to the project but it places positive obligations on Member States under Article 6(5) of the 2006 Decision which reads:

Member States shall take any measures they consider necessary to facilitate and speed up the completion of projects of common interest and to minimise delays, while complying with Community law and international conventions on the environment, especially as regards projects declared to be of European interest.<sup>16</sup>

Moreover Article 11 of the Decision states that 'Member States shall make every effort to implement the projects of common interest'. Before considering, as requested, the legality of the project's TEN status, it is necessary to review the management structure of the project company.

### 7.2 Nord Stream's Management History

The project was first conceived in 1997, when Gazprom and Neste (a Finnish company) later known as Fortum formed a joint company, North Trngas Oy. The

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<sup>13</sup> Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC

<sup>14</sup> The project is listed as such in Annex III of the Decision.

<sup>15</sup> Regulation (EC) No 680/2007 of the European Parliament and of the Council of 20 June 2007 laying down general rules for the granting of Community financial aid in the field of the trans-European transport and energy networks

<sup>16</sup> The Nord Stream pipeline is a project of 'European interest' in accordance with Article 8 and is listed as such in Annex I.

North Transgas Oy was established to construct and built a gas pipeline from Russia to Northern Germany across the Baltic seas. Ruhrgas (later E.ON AG) and Wintershall (later BASF AG) became German partners to the project. An initial management structure comprising of Gazprom, Forstum, Wintershall and Ruhrgas was established to manage the project implementation.

In May 2005, Fortum withdrew and sold its 50% stake in the project to Gazprom. Forstum's disinvestment from North Transgas Oy was based on its corporate strategy to focus on more on the utilisation of natural gas rather than building gas infrastructure. In September 2005, Gazprom, BASF and E.ON signed a basic joint venture agreement (JVA) on the construction of a North European Gas pipeline and the North European Gas Pipeline Company (later Nord Stream) was incorporated in Zug, Switzerland. Based on the JVA agreement, Gazprom holds 51% of the stake in the joint venture while BASF AG and E.ON AG hold 24.5% each.

The first shareholders' meeting was held in Moscow to make decisions on personal and other operational matters in March 2006, followed by the signing of the final shareholders agreement by the three companies in August 2006. Nord Stream is now managed by a two tier management structure comprising of a shareholder's committee and a management board drawn from representatives of each JVA stakeholder.

### 7.3 Concerns expressed

#### 7.3.1 *Limited Member State involvement*

It follows from the above that we have a project company based outside the EU, being registered in Switzerland, an EEA Member State, in which the majority shareholder is a national company of a third country. This is, however, a bi-lateral arrangement involving not just Russia but also Germany. There is some evidence that this arrangement may be extended. Nord Stream announced in April 2006 that another European corporate partner would be sought for the consortium. Companies from various additional Member States to Germany, such as Gas de France, BP, Transco and Gazuni were mooted. It is unclear how much progress has been made on this but it possibly shows some sensitivity given the stress in Decision 1364/2006/EC on supply to 'regions of the Community'<sup>17</sup> and the stress on ensuring 'interoperability' of gas networks<sup>18</sup> in Europe.

#### 7.3.2 *The Baltic States and Poland*

As it will become relevant below, the position of the one Member State involved in the project should be clarified. In 2005, the German government signed a bilateral agreement with Russia to build the gas pipeline from Russia to Germany under the Baltic Sea. Germany argues that this pursues its best interests, though Poland and Lithuania have argued that Germany made no attempt to co-ordinate a pipeline strategy within Europe prior to signing that agreement and as such that it failed to take into consideration the energy and security needs of the Baltic States and Poland, which the pipeline will by-pass.

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<sup>17</sup> Article 2 (2) (a) of Decision 1364/2006/EC

<sup>18</sup> Article 4 (3) (b) of Decision 1364/2006/EC

The current JVA stake holding and management structure of the Nord Stream project may be viewed as providing Russia with too much economic and political leverage. Gazprom (Russia's state owned energy company) is the majority stakeholder of the JVA project and as such can exercise extensive control in the shareholder committee. Being a private commercial venture, it is unlikely that the EU can compel the consortium partners into adopting another managerial model. But it is known that the Baltic States of Estonia, Latvia and Lithuania, together with Poland are not enthusiastic supporters of the project given both energy and security concerns. Estonia's decision to deny permission to the consortium to conduct sub-sea surveys in its EEZ, forcing Nord Stream to abandon a southerly route for the pipeline<sup>19</sup> forces the pipeline north to the Gulf of Finland which may constitute a less welcome route from both a technical and environmental viewpoint.

### *7.3.3 Transparency and Sustainability*

Critics have argued that there is limited information in the public domain on the full corporate and operational structure of Nord Stream and that more operational information would be welcome. The quality of operations will test the company's commitment to adhere to strict environmental, labour, security and general CSR standards required of a project that has been afforded a TEN-E status. An objective of any TEN-E project must be contributing to sustainable development and protection of the environment, by reducing the environmental risks associated with the transportation and transmission of energy.<sup>20</sup>

It is worth adding that the opinion given on TEN status given immediately below concerns the present status of the project. The future status of the project depends on its continuing capacity to meet the objectives set for trans-European energy networks. Because sustainability and environmental protection are prominent amongst these, continuing status may depend on the project continuing to meet such criteria.

### *7.4 Legal consideration of TEN status*

Turning to the question of the legality of the project's TEN status, as requested, projects eligible include high-pressure gas pipelines, excluding those of distribution networks, making it possible to supply regions of the Community from internal or external sources.<sup>21</sup> In addition one objective set for TEN status is reinforcing the security of energy supplies, and the specific example is given of 'strengthening relations with third countries in the energy sector in the mutual interest of all parties concerned.'<sup>22</sup>

In terms of eligibility, it is clear that an application for TEN status can come from a single Member State or from several public or private undertakings with the agreement of that Member State, assuming it is directly concerned by the project in question. In contrast projects proposals submitted only by third Countries or legal or

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<sup>19</sup> Mortished C, Severe delays and rising costs hamper Baltic Sea gas pipeline, Times, January 7, 2008.

<sup>20</sup> Article 3(d) of Decision 1364/2006/EC

<sup>21</sup> Art 2 (2)(a) of Decision 1364/2006/EC

<sup>22</sup> Art 3(c) of Decision 1364/2006/EC

natural persons established outside EU countries cannot be beneficiaries of EU funding under TEN. As stated above, however, it is less than clear whether the project company intends to seek access to such funds.

Although the incorporation of the joint venture company in Switzerland followed initial granting of TEN status to the pipeline, the European Commission must have been aware of this development by the time of the proposal to re-issue the relevant guidelines for trans-European energy networks (adopted in September 2006). The Guidelines<sup>23</sup> allow for the Commission to designate in agreement with the Member States concerned the appointment of a European Co-ordinator where a project of European interest encounters significant delays or implementation difficulties, and this specifically included are situations where third countries are involved.

One might conclude from this that without the German involvement there would be likely to be problems with the TEN status, but with the active involvement of such a Member State, as evidenced by the bi-lateral agreement of 2005, the present status of the project would seem secure. One might add that TEN status is not a recent matter; this has been apparent since at least 2000. Even allowing that that the precise status of the project company has changed over time, the essential bilateral nature of the project has not changed and if the validity of institutional decision making is to be the subject of challenge then one might expect this to be rather more prompt than eight years after the event.

## **8. An alternative management mechanism for the Nord Stream project?**

The instructions suggest that this paper might analyse alternative mechanisms to manage the pipeline and a suggested model is that based upon the International Commission for the Protection of the Rhine (hereafter “ICPR”). The establishment of such an institutional regime is presumably directed at wider trans-boundary problems that may arise in the building and operation of the gas pipeline under and along the Baltic Sea.

### **8.1 The International Commission for the Protection of the Rhine**

The ICPR was set up by countries bordering the Rhine with the assistance of representatives of the European Community as a regime to discuss questions relating to the pollution of the Rhine and to find provide common solutions. The relevant States recognised that protection of the Rhine, like other international waters, required an integrated trans-boundary approach.

The ICPR was initially administered by the regime provided under the 1963 Bern Convention which has subsequently been substituted by the Convention on the Protection of the Rhine 1999 (“The Convention”). The Convention came into force in 2003 and sets out the structure and functions of the ICPR.

The work of the ICPR is guided by a number of central principles of EU environmental law. These include: the precautionary principle; sustainable development; preventive action; rectification, as a priority at source; polluters- pay

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<sup>23</sup> Art 10 of Decision 1364/2006/EC



principle; principle of not increasing damage; application and development of the state of the art and best environmental practice and principle of not transferring environmental pollution from one environment to another. The utility of the application of these principles to the Baltic Sea may be obvious.

## 8.2 Structure of ICPR

The ICPR enjoys the legal capacity conferred on legal persons by domestic law. It is represented by a chairman and ICPR is chaired for three years by each delegation.<sup>24</sup> It meets for one plenary session per year at the invitation of the Chairman, but extraordinary plenary meetings can also be called by the Chairman or at the request of at least two delegations. Decision making requires unanimity and each delegation has one vote.<sup>25</sup>

ICPR has powers to cooperate with other states, organisations and external experts and also exchange information with non- governmental organisations.<sup>26</sup> Each Contracting State bears the costs of its representation and of any studies and actions it carries out within its territory.<sup>27</sup> The Commission is responsible for international measuring programmes and studies of the Rhine ecosystem.

One important element of the Convention is dispute resolution for it promotes the resolution of disputes through negotiation or any form of dispute settlement suitable to the parties. If a dispute not settled, it may be submitted at the request of one of the parties to the arbitration process set in Annex 1 of the Convention.<sup>28</sup>

## 8.3 Limitations of the ICPR model

The ICPR has proved to be a successful model in managing trans-boundary waters and it has several useful features that might assist the management of the Nord Stream pipeline as it has been posited as a model suitable for wider adoption.<sup>29</sup> However, the Convention was promoted by five like-minded States, four of who were EU Members, the fifth Switzerland being an EEA State. Significantly the ICPR does not have executive or coercive powers to force member states to carry out its decisions. Solutions have to be agreed by consensus by the contracting states.

The ICPR deals with inland waters and with an environment that is ultimately less complex than that of the Baltic Sea. It does so to a large degree by national environmental ministers from the contracting states meeting regularly to shape common environmental solutions for the river basin. This consensual approach helps to facilitate the speedy national implementation of ICPR programmes and environmental projects.

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<sup>24</sup> Arts 6 and 7 of the Convention

<sup>25</sup> Article 10 of the Convention

<sup>26</sup> Article 14(1) & (3) of the Convention

<sup>27</sup> -Article 13 of the Convention

<sup>28</sup> Article 16(1) & (2) of the Convention

<sup>29</sup> Oterdoom H, From use and protection to sustainable development: The river Rhine, a case study (2001) a paper presented by the Secretary general of the International Commission for the Protection of the Rhine, available at <http://www.eaurmc.fr/lyon-fleuves-2001/fleuves/RHIN%20%Oterdoom.htm>

#### 8.4 Back to the Helsinki Commission

The paper considered earlier the work of the Helsinki Commission in protecting the marine environment of the Baltic Sea from all sources of pollution through intergovernmental co-operation between Denmark, Estonia, the European Community, Finland, Germany, Latvia, Lithuania, Poland, Russia and Sweden, the very entities affected by the operation of Nord Stream.

The Commission already strives for a healthy Baltic Sea environment with diverse biological components functioning in balance, resulting in a good ecological status and supporting a wide range of sustainable economic and social activities. As such it has an obvious coordinating and supervisory role to play. It is a mature organization having been established for over three decades.

The structures of the Commission are not dissimilar to those of ICPR with chair rotating between contracting parties every two years and with (occasional) ministerial level meetings. It invokes many of the the principles of EU environmental law including the precautionary principle, prevention of pollution at source and the employment of best available techniques (BAT) for operations that might impact on the Baltic Sea.

Russia seems quite content to work within the Helsinki structure. It was represented at the VIII International Environmental Forum “Baltic Sea Day” on 22-23 March in St. Petersburg (considered at 4.3 above) at which the environmental impact assessment for the Nord Stream pipeline was discussed and the related Round Table which gave rise to a resolution calling for the project management to carry out environmental impact assessment (EIA) for gas pipeline based on international environmental law. Russia, it will be recalled, although not having ratified the Espoo Convention, undertook to engage in and support environmental impact assessment.

The Resolution called for full consideration of reasonable alternatives (both technical and geographical) to the proposed pipeline and referred to many of the environmental issues set out in Part 4 of this paper. It called for widespread consultation and called for provision to ensure that any final decision on the construction of Nord Stream gas pipeline takes due account of the outcome of the environmental impact assessment, including the environmental impact assessment documentation, and the comments received.

### **9. Conclusion**

The paper addresses the issues raised in the order raised by the European Parliament Committee specification. There is an executive summary of main findings at the front of the document. It is perhaps important to stress that many of the important environmental issues will be played out in very near future as the process of environmental impact assessment crystallises. The timescale for the project is tight, making dependence on the process of EIA critical in terms of environmental protection of a sensitive and complex marine environment.