The Nord Stream Pipeline: International Environmental Law Issues

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The issues:

• What are the applicable legal rules?
• Will there by a common approach or will each coastal State be subject to/apply different rules?
• To what extent will environmental obligations vary according to the stage of the project (surveying, construction, operation, decommissioning)?
• How may the environmental obligations of the parties be enforced?
What are the applicable legal rules?

- 1. 1982 Law of the Sea Convention
- 2. 1992 Convention on Biological Diversity
- 3. 1992 Helsinki Convention
- 4. 1996 London Protocol
- 5. 1991 Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS)
- 6. 1972 World Heritage Convention (and Underwater Cultural Heritage)
- [EIA, Liability and Dispute Settlement are being addressed in subsequent presentations]
- Customary International Law Obligations

Define “applicable”: (i) State/EC is a party; (ii) treaty is in force; (iii) the treaty is applicable to the activity in question and within the relevant geographic area (e.g. IW, TS and EEZ of Russia/Germany)
1. 1982 Law of the Sea Convention

- Directly addresses pollution from pipelines on the CS, eg. Article 79(2): “Subject to its right to take reasonable measures for... the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables and pipelines”

- Extensive treatment of protection of the marine environment in Part XII with obligations of States including to:
  - protect and preserve the marine environment
  - Prevent, reduce and control pollution of the marine environment from any source, including measures necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life
  - prevent damage by pollution to other States arising from incidents under their jurisdiction and control
  - Notification, monitoring, and assessment obligations (though linked to ‘substantial pollution of, or significant and harmful changes in, the environment’)
  - Focus on pollution from installations and devices used in exploration and exploitation of the CS/EEZ resources and other installations and devices operating in the marine environment; Article 208 obligation to prevent, reduce and control pollution ‘arising from or in connection with seabed activities subject to’ coastal state jurisdiction
2. 1992 Convention on Biological Diversity

- Applies to components of biological diversity in areas within national jurisdiction (iw, ts, EEZ); all 5 States and EC parties
- General obligation to conserve biological diversity; for in situ conservation this includes (‘as far as possible and appropriate’) establishing a system of protected areas, promoting the protection of ecosystems and natural habitats and rehabilitate and restore degraded ecosystems and promote recovery of threatened species; assessment, monitoring and research
- Development of protection of marine and coastal biodiversity since COPI; cooperation with regional seas agreements (and CBD itself part of web of biodiversity-related treaties, including WHC and Bonn Convention)

- Prevent and eliminate pollution of the marine environment of the Baltic Sea Area caused by harmful substances from all sources, in order to promote the ecological restoration of the Baltic Sea Area and the preservation of its ecological balance (Baltic Action Plan 2007 sets restoration target of 2021)
- ‘harmful substances’ defined in Annex I (intrinsic properties and characteristics liable to cause pollution) with ‘priority group’ list including ‘oils and hydrocarbons of petroleum origin’ (oil means ‘petroleum in any form’)
- Applies precautionary principle, BEP and BAT
- Obligation to prevent transboundary pollution
- Assessment, notification and consultation, and reporting provisions
- Applies to Baltic Sea Area, including iw, ts and EEZ
- Applies inter alia to prevention of dumping (‘deliberate disposal...other man-made structures at sea’) and to prevent pollution from exploration and exploitation of its part of the seabed and subsoil or ‘from any associated activities thereon’

- Objective is to protect and preserve the marine environment from all sources of pollution and obliges states to take effective measures to prevent, reduce and, where practicable, eliminate pollution caused by dumping.
- Applies precautionary approach, ppp; requires waste prevention audit, assessment and monitoring.
- Dumping includes any abandonment of platforms or ‘other man-made structures at sea’ for the sole purpose of deliberate disposal (with exclusion for ‘matter’ – eg cables, pipelines and other marine research devices – placed for a purpose other than disposal).
- Finland and Russia not parties to Protocol though all 5 coastal States party to the 1972 Convention.
5. Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS)

- 10 States party (not Russia - a Range State - nor EC)
- obliges Parties to engage in habitat conservation and management, surveys and research, pollution mitigation and public information (Conservation and Management Plan annexed to Agreement includes working towards prevention of ‘other significant disturbance, especially of an acoustic nature’
6. Convention Concerning the Protection of the World Cultural and Natural Heritage 1972

- Duty to ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated on its territory.
- World Heritage List includes marine and coastal heritage sites e.g. High Coast/Kvarken archipelago (Finland and Sweden, 2000/2006)
- World Heritage in Danger List (e.g. Dresden Elbe Valley added in 2006) and, ultimately, removal from list (rare: Arabian Oryx Sanctuary in Oman delisted in 2007)
- Cultural and natural heritage included (or mixed sites); separate Convention on the Protection of the Underwater Cultural Heritage (2001) (underwater at least 100 years; pipelines and cables expressly excluded from definition regardless of age, as are installations still in use) with general obligation to protect and preserve and the specific obligation to use best practicable means to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting the cultural heritage; provisions on eez/cs assume activities ‘directed at’ cultural heritage; in force 2.1.09 but no Baltic State participation.

- First international instrument to address procedural human rights in an environmental context
- Establishes international minimum standards in respect of each of its 3 pillars; upward derogation; non-discrimination
- Does not create a supranational forum but rather concerned with state implementation of their treaty obligations at national (and EU) level
- Established a Compliance Committee which allows submissions by members of the public, including NGOs
- ‘Environmental information’ broadly defined
- Public participation in decisions on whether to permit proposed activities (a) listed in Annex I (pipelines not included) or (b) which may have a significant adverse effect on the environment
- Access to justice provisions buttress first two pillars and provide members of the public access to administrative or judicial procedures to challenge acts or omissions of private persons and public authorities which contravene provisions of its national law relating to the environment (but standing subject to meeting the criteria, if any, laid down in national law)

- Article 19 exhorts each contracting party ‘[i]n pursuit of sustainable development, to take into account those international agreements to which it is a party... [in] striv[ing] to minimize in an economically efficient manner harmful environmental impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area’
- ‘operations’ presumably includes pipeline construction etc; ‘Area’ includes offshore (iw, ts, cs/EEZ); Russia not a party (but provisional application)
- Weak versions of PPP and precaution
- Protocol on Energy Efficiency and Related Matters defines environmental impact broadly but of little relevance to pipeline
Some Conclusions:

- No direct regulation of environmental consequences of pipeline siting and construction (no equivalent eg to MARPOL for pipelines)
- Rather, surveying, siting and construction of submarine gas pipelines regulated by wider environmental instruments addressed to marine pollution and conservation, habitat and species conservation
- Clearly constrained by environmental obligations, both substantive and procedural
- Effectiveness dependent on participation in treaties, and their effective domestic/EC implementation and enforcement
- Potential for Article 9 Aarhus to buttress domestic environmental enforcement through individuals, but subject to national rules on standing
- Dispute settlement (principally inter-State) and compliance procedures (individuals and ngos under Aarhus)