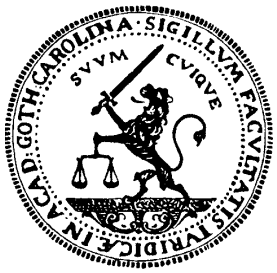

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Coastal state jurisdiction in offshore pipeline projects

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Contents

Summary

EU is consuming more and more energy and importing more energy products leading to dependency on a limited number of foreign producers. Europe is facing big challenges with a growing demand for natural gas. Historically, pipelines have always been the prevailing way to supply gas to Europe. The laying of offshore pipelines is recognised as a method of communication like shipping and air transportation, according to *jus communcationis*, which is a right of all nations. Depending on in which maritime zone a pipeline is proposed being laid and the nationality of the entity wishing to lay an offshore pipeline, different sets of rules apply. International law and LOS (Law of the Sea) gives no rights to a foreign entity to lay a pipeline in another states territorial sea. A coastal state enjoys absolute sovereignty over its territorial sea and the relevant domestic law governs the foreign entity that wishes to lay a pipeline there.

However, if a non-coastal entity wishes to lay an offshore pipeline on the continental shelf or EEZ (Exclusive economize zone) of another state, the coastal state's jurisdiction decreases to a functional jurisdiction, which gives the coastal state and the non-coastal entity the rights given in LOS, Art 79. The coastal state may not impede the laying of pipelines *per se* in the EEZ/Continental shelf, but it can safeguard its interests offshore by taking reasonable measures to preserve the environment and its natural resources, and influence the delineation of the pipeline by proposing an alternative route if it would be found suitable with reasonable environmental grounds. This gives a coastal state the right to control and affirm conditions concerning the route. The coastal state's right to take reasonable measures comprises to protect offshore development areas and ongoing exploration and exploitation of its natural resources on the continental shelf. Consequently, the coastal state can require an entity to reallocate the route of the pipeline if it endangers these projects. The possibility for a coastal state to prevent the laying of an offshore pipeline is very limited if an EIA (Environmental impact assessment) not clearly demonstrates that the impact on the environment would be negative. The EIA is nevertheless an instrument for the coastal state to use to safeguard its interest to make sure that environmental considerations are implemented in the planning, investigation and selection of the most appropriate solution, construction, pre-commissioning and operation. LOS requires however that a coastal state must act *bona fide*, meaning that the state must act in good faith with honest intentions and beliefs.

Conflicts of jurisdiction may arise when cross-border pipelines are constructed and operated in different maritime zones. Different states with different interests in a cross-border pipeline project can claim jurisdiction in diverse matters. States such as a sending state, where the pipeline originates, a receiving state, a transit/coastal state and a state of the incorporation/registration of an entity can have conflicting jurisdiction

claim. The problems and questions arise in situations where the offshore pipelines are located outside the territorial sea and in the shelf or the EEZ of the coastal state. There is a conflict of jurisdiction between the coastal state and other states which are interested in using their communicative freedom. Conflicting jurisdiction regarding different issues may occur, and different principles of jurisdiction give different result, which gives little opportunity to predict the outcome. Conflicts of jurisdiction cannot be avoided since a cross-border pipeline always connects two separate areas of jurisdiction. One way of solving this problem has been through bilateral and multilateral pipeline agreements. If a pipeline crosses the continental shelves and EEZ of other states, the governments of the transit states are not parties of the pipeline agreement. However, coastal states such as a transit state in an offshore pipeline project can take reasonable measures to protect the production of its natural resources, protect existing cables and pipelines and protect the marine environment. The coastal state can take protective measures to control pollution from pipelines even though the pollution occurs outside its territory.

The Nord Stream project has been subject to debate in the Baltic Sea states affected by the project. The arguments used have been, among others, environmental concerns since the Baltic Sea is heavily polluted by heavy metals, chemical weapons and dumped ammunition. However, the possibility for the affected states to prevent the laying of the Nord Stream pipeline is very limited if the EIA does not evidently show that the impact on the environment would be harmful.

Sammanfattning

EU förbrukar och importerar mer och mer energi vilket leder till ett beroende av utländska producenter. Europa står inför stora utmaningar i och med ökad efterfrågan på naturgas. Historiskt sett har gasledningar varit den rådande metoden att transportera naturgas till Europa. Att dra en rörledning är en erkänd metod för kommunikation såsom sjöfart och flygtransport, vilket enligt jus communcationis är en rättighet för alla nationer. Olika regler gäller beroende på i vilken maritim zon gasledningen är avsedd att läggas och vilken nationalitet den juridiska personen har. Om en utländsk juridisk person vill dra en gasledning genom territorialhavet tillhörande en annan stat, så är den bunden av den statens relevanta nationella lagstiftning. Internationell rätt och havsrättskonventionen ger ingen rätt att lägga gasledning genom en annan stats territorialhav och en kuststat har absolut suveränitet över sitt territorialhav.

Om en utländsk juridisk person emellertid önskar lägga en gasledning på en annan stats kontinentalsockel eller exklusiva ekonomiska zon, minskar kuststatens jurisdiktion till en funktionell jurisdiktion, vilket ger kuststaten och den utländska juridiska personen de rättigheter som anges i Artikel 79 i havsrättskonventionen. En kuststat kan inte hindra utläggandet av en gasledning genom sin EEZ/kontinentalsockel i sig. Dock finns det möjligheter för en kuststat att vidta skäliga åtgärder för att bevara miljön och dess naturtillgångar samt påverka och fastställa villkor för rörledningens sträckning genom att föreslå en alternativ sträcka om det skulle anses vara lämplig ur miljömässiga skäl. Kuststatens rätt att vidta skäliga åtgärder omfattar rätten att värna om eventuell pågående utforskning och utvinning av kontinentalsockelns naturtillgångar. Följaktligen kan en regering kräva att den utländska juridiska personen väljer en annan sträcka om gasledningen påverkar utforskningen eller utvinningen. Dock är möjligheten för en kuststat att hindra dragningen av en gasledning begränsad såvida inte en miljökonsekvensbeskrivning tydligt illustrerar att effekten på miljön skulle vara uppenbart negativ. Miljökonsekvensbeskrivningen är trots detta ett instrument för en kuststat att skydda sina intressen till havs, samt ett hjälpmedel för att se till att den utländska juridiska personen tillämpar miljöhänsyn i planeringen och att miljöfaktorer beaktas i beslutsprocessen. Vidare är miljökonsekvensbeskrivningen ett instrument för att bedöma vilken potentiell inverkan en planerad verksamhet har på miljön. Havsrättskonventionen kräver i sin tur att en kuststat skall agera bona fide, vilket innebär att staten måste agera i god tro.

Konkurrerande jurisdiktion kan uppstå vid gränsöverskridande gasledningar. Olika stater med olika intressen i ett gränsöverskridande gasledningsprojekt kan kräva att utöva jurisdiktion inom olika frågor. Ledningens ursprungsstat, mottagande stat, en kuststat vars EEZ används som transitområde för ledningen och en utländsk juridisk persons registreringsland kan ha konkurrerande anspråk inom en fråga. Problemen

och frågeställningarna som uppstår är i de fall gasledningarna är utlagda utanför en kuststats territorialhav, men inom statens EEZ. Kuststatens intresse av att skydda sina intressen till havs kan kollidera med andra staters rätt till kommunikation, enligt jus communcationis. Konkurrerande anspråk att utöva jurisdiktion kan uppstå och olika principer för jurisdiktion ger olika resultat, vilket leder till oförutsebarhet. Konkurrerande jurisdiktion kan dock inte undvikas då en gränsöverskridande gasledning alltid ansluter två olika jurisdiktioner. Ett sätt att lösa detta problem har varit genom att ingå bilaterala och multilaterala avtal. En kuststat är dock inte en part i dessa avtal, men har rätt att vidta åtgärder för att förhindra, begränsa och kontrollera föroreningar från gasledningar som har sitt ursprung utanför sitt territorium. Vidare får kuststaten vidta rimliga åtgärder för att skydda befintliga ledningar och kablar på havsbotten.

Nord Streamprojektet har gett upphov till debatt i Östersjöstaterna som berörts av projektet. De argument som framförts av motståndarna till projektet har bland annat varit miljömässiga skäl eftersom Östersjön är starkt förorenat av tungmetaller, kemiska vapen och ammunition som dumpats. Dock är möjligheterna att hindra utläggandet av en gasledning genom Östersjön mycket begränsade såvida inte en miljökonsekvensbeskrivning tydligt visar att miljöpåverkan skulle vara alltför skadlig.

Preface

I would like to thank Colonel Lars-Olof Corneliusson, Naval Attaché at the Embassy of Sweden in Washington, D.C. that opened my eyes to the interesting field of LOS, which involved participation at interesting briefings in Congress and think tanks. Great thanks also to Pontus F. Järborg, Minister/Consular General, for being an inspiration during my stay in the States.

I want to express my deepest gratitude to my family, especially Ashkan and Arash for their endless support through law school.

Finally, I want to thank my supervisor, Lars-Göran Malmberg, who has helped me along the way with valuable advice.

Arsalan Labaf
Malmö, May 2010

Abbreviations

BEP	Best Environmental Practice
BAT	Best Available Techniques
EEC	European Economic Community
EEZ	Exclusive Economical Zone
EIA	Environmental Impact Assessment
ICJ	International Court of Justice
HELCOM	Helsinki Commission
LNG	Liquefied natural gas
LOS	United Nations Convention on the Law of the Sea of 10 December 1982
Mtoe	Million toe
NEGP	Northern European Gas Pipeline
NGO	Non-Governmental Organization
OPEC	The Organization of the Petroleum Exporting Countries
UK	United Kingdom

1 Introduction

"*Nord Stream is a EU priority energy project and important in complementing the European energy grid*". [1]

Questions of jurisdiction over the laying of pipelines do not figure significantly in texts on international law since historically most of the cross-border pipelines have been land based, crossing directly from one sovereign territory to another. The energy consumption and dependency on gas imports are growing constantly in Europe and supplies are becoming insufficient. This has lead to further co-operation between the EU and the world's largest gas producer, Russia. Offshore pipeline projects, such as the Nord Stream, which will be laid across the Baltic Sea, crossing the territorial waters of Russia, Denmark and Germany as well as the EEZs' of Finland and Sweden, is one cross-border option to transport natural gas. The Russian-German-Dutch Consortium have emphasised the fact that the project truly is a pan-European project, which all EU-member states should support. However, the Nord Stream project has been subject to tough debates in the states affected by the project. A coastal state that is a transit state affected by an offshore cross-border pipeline project may exercise extraterritorial jurisdiction beyond its territorial sea only in so far it is permitted under international law. Problems of jurisdiction may arise when states try to exercise jurisdiction extraterritorially, but LOS affirms that coastal states may exercise limited functional jurisdiction on its continental shelf. However, beyond the territories of states, possible conflict of interests may arise between an entity interested to lay an offshore pipeline crossing another state's EEZ/continental shelf and the coastal state that has no relationship and interest in the natural gas that will be transported.

1.1 Aim of the Study

The purpose of the thesis is to clarify and identify the means a coastal state have according to international law to safeguard its interests as a transit state in an offshore pipeline project. Questions of jurisdiction with the focus on a coastal state's right to safeguard its interests through different conventions and principles of jurisdiction will be discussed. The study will have a regional Baltic perspective, also dealing with the implication of the European energy dependency on a limited number of foreign producers. Furthermore, regional conventions will be referred to since the Nord Stream will be exemplified as a cross-border offshore project.

[1] Günther Oettinger, EU Energy Commissioner, April 9, 2010.

1.2 Method and disposition

The laying of cross-border offshore pipelines is a highly political issues dealing with matters such as energy security, vulnerability analyses and environmental aspects. My aim is however to make a legal analysis concerning cross-border pipelines under international law. Due to the political nature of the subject and for better understanding of the Nord Stream project, the European energy outlook, dependency, policy and the EU-Russian relationship in the gas sector will be discussed. In the course of writing this study, the aim has been to present a descriptive perspective explaining a field not frequently debated through a legal perspective, but still clarifying with a continuous analytical approach. Consequently, in order to answer the questions, the aim is a descriptive and analytical approach throughout the thesis.

The thesis is structured in five different chapters. Chapter two deals with the European energy outlook, policy and offshore pipelines. Some remarks regarding gas contracts and different project models will also be made that influence on questions of jurisdiction. Chapter 3 deals with LOS and the rights of laying offshore pipelines in different maritime zones. Jurisdictional questions and a coastal state's means to safeguard its interests in its different maritime zones will also be discussed. By way of concluding the sections of 3.6-8, practical solutions regarding questions of jurisdiction will be clarified in the concluding remarks in 3.6.9. The Nord Stream pipeline project that will link Russia and the European Union via the Baltic Sea will be presented in chapter 4, focusing on the international consultation process and the role of the Environmental Impact Assessment (EIA). Furthermore, the arguments stressed by the coastal states and the affected states around the Baltic will be analysed and reflected upon. Finally, chapter five concludes the aim of the study by clarifying and concluding a coastal state's means to safeguard its interests as a transit state in an offshore pipeline project and the conflicting jurisdiction that can arise between states.

1.3 Material

With the aim of creating a comprehensive overview of the current legal position on the laying of offshore pipelines according to international law, LOS will be the main legal source. The Espoo and Helsinki Conventions will also be used as legal sources since the conventions are relevant for a coastal state's means to safeguard its interests, especially in the Baltic region. Since this field has not been frequently debated through a legal perspective, the legal doctrine is limited. Some legal articles have however reflected upon this topic and these have been of help in answering my questions. The websites of the EU Commission and the Nord Stream project has also been a source in presenting the European dependency on natural gas and the international consultation process in an offshore pipeline project.

1.4 Delimitations

LOS has been the main legal source in clarifying and identifying the means a coastal state have to safeguard its interests as a transit state in an offshore pipeline project according to international law. Hence, domestic law will not be in focus in this study. Due to considerations of delimitation, only a selection of the most relevant conventions will be reviewed, focusing from a Baltic coastal state's perspective. Hence, the conventions referred to in the following should not be regarded as an exhaustive outline since there are conventions dealing with different issues such as biological diversity, decommissioning of a pipeline and protecting underwater cultural heritage. Private law aspects dealing with an offshore pipeline project itself such as provisions regarding construction, operation, financing, transportation, maintenance, officers and staff, compliance and insurance will not be in focus due to considerations of delimitation.

2 THE EUROPEAN ENERGY OUTLOOK, POLICY AND OFFSHORE PIPELINES

2.1 Introduction

EU is consuming more and more energy and importing more energy products. Energy consumption and dependency on oil and gas imports are growing constantly and supplies are becoming insufficient. As a result to this, external dependence for energy is escalating. It is a fact today that at least for the next 20 years, natural gas will be a key energy vector for the European Union. Gas is the second primary energy source for Europe since 1996.[2] The agenda in EU is not only to promote a broad mix of energy sources but also to reduce the risks of Europe's energy dependency. Energy was fundamental to the foundations of the EU and has recently returned to the top of the political agenda. Securing European energy supplies is consequently high on the EU's agenda.[3] Furthermore, there is a wish for for diversity in suppliers, transport routes and transport mechanisms. The energy community products are unsatisfactory for the energy requirements in the Union. Historically the policy in the Union has been to promote competition in the gas sector. There are ideas that promote the opposite, which is to encourage long-term co-operation models based on a fair and long term economic base.[4] This is predominantly the fact since the members of the Union in the Energy sector mainly trade with a world of monopolies where competition is totally absent.

Given the importance energy has now assumed in the Union, this has lead to measures being taken. The Union have moved towards an active energy policy with the aim to decrease its energy dependence. There are figures which indicate that in the next 20 to 30 years, 70% of the Unions energy requirements, as opposed to the current 50%, will be covered by imported products if current rates continue.[5]

This has far-reaching effects on the economy of the Union and the dependency can be observed in all sectors of the economy. Oil is and remains the most intensively used product in the EU's fuel mix. Comparing to the 1990s, the gross inland consumption of oil has decreased only slightly and the gas and nuclear energy share during the same period has increased by six and two percentage points accordingly and in 2006 each comprised respectively 24% and 14% of gross inland consumption.[6]

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[2] Gilardoni (2008), p. 2.
[3] http://ec.europa.eu/energy/security/index_en.htm, 2010-02-20
[4] Gilardoni (2008), p. 2.
[5] Green Paper, p. 2.
[6] Europe's current and future energy position (2008), p. 8.

2.2 The Energy dependency on the Gas sector and its impacts

The energy dependency in the Union was 53.1 % in 2007 and 608 Mtoe of oil was imported to the Union in 2006.[7] The biggest supplier is the OPEC[8], which covers 38% of the oil import. Russia stands for 33%, while Norway and Kazakhstan provide 16% and 5% of the oil imports to the Union. The European Union produces less than 20 percent of its total oil consumption.[9]

The situation is different when looking at the gas sector, where domestic production is mostly taking place in the Netherlands and the United Kingdom. The biggest exporters of gas to the EU are Russia (42%), Norway (24%), Algeria (18%) and Nigeria (5%).[10] Taking geopolitics into consideration, around 45% of oil imports come from the Middle East and 40% of natural gas from Russia. Due to disagreements between Russia and Ukraine, natural gas supplies to Europe have occasionally been interrupted. This has brought up the discussion regarding the dependency on Europe's neighbours. The European Union is heavily dependent on Russia to meet its vast and growing demand for gas supplies. With its hydrocarbon resources and geographical immediacy, the dependency is to be expected to continue for many years.[11]

The dependency on natural gas and on specific suppliers is different around the Union and it is worth to consider the fact that the supplier is not always Russia. Spain which is highly dependant on importing energy supplies is one of the few EU states that imports no gas from Russia and is in fact unique in the Union in putting into law in 2000 a self-imposed limit on the share of its total gas consumption coming from any other country.[12]

The situation and the dependency differ considerably between the members of the Union. The single state that is completely energy independent is Denmark. On the other side of the list with states highly dependent of energy import are Ireland, Italy, Portugal and Spain with import dependency exceeding 80%, while for some countries like Poland and United Kingdom; import dependency ratios are about 20%.[13] Creating and maintaining a

[7] According to Eurostat, energy dependency shows the extent to which an economy relies upon imports in order to meet its energy needs. The indicator is calculated as net imports divided by the sum of gross inland energy consumption plus bunkers.
[8] Organization of the Petroleum Exporting Countries' members are Algeria, Angola, Ecuador, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, the United Arab Emirates and Venezuela.
[9] Europe's current and future energy position (2008), p. 9.
[10] *Id.*
[11] North Africa and Europe: energy partnership (2009), p. 157.
[12] Europe's current and future energy position (2008), p. 9.
[13] *Id.*

uniform energy policy in the Union is a tough task since the Member States have different energy structures and level of dependency on import.

Due to delimitation there will be no considerable focus on energy policy and politics, but some factors should be mentioned for better understanding of the study. The reliance and dependency on energy has grown and the rise of oil prices in the 70s put has made energy security and security of supply important objects in the agenda. The European Commission defines energy security as 'the ability to ensure that future essential energy needs can be met, both by means of adequate domestic resources worked under economically acceptable conditions or maintained as strategic reserves, and by calling upon accessible and stable external sources supplemented where appropriate by strategic stocks'. Briefly, energy security refers to sustainable and reliable supplies at reasonable price.[14]

It has been confirmed that there is a European dependency on import of natural gas. What impacts does this have? First and foremost in an economic perspective a huge financial flow is created towards foreign producers, but also through a political perspective, EU becomes the weaker side negotiating with players with massive resources.[15] This can also disturb and create complications in the relationship between the Union and the foreign producers. These foreign producers are often state owned, bound by political decisions and strictly connected with their global economic and political strategies. Some complications are created since the foreign producers are largely influenced by political decisions and do not follow the principles that typically govern private enterprise.[16]

2.3 Russian Gas, Gazprom and the EU

Europe is facing big challenges seeing the growing demand for natural gas. The high dependency one on single producer, namely Russian gas, can effect the competition. Furthermore, the gas dispute in early 2009 between Russia and Ukraine is an example on vulnerability when depending on one single producer. The Russian state-owned company Gazprom cut off gas supplies to the Ukrainian gas company Naftogaz due to a dispute relating to allegations by Russia that Ukraine had failed to make the timely payment of an invoice and that Ukraine had been siphoning domestic use Russian gas meant for transhipment across Ukraine.[17] In addition, Gazprom proposed an increase of the price of the transhipment of gas to Ukraine, which resulted in a diplomatic clash between Russia and Ukraine. However, the dispute affected and had its impact on some European nations that saw their gas supplies decrease. States such as Italy were affected and Bulgaria, Serbia and Bosnia had number of residents without heat in the cold winter.[18] This

[14] North Africa and Europe: energy partnership (2009), p. 157.
[15] Gilardoni (2008), p. 3.
[16] Gilardoni (2008), p. 4.
[17] Hunt & Eisele (2009), p. 258.
[18] *Id.*

is however not the first incident in which Russian energy supplies is cut off. In January 2003, Russia suspended its oil deliveries to a Latvian port and the official explanation was that the Latvian tariffs were too high and that it was more reasonable to ship the oil from a Russian terminal in the Gulf of Finland. Nonetheless, there were some critics that the embargo coincided perfectly with Latvia's refusal to sell its oil transit company, Ventspils Nafta, to the Russian oil company Transneft.[19]

Gazprom, which is a publicly traded company, in which the Russian government holds a majority stake of 51 percent, is considered a monopolist due to facts such as the owning of the entire high-pressure interregional pipeline network as well as 75 percent of low-pressure distribution networks. Furthermore, Gazprom owns about half of Russia's proved reserves of natural gas and all the main gas processing facilities, as well as legal export monopoly.[20] The private companies in Russia that owns reserves cannot export since the Russian state regulates the domestic price. The energy companies outside of Russia, NGO's and academic institutions have been insisting on a liberalisation of the Russian gas industry, calling for unhindered and clear access to Russian gas reserves and that access should be made available to foreign or independent firms to enter the Russian gas sector.[21]

It should also be mentioned that even if access is given to foreign companies, there is still a problem to transport the gas given that Gazprom owns the regional pipeline network. One example is the Russo-British joint venture TNK-BP, which has had difficulties to find a market for Kovykta gas field because there exists no pipeline and permission to build a pipeline was not given.[22] Despite the fact that the Nord Stream pipeline project falls under the EU acceleration directive (2003/54/EC), which obligates for regulated third party access, this project was exempt from the access requirements since the EU-Russia Energy Partnership has adopted the project as a "project of European interest". This is a clear example of the EU understanding the need of energy supply and in demanding Russia to liberalize its gas industry; the EU acknowledges the fact that a completely liberalized market is not the ultimate result.[23]

[19] Whist (2008), p. 22.
[20] Grigoryev (2007), p. 126.
[21] Grigoryev (2007), p. 132.
[22] *Id.*
[23] Grigoryev (2007), p. 136.

2.4 The Future and Relevance of Natural Gas for Europe

Environmental concerns regarding emissions resulting from fossil fuels and damages caused by the energy supply are essential factors that are considered when forming an Energy policy. Global temperatures are assumed to continue rising. Adapting to climate change will be integrated into all EU policies. Changes in weather patterns; rising sea levels, increased frequency and intensity of extreme weather events will have a major economic impact.[24]

It has been mentioned that natural gas will for at least 20 years continue to be a key energy source for Europe. The explanation to this is partially increase in consumption, but also seeing that the European reserves are reducing. The gas industry across Europe is developing new co-operations and developing linkages between thus far unconnected gas fields and constructs new pipelines to satisfy the growing demands of European load centres.[25]

Historically, pipelines have always been the prevailing way to supply and transport gas to Europe. Pipelines from Algeria, Norway but also from Russia to the Union pass through many countries, which are members of the Union. Growing demand and increasing intra-Community trade produced by the internal market will generate a greater need for transport infrastructure, which also includes intra- and trans-European transport networks and port infrastructure for liquefied natural gas (LNG). The cost for transporting gas differs when comparing transport through a pipeline or a ship, which transport LNG. The profitability is primary depending on the distance.[26] An environmental concern such as greenhouse gas emissions is also a factor to consider when transporting gas with ships. The gas must be converted to liquid form in special tankers, which creates pollution. The conversion process requires large amounts of energy and results in emissions. Europe is well located to its suppliers with existing pipelines to Norway, Russia and Algeria. Qatar is planning to increase its LNG export due to technical development, which has lead to better profitability when transporting LNG. Future projects such as the Nabbuco pipeline and import from Iran and Nigeria through other pipeline projects supported by the Union, but also through LNG shipping, can increase the diversity in suppliers. This can pressure the prices for the consumers but also increase the competition between the suppliers.

However, future existing pipeline projects can increase the dependency on Russian gas. On the other hand future pipeline projects from different suppliers could also trigger a potential competition among Russia, Norway and Algeria, which for the most part are the gas producing countries that

[24] http://ec.europa.eu/environment/climat/adaptation/index_en.htm, 2010-03-02
[25] Arentsen & Kunneke (2007), p. 3.
[26] Green Paper (2000), p. 41.

supply the Union.[27] Russian selling capacity will be increased by at least two existing main projects. One is the Nord Stream, which will transport gas to Germany via the Baltic and the second is South Stream that will pass under the Black Sea, reaching Bulgaria and then Italy and Austria. The South Stream is considered to reduce Ukraine's influence on Russian exports of gas to Europe, a major portion of which is currently piped through Ukraine.[28]

2.5 Offshore pipelines

"This [The Nord Stream pipeline] increases the energy security of Europe. New pipeline routes are needed and it is better that energy is transported via pipeline instead of by boats, trains or on the road. This is better from the environmental perspective."[29]

In recent times, new technology has considerably enhanced the distances that pipelines can carry hydrocarbons offshore and onshore. This has lead to and improved the potential for exporting hydrocarbons from isolated production centres to consumers via pipeline. The number of pipelines has consequently increased due to this development.[30]

The first pipeline built was in the United States of America in 1859 to transport crude oil. The petroleum industry has proven that pipelines are the most economical means of large scale overland transportation for crude oil, natural gas, and their products, clearly superior to rail and truck transportation over competing routes, given that large quantities are moved on a regular basis.[31] In the global energy industry, exporters and consumers have become increasingly dependent on the transportation of hydrocarbon products through long-distance pipelines. Many of the long-distance pipelines crossing different states territories, also referred to as transboundary or cross-border pipelines, are affected by public international law.[32] If a cross-border pipeline goes through a state's territory, the state must deal with issues such as jurisdiction over the pipeline, environmental protection, security, safety and inspection, commercial tariffs, government fees, quality control of petroleum and operation of the pipeline. As opposed to domestic pipelines, which are regulated exclusively by local laws, cross-border pipelines require further considerations and balancing between local- and international law.[33]

[27] Gilardoni (2008), p. 5.
[28] Gilardoni (2008), p. 6.
[29] Quote from the Finnish Prime Minister Matti Vanhanen, 12 February 2010
[30] Herbert Smith Publications (2002)
[31] Guo et al. (2005), p. 1.
[32] Herbert Smith Publications (2002)
[33] Dulaney & Merrick (2005), p. 248.

2.6 Project alternatives – Offshore and Onshore pipeline

Energy infrastructure projects like bridges, tunnels and harbours, pipelines, wind farms- and offshore power cables are in general smaller infrastructure projects. Nevertheless, since these energy projects stretches over longer distances, it may for that reason be necessary to cross sensitive areas, like munitions dump sites, which also is the case in the Nord-Stream project, and which I will discuss later.[34]

Pipelines can be laid offshore and onshore. As mentioned, the cost for transporting gas differs when comparing transport through a pipeline or a LNG ship. The profitability is primary depending on the distance. When finding a route, weighing the interests between the lowest environmental impact and most profitability is fundamental before the construction of pipelines. A primary environmental consideration is to reduce a pipeline routing distance in order to limit the environmental footprint of a project. When reasoning between an offshore and an onshore pipeline, local considerations must be taken including variety of reasons such as safety, environmental, economic and sustainable considerations.[35]

One of the reasons of choosing offshore locations instead of onshore is the accessibility of space, which can be an insufficient resource. This is a reality particularly in the relatively densely populated Europe. All use of the sea has an influence, which includes both energy infrastructure as well as ship traffic.[36] However, one argument mainly from the pipeline companies and industry is that projects concerning pipelines mainly impact the sea during the construction phase, while impact during operation is limited and mainly associated with third party risk. This is not the whole truth and the statement needs to be modified due to the fact that bigger pipeline accidents and attacks have occurred resulting in environmental pollution and casualties.

The benefits of laying an pipeline offshore instead of onshore is that the gas that is transported offshore has more gas at sustained pressure than onshore systems which means lower impact on people and the environment than other options. Furthermore, a route over land requires series of compressor stations every 200 kilometres, which also can be a source of emissions. An offshore pipeline is laid at a speed of about three kilometres per day, which means that there will be shorter and smaller amount of environment disturbances than onshore.[37] Another aspect one must have in mind is that

[34] http://www.nord-stream.com/fileadmin/Dokumente/NORD_STREAM__FACTS/English/NORD_STREAM_FACTS_ISSUE_2_ENGLISH_DOWNLOAD.pdf (2010-03-06)
[35] http://sakhalinenergy.jp/en/documents/doc_32_pipelines.pdf, p. 6. (2010-04-25)
[36] http://www.nord-stream.com/fileadmin/Dokumente/NORD_STREAM__FACTS/English/NORD_STREAM_FACTS_ISSUE_2_ENGLISH_DOWNLOAD.pdf
[37] http://www.nord-stream.com/en/safety-environment/turvallisuustandardit/offshore-pipelines.html (2010-03-20)

the continental shelves' are different around the world. For example, the seabed in the North Sea and the laying of more than 6000 kilometres of pipeline differs a lot with laying pipeline on the seabed of the Baltic Sea.[38] Consequently, experience from subsea pipeline projects from other parts of the world cannot always be used fully when laying pipeline on a seabed. However, concerning the Baltic Sea, there is experience that can be drawn from the five major Norwegian gas pipelines that are routed through Danish waters.[39]

2.7 Gas contracts

Even though gas contracts are not the focus in this study, the essential provisions in a gas contract between the owner of the pipeline and the shipper or user will be pointed out for better understanding. Gas pipelines are large capital-intensive projects that have a tendency to have heavy up-front costs, low and normally stable operating costs and a long repayment period.[40] However, financing pipeline projects requires large capital and circumstances which can have an effect on the financing are whether the pipeline company is a separate entity purchasing the hydrocarbons at one end and selling them at the other end to large buyers, or simply performing a transport function between producers and consumers for a tariff and does not own the hydrocarbons.[41]

Customarily, a gas contract is entered between the owner of the pipeline, which can be a joint venture between companies, and the shipper or user. The gas contract usually includes following fundamental provisions. In general, the user nominates a volume of gas that it wants delivered from an inlet point to a specified outlet point. Following this, the user agrees to deliver the nominated quantity of gas at the inlet point and the owner agrees to transport the gas from the inlet point and redeliver it at a specified outlet point.[42] Furthermore, provisions and charges relating to the transport service are settled which can lead to the user paying overrun, underrun or imbalance charges to the owner for not delivering or taking gas in accordance with its nominations. Additionally, the gas contract contains detailed provisions relating to the specification of the gas in the pipeline and the penalty of non-compliance.[43] There must be provisions that clarify which party has title to the gas while in the pipeline. Provisions about force majeure, maintenance, measurements and allocation are customarily also included in the contract.

How the contract is exactly formulated will vary significantly depending on where the pipeline is located and the laws of that location and the purpose for which the pipeline is constructed.[44]

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[38] *Id.*
[39] *Id.*
[40] Stein (2003), p. 278.
[41] *Id.*
[42] Dulaney & Merrick (2005), p. 261.
[43] Dulaney & Merrick (2005), p. 262.
[44] *Id.*

2.8 Analogy to onshore pipelines, International law & two framework models for a cross-border pipeline project

The question of jurisdiction, which I will deal with later, is also influenced by the project model chosen when initiating the construction of a cross-border pipeline. There are two different models under public international law that can be used as framework when initiating a transboundary pipeline project: the Interconnector model and the Unified project model.[45]
Cross-border pipelines requires as mentioned a mix of domestic and international laws. Intergovernmental and host government agreements are also used to regulate cross-border pipelines.[46]
Depending on which model is put in practice, there will be different and substantial legal implications. This is of importance not only for political and business relationships of the states, but also for the commercial participants involved in a project.

2.8.1 The Interconnector model

The interconnector model regards the cross-border pipeline as a system of connected national pipelines and each state retains sovereignty and jurisdiction over that part of the pipeline that lies within its territory.[47]
An analogy would be a highway that starts in one state, and continues into another state. Although there is no requirement for an interstate agreement for building an interconnector model pipeline, an interstate agreement simplifies the commercial execution of a project.[48] This leads to each domestic pipeline being commonly owned and operated by different parties. The terms and conditions of using each pipeline may consequently be different requiring users to enter into separate gas contracts for each sector of transit. Issues such as tariffs and transit fees, right of access, capacity allocation and rights of way are based on these separate contracts or by agreements with respective states. The Interconnector model has its complications since a cross-border pipeline transport is extraterritorially. Lack of ability, inconvenience and unpredictability to rely just upon a single state's pricing, regulatory, or legal issues to resolve potential commercial or contractual disputes might end in difficulties.[49] This can especially become a problem in states with insecure legal and judicial systems.

[45] *Id.*
[46] Dulaney & Merrick (2005), p. 248.
[47] Vinogradov (1999), p. 75.
[48] Herbert Smith Publications (2002)
[49] *Id.*

2.8.2 The Unified Project model

The Unified Project model is a single, unified asset with common owners and transport terms, which is regulated by a combination of domestic law, international law and contract.[50] The most significant difference from the interconnector model is the issue of national jurisdiction over the pipeline and that one single legal regime is created between the relevant states. The legal regime created applies with regards to construction and maintenance of the entire pipeline. Unlike the interconnector model, there is no need of a prior agreement as to the location of the common boundary and makes the Unified Project model the most suitable model in situations where there are territorial claims and boundary disputes.[51]

[50] Dulaney & Merrick (2005), p. 248.
[51] Herbert Smith Publications (2002)

3 LEGAL FRAMEWORK AND JURISDICTION

3.1 Introduction

In this chapter, the coastal state's means to safeguard its interests as a transit state in an offshore pipeline project will be clarified. Questions of jurisdiction with the focus on a coastal state's right to safeguard its interests through different conventions and principles of jurisdiction will also be discussed.

Initially, the laying of offshore pipelines in the different maritime zones according to Law of the Sea (LOS) will be presented. To be able to examine the means of influence a coastal state has in a cross-border pipeline project, jurisdictional questions and problems regarding cross-border pipelines and international law will also be described and answered in this chapter. Other involved states such as sender and receiver states' means to safeguard their interests offshore through different principles of jurisdiction will also be clarified. The focus will however be on the coastal state's means to safeguard its interests offshore through LOS and different principles of jurisdiction.

Oceans cover approximately 70 percent of the surface of the Earth. This area has long been an area that lay beyond the control of States. Previous to the introduction of jurisdiction based on the continental shelf and the exclusive economic zone (EEZ), almost all of this area was beyond national jurisdiction and only a tiny belt of usually 3 to 4 nautical miles[52] was subject to the direct control of a coastal state.[53] Coastal states can extend their jurisdiction to the seabed and waters around their territorial sea out to 200 nautical miles, and the seabed in limited circumstances to as much as 350 nautical miles. Two-third of the world's oceans are beyond national jurisdiction.[54]

Questions of jurisdiction over the laying of pipelines do not figure significantly in texts on international law and historically, since most of the cases regarding cross-border pipelines have been land based, crossing directly from one sovereign territory to another has been solved through bilateral agreements which have lead to few jurisdictional problems.[55]
Conflict of jurisdiction in issues such as the operation of an offshore pipeline project, transportation, safety and environmental protection arises when considering cross-border pipelines.

[52] A nautical mile is a unit of distance equal to 1,852 metres.
[53] Stuart (2007), p. 69.
[54] *Id.*
[55] Crowley (1987), p. 39

Different states with different interests in a cross-border pipeline project can claim jurisdiction in diverse matters. States such as a sending state, where the pipeline originates, a receiving state, a transit/coastal state and a state of the incorporation/registration of an entity can have conflicting jurisdiction claim.

In December 2006, the Swedish Committees on Foreign Affairs and Environmental and Agriculture held a public hearing regarding the laying of the Nord Stream across the Baltic Sea. The hearing dealt with the facts of the projects, international law and process of permission, and there were many questions concerning questions of jurisdiction, which illustrated the complexity in the issue.[56]

Conflicts of jurisdiction may arise when cross-border pipelines are constructed and operated in different maritime zones. This chapter will initially describe the possibility of the laying of offshore pipelines in different maritime zones. Questions of jurisdiction with a focus on a coastal state's means to safeguard its interests offshore in a pipeline project will be identified and discussed. By way of conclusion and concluding remarks, practical solutions and questions of jurisdiction will be clarified at the end of this chapter.

3.2 Maritime Zones and Maritime Delimitation according to UNCLOS

3.2.1 Law of the Sea

States began exploring the seabed and building oil and gas platforms after World War II. Few statues of waters beyond the territorial sea existed and the necessity to consider what legal regime ought to deal with oil platforms was brought about by states asserting rights and seeking to exploit their adjacent continental shelves. It is the development of these continental shelves to which the present legal status of platforms and pipelines can be traced.[57]

1982 United Nations Convention on the Law of the Sea (LOS) opened for signature at Montego Bay, Jamaica in December 1982, and entered into force on 16th November 1994. The institution of the 200-mile EEZ, accompanied by still further extension seaward of the outer limit of the

[56] Riksdagen (2007) Utrikesutskottets och miljö- och jordbruksutskottets offentliga utfrågning den 12 december 2006 om en gasledning i Östersjön – fakta om projektet – internationell rätt – tillvägagångssätt vid tillståndsprövning [The Foreign Committee and Environmental – and Agriculture Committee's Public Hearing 12 December 2006 on a Gas pipeline in the Baltic Sea – Facts of the Project – International Law – process of Permission]

[57] Kaye (2007), p. 379.

continental shelf, as well as a clear uniform adoption of the 12-mile territorial sea worldwide, has considerably increased the importance of maritime boundary delimitation in the existing international law. The legal concept of equity has played an increasing role in modern bi-and unilateral relations and in the management of practical international affairs that involve sharing/participation/allocation/utilization/delimitation of natural resources and boundaries.[58] The maritime boundary delimitation was one of the hard-core issues faced by the Third United Nations Conference on the Law of the Sea (UNCLOS III), and was resolved after ten years of protracted negotiations.[59]

The purpose of the convention was to establish a comprehensive set of rules regarding economical, technological and marine environmental issues governing oceans and to replace the previous conventions from 1958 (UNCLOS I) and 1960 (UNCLOS II).[60] LOS gives an broad treatment of protection of the marine environment in Part XII with obligations of states, including to protect and preserve the marine environment, preventing, reducing and controlling the pollution of the marine environment from any source, including measures necessary to safeguard and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.[61] Furthermore, the obligations of the states include notification, monitoring, and assessment obligations linked to substantial pollution or significant and harmful changes in the environment.[62]

3.2.2 The Territorial sea

According to LOS Art. 3, each state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with LOS.[63] According to LOS Art. 2, a state has sovereignty over the territorial sea, which means that it has full legislative jurisdiction therein in the same way as land territory. Nevertheless, since territorial waters are used regularly by other states, international law has placed limitations on the exercise of this jurisdiction in certain circumstances.[64] The water closest to the coast is called internal water, which gives the coastal state a jurisdiction that almost equates to the jurisdiction on land.[65]

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[58] Kwiakowska (1988), p.268.
[59] *Id.*
[60] http://www.unlawoftheseatreaty.org/ (2010-04-01)
[61] http://www.internat-recht.uni-kiel.de/veranstaltungen/pipeline-conference/beitraege/Redgwell.pdf (2010-05-01)
[62] *Id.*
[63] According to Art. 5 the normal baseline for measuring the breadth of the territorial sea is the lower-water line along the coast as marked on large-scale charts officially recognized by the coastal State. Also note the principle of straight baselines, which now represents customary law.
[64] See LOS Art. 17, 27-28 and Dixon (2007), p. 210.
[65] Herbert-Burns et al. (2009), p. 202.

Given that jurisdiction is the capacity of a state under international law to prescribe and enforce a rule of law and given that a state have an absolute right to prescribe and to enforce rules of law within their own territory, a coastal state has the right to refuse an entity that wishes to lay a pipeline on a states internal waters or territorial sea. According to LOS Art. 21, the coastal state may adopt laws and regulations, in conformity with the provisions of LOS and other rules of international law, relating to the innocent passage through territorial sea, in respect of the protections of cables and pipelines. A foreign entity with the intentions of laying an offshore pipeline across the territorial sea to the territory of another state is dependent on its own government to secure the necessary rights by negotiation with the coastal state.[66]

3.2.3 The Exclusive Economic Zone (EEZ)

The exclusive economic zone (EEZ) is an area beyond and adjacent to the territorial sea.[67] The EEZ can extend up to 200 miles from the baselines of the territorial sea.[68] Within this area, the coastal state is given 'sovereign rights' for the purpose of exploring and exploiting the living and non-living resources of the area such as oil and gas. The EEZ is regarded as *sui juris*, meaning that the coastal state has certain exclusive rights for the functional purpose of enjoying EEZ rights but where many of the freedoms of the high seas[69] are preserved. What coastal states have are sovereign rights in the EEZ, but this does not mean sovereignty over the EEZ. Consequently, a coastal state has only those rights given by LOS and can not interfere with commercial activity by other states in the EEZ unless such activity directly challenges the coastal state's sovereign rights.[70]

According to LOS Art. 58, all States, whether coastal or land-locked, enjoy the freedom referred to in article LOS Art. 87 of the laying of offshore cables and pipelines. In exercising their rights and performing their duties under LOS in the exclusive economic zone, states shall have due regard to the rights and duties of the coastal state and shall comply with the laws and regulations adopted by the coastal state in accordance with the provisions of LOS and other rules of international law in so far as they are not incompatible with the part dealing with EEZ in LOS.[71]
This means that a coastal state can make certain that a pipeline does not interfere with artificial islands, marine scientific research, installations and structures in connection with the coastal state's exercise of its sovereign

[66] Crowley (1987), p. 42.
[67] LOS Art 55
[68] LOS Art 57
[69] The general principle of the high seas is that they are *res communis*, which is a principle of customary law and may not be subject to sovereignty of any state. Entitles the freedom of laying submarine cables and pipelines. (LOS Art. 220)
[70] Dixon (2007), p. 215.
[71] LOS Art. 58 (3)

rights in the EEZ and that a pipeline doesn't hinder the coastal state's duty to protect and preserve the marine environment according to LOS Art. 56.[72] LOS has created a balance of interest between the powers of a coastal state and 'other' third states in the EEZ, where the rights, jurisdiction and duties of a coastal state are set out in article 56. LOS Art. 58 indicate the rights and duties of other States in EEZ and LOS Art. 59 state the basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the EEZ.

The freedom to lay offshore pipelines on the continental shelf within the EEZ is protected according to LOS. Art 58, which preserves *inter alia* the freedom of laying offshore pipelines referred to in LOS Art 87. By applying LOS. Art 56 (3), the laying of offshore pipelines on the shelf of the EEZ is regulated by the regime established for the continental shelf.[73]

According to LOS Art. 208, the coastal state in addition has the duty to adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction. LOS Art. 214 give the coastal state the right to enforce that legislation. Furthermore, the freedom of other states to lay offshore pipelines on the shelf of the exclusive economic zone is further protected by the LOS dispute settlement machinery providing that disputes concerning the freedom and right of laying offshore pipelines in the EEZ of a coastal state fall within the binding dispute settlement procedures of Section 2 of Part XV.[74]

3.2.4 The Continental Shelf

According to LOS Art. 76 the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. The legal concept of continental shelf cannot extend beyond 350 nautical miles from the baselines of the territorial sea.[75]

The continental shelf is 'inherent' in statehood and must not be expressly claimed by states. The rights which a coastal state exercise over the continental shelf exists as an extension of the statehood of the coastal state and do not have to be claimed or recognized by other states.[76] Nevertheless, the rights given according to LOS on the shelf are 'sovereign rights' for the

[72] Crowley (1987), p. 45.
[73] Dupuy & Vignes (1991), p. 986.
[74] *Id.*
[75] LOS Art. 76 (5)
[76] See LOS Art. 2(2) and Art. 77 (3) and Dixon (2007), p. 218.

purpose of exploiting and exploring its natural resources and not sovereignty over the shelf.[77]

According to LOS Art. 77 (2), the rights are exclusive in the sense that if the coastal state does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal state.
The waters above the shelf *prima facie* retain their status as high seas according to LOS Art. 78, even though is modified for waters within the 200-mile limit where the EEZ regime will operate.[78] On the continental shelf, the scope of the right of a non-coastal state entity to lay an offshore pipeline as well as the extent to which a coastal state may control and limit that right is determined by international law and article 79, which I will deal with under 3.3.[79]

3.2.5 The high seas

The general principle of high seas is that they are *jus communis* and open to the enjoyment of every state and may not be subject to the sovereignty of any state. It comprises, *inter alia*, both for coastal and land-locked States the freedom to lay offshore cables and pipelines.[80] According to LOS Art. 112, all states are entitled to lay offshore cables and pipelines on the bed of the high seas beyond the continental shelf.[81]

[77] LOS Art 2 & 77
[78] Dixon (2007), p. 218.
[79] Crowley (1987), p. 42.
[80] LOS Art. 87
[81] Article 79 (5) applies to such cables and pipelines.

3.3 LOS. Art 79 - Offshore pipelines on the continental shelf

United Nations Convention on the Law of the Sea, Article 79 - Submarine cables and pipelines on the continental shelf

1. All States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this article.
2. Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines.
3. The delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State.
4. Nothing in this Part affects the right of the coastal State to establish conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.
5. When laying submarine cables or pipelines, States shall have due regard to cables or pipelines already in position. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.

The laying of offshore pipelines and cables are recognised as a method of communication like shipping and air transportation, according to *jus communcationis,* which is a right of all nations. The *jus communcationis* leads to the conclusion that coastal states cannot prohibit the construction of pipeline on their continental shelf.[82]

In addition to the entitlement of states to lay offshore pipelines on the high seas, the coastal state's control over the exercise of the freedom to lay pipeline on the shelf is extended through this provision. Furthermore, a coastal state could impede the laying of a pipeline not conforming to its reasonable measures for the protection of the environment, even where, as with a transiting pipeline, the pipeline in question was otherwise outside its jurisdiction.[83]

The provision regarding the delineation of the course for the laying of such pipelines gives the coastal state the right to influence the course. This gives a coastal state a right to propose an alternative route if it would be found suitable with reasonable grounds. One reasonable ground is to reflect environmental considerations and this consent gives a coastal state an absolute discretion. Such conditions and duties imposed in connection with the delineation of the route depend on local circumstances.

[82] Roggenkamp (1998), p. 95.
[83] Crowley (1987), p. 42.

One project and example which I will deal with in chapter 4 is the Nord Stream project in which in September 2007 following a Finnish request that the Nord Stream consortium should initially consider Estonian waters instead of the Finnish EEZ. The Finnish authorities argument was that the Estonian seabed would be less rocky than the Finnish and would thus be a better route and more suitable.[84] However, the Estonian authorities rejected this after fierce debates in the country and the reason for the rejection was that the pipeline project itself had legal contradictions and could therefore not be evaluated in its current state. The Nord Stream consortium decided not to take the case through the Estonian legal system, or even resubmit the application and the consortium returned to its original plan, which was to negotiate with Finland and to lay the pipeline through the Finnish EEZ and Gulf of Finland.[85]

Other typical examples that have legal grounds in the LOS are that a coastal state may prohibit the laying of pipelines through safety zones established around artificial islands, installations or structures.[86]

In addition to the mentioned grounds, a coastal state have sovereign rights to explore and exploit the natural resources of its continental shelf and EEZ, which gives the coastal state the right to prohibit the laying of an offshore pipeline through offshore development areas.[87] However, one might speculate whether a coastal state can refuse to conduct survey or through other means make unnecessary delay of an entity wishing to lay a pipeline. Can the coastal state abuse its right given by LOS? LOS requires that a coastal state must act *bona fide*, meaning that the state must act in good faith with honest intentions and beliefs.
According to LOS Art. 300, states party to the LOS shall fulfil in good faith the obligations assumed under the Convention and shall exercise the rights, jurisdiction and freedoms recognised in the Convention in a manner that would not constitute an abuse of right. Consequently, a state cannot apply LOS Art. 79 (3) and assign routes that would make it impossible for an entity to lay a pipeline. LOS Art. 79 (4) states that a coastal state have jurisdiction with regards to offshore pipelines transporting oil and gas to shore from a production installation on its continental shelf.

There is a difference between the laying of pipelines in the territorial sea and pipelines on the continental shelf. Since jurisdiction is the capacity of a state under international law to prescribe and enforce a rule of law and given that a state have an absolute right to prescribe and to enforce rules of law within their own territory, the coastal state has absolute sovereignty over the pipeline within its territorial sea. The coastal state's jurisdiction decreases to a functional jurisdiction when the pipeline is located on the continental

[84] Whist (2008), p. 7.
[85] *Id.*
[86] Lagoni (1998), p. 20.
[87] Lagoni (1998), p. 21.

shelf. Pipelines used in connection with offshore petroleum production and supply are subject to coastal states' power to exercise sovereign rights for the purpose of exploring and exploiting its natural resources on the continental shelf.[88] The right to construct and operate field-to-coast pipelines is similar to a coastal state' s right to construct and maintain or operate on its continental shelf installations and other devices necessary for the exploration and the exploitation of its natural resources.[89]

Another essential factor that has legal implications is the existence of different kinds of offshore pipelines.[90] The offshore pipelines that are considered to be part of the production installations differ from offshore pipelines, which transport petroleum to shore, and fall under LOS Art. 79 (4). The freedom of states to lay offshore pipelines is limited to what is necessary for the landing and supply of the petroleum produced. Disagreements and disputes are possible when defining the different pipelines and also between the rules regulating pipelines within a coastal state's territorial sea and beyond the coastal state's territorial sea.[91]

Furthermore, there should be due regard to cables or pipelines already in position. The relationship between 'due' and 'reasonable' regard is on the other hand unclear. The requirement to consider existing cables or pipelines is similar to the one regulated in LOS Art. 112 (2), which expressly refers to LOS Art. 79 (5). However, there is a difference due to the fact that a coastal state may also take reasonable measures for the protection of offshore pipelines constructed or used in connection with the exploration of the continental shelf or exploitation of its natural resources and related matters.[92]

3.4 The relationship between the EEZ and the continental shelf

As mentioned, both the EEZ and the continental shelf give the coastal state sovereign rights to explore and exploit natural resources of the sea area adjacent to its coast. Whereas the continental shelf doctrine confirms the status of the super adjacent waters as remaining high seas and subject to the coastal state's rights of exploration and exploitation, their status under the EEZ doctrine is generally considered to be of a new *sui generis* nature.[93] This is the fact irrespective of if one considers the extent of the coastal state's right over the EEZ as restricted by lack of jurisdiction or by an auto-limitation of a comprehensive jurisdiction. Nevertheless, the coastal state's rights are more extensive than the rights over the continental shelf,

[88] Roggenkamp (1998), p. 93.
[89] *Id.*
[90] Such as transportation pipelines, intra-field pipelines and inter-field pipelines.
[91] Roggenkamp (1998), p. 95.
[92] Lagoni (1998), p. 22.
[93] Crowley (1987), p. 40.

especially with regard to fishery and pollution control. According to LOS Art. 86, the provisions relating to the high seas apply to all parts of the sea that are not included in the EEZ, territorial sea or internal waters of a state. However, as regards the laying of offshore pipelines, all states enjoy the freedoms of the high seas within the EEZ, which is a non-exhaustive list in LOS Art. 87.

The EEZ and the continental shelf remain two separate regimes and there is a difference between the laying of pipelines on a state's shelf and a state's EEZ in at least two respects. The first is as mentioned that the continental shelf is 'inherent' in statehood and must not be expressly claimed by states, unlike the EEZ. However, there is an important fact in that in many parts of the world the shelf extends beyond the 200-mile limit of the EEZ. In this area where the shelf extends the 200-mile and goes beyond the EEZ, the legal status of the adjacent waters, unaffected by the EEZ regime, would be governed by the high seas provisions of LOS, and modified only by those relating to the continental shelf.[94] Coastal states, which have not ratified LOS, can also expressly claim its EEZ. The ICJ[95] stated that coastal states have the customary right to establish an exclusive economic zone and the principles in Part V of LOS may additionally be considered as customary law.[96]

The freedom to lay offshore pipelines on the continental shelf within the EEZ is protected according to LOS. Art 58, which preserves *inter alia* the freedom of laying offshore pipelines referred to in LOS Art 87. By applying LOS. Art 56 (3), the laying of offshore pipelines on the shelf of the EEZ is regulated by the regime established for the continental shelf.[97]

3.5 The conventional regime for offshore pipelines

Pipelines, which leads from one point to another often cross different jurisdictional areas. Depending on if it is an onshore or an offshore pipeline, different sets of rules applies. If a pipeline is constructed to lead from an installation on the continental shelf to the shore, it can in general cross many different jurisdictional areas.[98] The areas and maritime zones that can be at hand are the continental shelf, which it can start from or pass, the EEZ, the territorial sea and finally ashore to a processing or distribution plant. The rules apply differently whether it is a domestic or foreign entity wishing to lay an offshore pipeline.[99] As mentioned, a state has sovereignty over the

[94] Crowley (1987), p. 46.
[95] International Court of Justice, Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 13, at p.
[96] Lagoni (1998), p. 25.
[97] Dupuy & Vignes (1991), p. 986.
[98] Crowley (1987), p. 42.
[99] *Id.*

territorial sea, which means that it has full legislative power therein in the same way on land territory. This means that the relevant domestic law governs a domestic entity wishing to lay a pipeline.

Correspondingly, if a coastal state entity wishes to lay an offshore pipeline on the continental shelf, it would be subject to the sovereignty of the coastal state, and the laying of a pipeline would fall under the coastal state's domestic law. Furthermore, any conditions regarding safety of personnel, prevention of pollution, capacity of pipeline, access to the pipeline facility by third parties and the nature of hydrocarbons to be carried depends on the domestic law of the coastal state.[100]

Depending on in which maritime zone a pipeline is intended to be laid and the nationality of the entity wishing to lay an offshore pipeline, different sets of rules apply. A foreign entity with intensions of laying an offshore pipeline across the territorial sea to the territory of another state is bound by the relevant domestic law that governs that territory. International law and LOS gives no rights to a foreign entity with intentions of laying a pipeline and a coastal state enjoys absolute sovereignty over its territorial sea and the relevant domestic law governs an entity wishing to lay a pipeline there. The same applies in the situation where the coastal state's territorial sea is only transiting area for the pipeline. If the coastal state refuses an entity to the lay the offshore pipeline despite lucrative and well paid tariff income, the entity has no further legal saying. The non-coastal entity would then be bound to depend on its own government to negotiation with the coastal state.

It should also be mentioned that these entities and foreign producers are often state owned and bound by political decisions and strictly connected with their global economic and political strategies. It is thus often in the interest of the entity's government to initiate negotiation with the coastal state. However, if a non-coastal entity wishes to lay an offshore pipeline on the continental shelf or EEZ of another state, the coastal state's jurisdiction decreases to a functional jurisdiction, which gives the coastal state and the negotiating non-coastal state and its entity the rights mentioned in LOS, Art 79.[101]

3.6 Offshore pipeline jurisdiction

3.6.1 Introduction

Conflict of jurisdiction arises in cross-border pipeline projects. The conflicts can concern issues such as transportation, route, operation, construction, fiscal, safety and environmental protection. Different states with different interests in a cross-border pipeline project can claim

[100] *Id.*

[101] By applying LOS. Art 56 (3), the laying of submarine pipelines on the shelf of the EEZ is regulated by the regime established for the continental shelf.

jurisdiction in diverse matters. States such as a sending state, where the pipeline originates, a receiving state, a coastal/transit state and a state of the incorporation/registration of the entity, which usually is a joint venture between different entities building a consortium, can have conflicting jurisdiction claims.

With regards to choice of law rules, which will not be in focus in this study, the law of the governing jurisdiction will clarify whether the property concerns movable or immovable property, which form of encumbrance the property may consent to and how the property or its value will secure the loans.[102] If doing an analogy study to oil and gas exploration platforms and its pipelines, these pipelines are mostly movable and thus registered under a flag. Wherever a couple of platforms share a pipeline, they are usually in the same maritime zones and the same flag state, as a result sharing jurisdiction.[103]
The territoriality principle is the most basic principle of jurisdiction in international law. Under the territoriality principle, states have an absolute right to prescribe and to enforce a rule of law. The legal ability of a state to exercise jurisdiction beyond its normal boundaries is called extraterritorial jurisdiction. The power of a state to make and enforce rules of law is to a large extent connected to its own territory. When considering the energy sector, the territorial principle is regarded to be the most fundamental of all principles governing jurisdiction.[104] However, other principles of international law can support a state's jurisdiction claim in a cross-border pipeline project. These are principles such as the nationality principle, the protective principle and the principle of universality. However, for the energy sector, the most relevant principle to safeguard coastal states interests offshore are the principles of territoriality, nationality and protective principles. These are the principles that will be discussed and dealt with in this subchapter.

According to the *Lotus Case*, which has also become a principle, it was acknowledged that there is a fundamental rule of international law that the jurisdiction of a state within its own territory is complete and absolute. The state has power and authority over all persons, property and events within its territory. However, the state cannot exercise its power in any form in the territory of another state. At UNCLOS III, there was a general acceptance of the right of a coastal state to exercise jurisdiction over installations engaged in economic activity offshore, in the EEZ and on the continental shelf.[105]

We have examined the rules in LOS regarding the laying of pipeline in different maritime zones. However, problems of jurisdiction arise when states try to exercise jurisdiction extraterritorially. Coastal states have

[102] http://www.internat-recht.uni-kiel.de/veranstaltungen/pipeline-conference/beitraege/Boerner.pdf , p. 10. (2010-04-15)
[103] Crowley (1987), p. 42.
[104] Macdonald & Johnston (1986), p, 558.
[105] Kaye (2007), p. 379.

greater rights and jurisdiction the closer the relevant maritime zone is to the coastal state.

3.6.2 Jus Communicationis and the functional jurisdiction of coastal states

Beyond the territory of states, there is a possible conflict of interests between the rights of all nations (*jus communicationis*) and the functional jurisdiction of coastal states. LOS acknowledges that coastal states may exercise, without express proclamation, functional jurisdiction on the continental shelf and submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin. The coastal state's jurisdiction is limited to the exploration and exploitation of natural resources in or on the continental shelf.[106] The coastal state's jurisdiction over seas is not identical to the jurisdiction on land. The right to innocent passage through the territorial water is an example to this, hindering the sovereignty of the coastal state, since it allows for continuous and expeditious passage through the coastal state's territorial sea, as long as it is not prejudicial to the peace, good order or security of the coastal state and it takes place in conformity with LOS and with other rules of international law.[107]

In cross-border projects where a pipeline goes beyond the jurisdiction of the states involved in a pipeline project and crosses the shelf of another coastal state, some questions arise. Since these pipelines are not constructed and used for the petroleum production of that coastal state, it could be said that these pipelines are beyond that coastal state's functional jurisdiction. LOS refer particularly to certain methods of offshore communication such as navigation and fishing, as well as the laying of offshore pipelines, by noting that under the jus communicationis, pipelines are recognised as a method of communication such as shipping and air transportation.[108] This principle limits a coastal state's means to deny the construction of pipelines on their continental shelf. However, the communicative freedom of the states involved in a cross-border pipeline is restricted and LOS has provisions dealing with means a coastal state has to safeguard its interests offshore.[109]

Nevertheless, the rules are different with regards to installations and structures in the EEZ, such as planned service platform. According to Art. 60 LOS, the coastal State has exclusive jurisdiction over such installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

[106] Roggenkamp (1998), p. 93.
[107] Gavouneli (2007), p. 39.
[108] Roggenkamp (1998), p. 95.
[109] See Chapter 3.2-3.5

However, there are ways for a coastal state to exercise jurisdiction over offshore pipelines. Then again, the extent of the jurisdiction differs depending on the relationship with offshore exploration and exploitation of natural resources and in which maritime zone the pipeline is located. If the offshore pipeline is located in the territorial sea of the coastal state, the extent of jurisdiction is unequivocal and clear. If the pipeline is connected to an offshore petroleum production facility, the coastal state's functional jurisdiction applies.[110] Otherwise, the jus communicationis applies in the situation where there is no relationship with the coastal state's functional jurisdiction and the coastal state still have some protective jurisdiction over these pipelines.

3.6.3 Territorial principle

When cross-border pipelines have fixed points of connection in different legal systems, some problems arise. When using the territorial principle, it can be difficult to decide which territory it assimilates and as a result, which state exercises jurisdiction. Some doubts remain as to when an act can be said to have taken place on the territory of a state, but these have been substantially reduced by the development of the 'objective' and 'subjective' approaches to territorial jurisdiction.[111] The subjective approach means the place where the action originates and objective approach means jurisdiction is given where the action is concluded. In the case of cross-border pipelines, this discussion can be relevant in scenarios where the cross-border pipeline have fixed points of connections in two legal domains. When considering subjective territoriality, a double fiction seems to apply giving the first assumption that an offshore platform assimilates to the land territory, and the second assumption that the pipeline assimilates to the platform, which assimilates to the territory. However, this principle is not easily functional and not of help for a coastal state to safeguard its interests, but rather of help for a sender and a receiver state in a cross-border pipeline project.[112]

3.6.4 Nationality principle

International law permits a state to exercise jurisdiction over its nationals. [113] The term national also refers to companies. LOS does not specifically refer to the nationality of pipelines but to the persons subject to its jurisdiction, which are the owners of an offshore pipeline. In the 1970 *Barcelona Traction*[114] case, the ICJ ruled that two traditional criteria of domestic law prevail, which are the place of incorporation and the territory in which the office is registered.

[110] Roggenkamp (1998), p. 94.
[111] Dixon (2007), p. 146.
[112] Roggenkamp (1998), p. 97.
[113] Dixon (2007), p. 147.
[114] Barcelona Traction, Light & Power Co (Second Phase) (Belg. V. Spain) 1970 I.C.J. 3 (Feb. 5)

Due to the fact that different states are involved in a cross-border offshore pipeline project, entities in a joint venture project can be registered in a third state, which will be the state of the incorporation/registration. If for example, Switzerland is the state of the incorporation/registration, the entity registered and incorporated in that state is considered to be a national of that state and therefore Swiss law may be applicable to the entity. This will lead to the result that Switzerland can prescribe legislation for conduct of a pipeline project outside the territory of Switzerland. However, this is under the presumption and understanding that it should not interfere with the domestic affairs of other states.[115] I will discuss this issue and principle in chapter 4.4 using the Nord Stream AG as an example, which is a consortium registered in Switzerland.

3.6.5 Protective principle

The jurisdiction based on the protective principle is that a state can claim jurisdiction and declare its authority over matters that are of interest for the state. This principle allows states to claim jurisdiction over offences directed against a state's security or vital interests.[116] National laws based on this principle are said to operate extraterritorially and the difference between the protective principle and universal jurisdiction is that the universal principle only exists regarding certain offences of an international character, whereas the former subsumes any matter harmful to the state.[117] An example of a state exercising jurisdiction based on the protective principle is the Netherlands, which applied this principle to control the activities of broadcasting installations on the Dutch continental shelf.[118] Many states uses this principle to some degree and the principle have shown to be applicable, even if there is a danger that some states might interpret their security too broadly.[119]

The protective principle gives coastal states the right to take reasonable measures for the prevention, reduction and control of pollution from pipelines crossing the state's continental shelf. These rights are also codified through LOS.[120] It should also be mentioned that there is a distinction made between the effects doctrine and the protective principle. Whereas jurisdiction based on effects doctrine requires that the effect or result of the offence occur in the territory of the state claiming jurisdiction, the protective principle apply even though the activity have not occurred in the territory of the state claiming jurisdiction.[121]

[115] Roggenkamp (1998), p. 98.
[116] Inazumi (2004), p. 25.
[117] Dixon (2007), p. 149.
[118] Roggenkamp (1998), p. 98.
[119] Akehurst & Malanczuk (1997), p.112.
[120] See Chapter 3.3
[121] Meesseen (1996), p. 108.

The coastal state can thus apply this principle to control pollution from pipelines even though the pollution occurs outside its territory. The coastal state can consequently claim jurisdiction regarding other activities that can be connected to the operation and construction of the offshore pipeline which have a harmful effect to the coastal state. However, the application of this principle often leads to conflict of laws since the principle is extraterritorial and the application of this principle has been moderated through the balance of interests approach.[122]

3.6.6 Balance of interests approach

The balance of interests approach has been developed to estimate whether a state have an accurate claim to extra-territorial jurisdiction. After the balancing of the interests at hand, a state might be entitled to apply legislative extra-territorial jurisdiction after balancing all interests concerned.[123] Cross-border events challenge territorial sovereignty as the conceptual basis for rules on legislative jurisdiction. The globalisation has complicated the understanding of the relationship between territory and power. Consequently, emerging models of jurisdictional theory are moving away from territory, and territorially based concepts of regulatory power, as basis for the defining legislative authority.[124] A coastal state with the intention of protecting its interests through legislative jurisdiction will have to make the allocation of legislative competence just, reasonable and the legally relevant element is to establish a 'genuine link'.[125]

There is ground for jurisdiction if there is a link between the state and a set of given facts, which are so substantial, direct and weighty that legislation in respect of them is in harmony with international law and its various aspects such as principles of non-intervention and reciprocity and the demands for interdependence.[126] If a coastal state has the intention of applying the balance of interests approach to claim legislative jurisdiction regarding an offshore pipeline project in its EEZ/continental shelf, the exercising jurisdiction must be evaluated by different factors. The factors and a set of given facts can involve circumstances such as:

- the extent to which the activity: (i) takes place within the regulating state or (ii) has a substantial direct, and foreseeable effect upon or in the regulating state;
- the links, such as nationality, residence, or economic activity, between the regulating state and the entity principally responsible for the activity to be regulated;

[122] Roggenkamp (1998), p. 98.
[123] *Id.*
[124] Parrish (2009), p. 631.
[125] Roggenkamp (1998), p. 98.
[126] *Id.*

- the character of the activity to be regulated, the importance of regulation for the regulating state and the extent to which other states regulate such activities;
- the extent to which another state may have an interest in regulating the activity;
- the likelihood of conflict with regulation with other states.[127]

However, the balance of interests approach has its flaws due to the fact that a claim to jurisdiction might be unreasonable if it requires an entity to take action that would violate the regulation of another state. Notwithstanding the fact that the balance of interests approach is an appropriate way of measuring and testing reasonability in claiming extraterritorial jurisdiction, this principle has its disadvantages due to the fact that the principle does not rule out the existence of conflicting jurisdiction, nor does it indicate clearly which person is responsible for balancing their interests. A foreign entity with the intentions of laying an offshore pipeline across the territorial sea to the territory of another state is depended on its own government to secure the necessary rights by negotiation with the coastal state. The balance of interests is thought to be most appropriate in diplomatic exchange and forum where different interests of different states are evaluated by the different factors.[128]

Conflict of jurisdiction in issues such as the operation of an offshore pipeline project, transportation, safety and environmental protection arises when considering cross-border pipelines. Different states with different interests in a cross-border pipeline project can claim jurisdiction in diverse matters. States such as a sending state, where the pipeline originates, a receiving state, a transit state and a state of the incorporation/registration of an entity can have conflicting jurisdiction claim. Which interests and which state's interests overcome? Predictability is of importance in a costly pipeline project. Different states can exercise legislative and enforcement jurisdiction over a cross-border pipeline. The balance of interests approach is a way of measuring the adequacy of claiming extraterritorial jurisdiction, but can give different results, which gives little opportunity to predict the outcome. The way to solve this problem has been through bilateral and multilateral pipeline agreements, which specifically deals with cross-border pipeline projects.

[127] Roggenkamp (1998), p. 99.
[128] *Id.*

3.6.7 Coastal state jurisdiction in the Baltic Sea according to the Helsinki Convention

Even though LOS have provisions giving a coastal state rights to safeguard its interests offshore through protective measures, the coastal states in the Baltic Sea bound to this convention can apply the Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992 (Helsinki Convention). The Helsinki Convention entered into force January 2000 and covers all sources of pollution. The convention applies to the Baltic Sea Area including the internal waters, the territorial waters and the EEZ of the Contracting parties to the Convention.[129]

The Helsinki Convention provides measures for preventing and eliminating 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.[130] 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'.

The Helsinki Convention gives a coastal state protective measures to call for entities to apply the precautionary principles, Best Environmental Practice (BEP) and Best Available Techniques (BAT). Furthermore, the Helsinki Convention has provisions regarding the obligation to prevent transboundary pollution, assessment, notification, consultation and reporting. According to Art. 7, an environmental impact assessment of a proposed activity is required when it is likely to cause a significant adverse impact on the marine environment of the Baltic Sea Area. However, this requirement occurs only when obligated by international law or supra-national regulations applicable to the Contracting Party of origin, which means that Contracting Party shall notify the Commission and any Contracting Party, which may be affected by a transboundary impact on the Baltic Sea Area. Furthermore Art. 7 (2) requires the Contracting Party of origin to enter into consultations with any Contracting Party which is likely to be affected by such transboundary impact, whenever consultations are required by international law or supra-national regulations applicable to the Contracting Party of origin. These requirements give a coastal state in the Baltic Sea additional rights to protect its interests offshore in cross-border pipelines in the Baltic Sea.

[129] The present Contracting Parties to the Helsinki Convention are Denmark, Estonia, European Community, Finland, Germany, Latvia, Lithuania, Poland, Russia and Sweden.
[130] Baltic Sea Action Plan (2007), p. 43.

3.6.8 International pipeline agreements

Some of the pipeline agreements date as early as the 1930s and 1940s, but most of the international pipeline agreements took place and were concluded in the 1970s and 1980s, with the significant increase in international trade in oil and gas as well as the beginning of offshore petroleum development. [131] The international pipeline agreement gives predictability to the states involved in a cross-border pipeline project. The primary objects of these agreements were to encourage and to promote the construction and operation of cross-border pipeline projects.

Initially, the contracting parties and governments agreed to apply a national regime to petroleum transported by pipelines regarding existing projects and projects to be built within their territories, exempting the project from any kind of tax, levy or duty. However, these agreements have become more complex and sophisticated, reflecting the complexity of the legal and jurisdictional issues involved.[132] The pipeline agreements have different forms and may be a framework international agreement establishing a set of general principles and obligations applicable to all cross-border pipelines between the parties.[133]

All bilateral agreements contain provisions regarding the nationality of the pipeline and the jurisdiction of the pipeline. The nationality of the pipeline is determined by way of reference to the companies' owning/operation it and usually the pipelines are operated by joint ventures in which the companies take part.[134] Conflicting jurisdiction cannot be avoided in a cross-border pipeline project due to the fact that the pipeline always connects two separate areas of jurisdiction.

Due to the offshore petroleum development in the North Sea in the 1970s, there have been several predominately bilateral pipeline agreements regarding operation and construction of offshore pipelines. The international agreements include provisions regarding the nationality of the pipeline and the pipeline company. Furthermore the agreement includes provisions regarding the route of the pipeline, transportation jurisdiction, the collaboration between both states with regard to the laying and operation of the pipeline, the fiscal and safety regime as well as the establishment of a dispute settlement committee and dispute settlement procedures.[135]

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[131] Vinogradov (1999), p. 76.
[132] *Id.*
[133] One example of this type of agreement is the framework agreement between the UK and Norway relating to the laying, operation and jurisdiction of inter-connecting submarine pipelines.
[134] Roggenkamp (1998), p. 100.
[135] *Id.*

The agreements in the North Sea have much in common, involving state-producers (mainly Norway and United Kingdom) and state-consumers (mainly Germany, Belgium and France).[136]

The balance of interests approach indicates that the extraterritorial jurisdiction of a sending state is not only based on the nationality of the pipeline but also on a genuine link with the petroleum production as the purpose of the pipeline often is to transport petroleum which is produced on the sending state's continental shelf and also often there is a absence of a proper regulatory interest at the receiving end of the pipeline. By giving the North Sea as an example, the receiving states like the UK, Germany and Belgium have full jurisdiction in the territorial sea and may thus refuse the landing of a pipeline. Although the receiving states have more extended jurisdiction compared to transit and coastal states, which are affected by cross-border pipelines, the interests of the receiving states in these pipelines have been more or less passive.[137] The reason for the lack of interest in claiming jurisdiction is the fact that the sender and receiving states takes a joint decision about the pipeline route and that the receiving states often cooperate fully in the construction of the pipeline.

There has however been a change regarding the interests of the receiving states in cross-border pipeline projects. The interest in security of energy supply has increased dramatically in the EU after the Russian-Ukrainian gas dispute, which left the European Nations without gas. The attitude and the direct concern for the natural environment of the receiving states have increased and national objections to the landing of petroleum pipelines have increased. [138]

However, when balancing the interests of the sending and the receiving states it is obvious that the interests of the sending states are unaffected and both states have conflicting jurisdiction over parts of the pipeline. For example, in the pipeline agreements that Norway enters into as a sending state, there are clauses, which holds that Norwegian jurisdiction "shall not exclude the concurrent jurisdiction of the X courts and the application of X law on the continental shelf, territorial sea and land territory of X".[139] It should also be mentioned that this provision not only is regarded concurrent legislative jurisdiction, but also enforcement jurisdiction by the courts of the sending and receiving states.[140] One should however not disregard the fact that a sending and a receiving state often cooperate fully and have large interest in the transportation of the petroleum. The circumstances and the interest are not the same regarding transit and coastal states.

If a pipeline crosses the continental shelves and EEZ of other states, the governments of the transit states are not parties of the pipeline agreement.

[136] Vinogradov (1999), p. 77.
[137] Roggenkamp (1998), p. 103.
[138] *Id*.
[139] *Id.*
[140] *Id.*

However, as mentioned, coastal and transit states have means through LOS and other conventions such as the Helsinki Convention, Espoo Convention (which I will deal with in chapter 4.2-4.3), and different principles of jurisdiction to protect its interests offshore.[141]

3.6.9 Concluding remarks on offshore pipeline jurisdiction

Different states with different interests in a cross-border pipeline project can claim jurisdiction in diverse matters. States such as a sending state, where the pipeline originates, a receiving state, a transit state and a state of the incorporation/registration of the entity, which usually is a joint venture between different entities, can have conflicting jurisdiction claims. When reasoning over jurisdiction in cross-border offshore pipelines, it is of great significance to first distinguish where the pipeline is located. The coastal states exercise full jurisdiction over pipelines located within their territorial sea, regardless of the connection the coastal state has to the pipeline. The problems and questions arise in situations where the offshore pipelines are located outside the territorial sea and in the shelf or the EEZ of the coastal state.

There is a conflict of jurisdiction between the coastal state and other states and its entity interested in using their communicative freedom. The extent of the jurisdiction differs depending on the relationship with offshore exploration and exploitation of natural resources. If the pipeline is connected to an offshore petroleum production facility, the coastal state's functional jurisdiction applies, which gives the coastal state jurisdiction over the pipeline with regards to the construction and the use of the pipeline.

If the pipeline is not connected to an offshore petroleum production facility, the coastal state has other means to safeguard its interest offshore. Coastal states cannot impede the construction of an offshore pipeline, but the state can apply conditions to the construction of a cross-border pipeline passing through the state's continental shelf/EEZ. Furthermore, the coastal state is given rights to take reasonable measures for the prevention, reduction and control of pollution from pipelines. However, conflicting jurisdiction regarding issues such as pollution and safety may occur, and although the balance of interests approach is a way of measuring the adequacy of claiming extraterritorial jurisdiction, the principle can give different results, which gives little opportunity to predict the outcome.

Even though the balance of interests approach is of help and solves conflict of laws in the situation where states apply the protective principle, and an appropriate way of measuring and testing reasonability in claiming extraterritorial jurisdiction, this principle has its weakness due to the fact

[141] More about this subject is found under chapter 3.3

that the principle does not rule out the existence of conflicting jurisdiction, nor does it indicate evidently which party is responsible for balancing their interests. Conflicting jurisdiction cannot be avoided due to the fact that a cross-border pipeline always connects two separate areas of jurisdiction. One way of solving this problem has been through bilateral and multilateral pipeline agreements.

The international pipeline agreement specifically dealing with cross-border pipeline projects gives predictability to the states involved in a cross-border pipeline project. By entering bilateral agreements conflicting jurisdiction claims between the sender and the receiver are often avoided. All bilateral agreements contain provisions regarding the nationality of the pipeline and the jurisdiction of the pipeline. The nationality of the pipeline is determined by the companies' owning/operation it and usually the pipelines are operated by joint ventures in which the companies take part. Thus, there is a close relationship between the nationality of the pipeline and the exercise of extraterritorial jurisdiction. If a pipeline crosses the continental shelves and EEZ of other states, the governments of the transit states are not parties of the pipeline agreement. However, coastal and transit states can take reasonable measures to protect the production of natural resources, protect existing cables and pipelines and to protect the marine environment. The coastal state can apply the protective principle to control pollution from pipelines event though the pollution occurs outside its territory. By using this principle the coastal state can as a result claim jurisdiction regarding other activities that can be connected to the operation and construction of the offshore pipeline which have a harmful effect to the coastal state.

4 Analysing the Nord Stream, a cross-border offshore project

4.1 Background

Nord Stream was formerly known as the Northern European Gas Pipeline (NEGP). In the 1990s a Russian-Finnish study was made to research the prospect of a Baltic Sea pipeline. A number of different possible routes were considered with the objective of finding the most reasonable way to transport natural gas from the world's largest reserves to Western Europe.[142] A route was finally determined after negotiation and consultation with the affected states. The Nord Stream will run through the EEZ of Russia, Finland, Sweden, Denmark and Germany as well as through the territorial waters Russia, Denmark and Germany. The pipeline will be fully operational in 2012 and is made up of two lines, each approximately 1,220 kilometres in length, with a combined capacity of 55 billion cubic metres of gas a year making Nord Stream one of the longest offshore pipelines in the world.[143] With an estimated investment of 7.4 billion €[144] with gas supply resources from the Yuzhno-Russkoye oil and gas reserve, Yamal Peninsula, Ob-Taz bay and Shtokmanovskoye fields, the construction of the pipeline started in April 2010.

The Nord Stream pipeline will supply Russian gas to Germany, Denmark, France, Belgium and the Netherlands with the possibility to build a pipeline connecting the Nord Stream to the United Kingdom.[145] The consortium Nord Stream is registered and has its headquarters in Switzerland in a joint venture between the Russian state-owned Gazprom, which have a majority stake-holding in the consortium with 51 % of the shares, while the German energy companies BASF SE/Wintershall Holding GmbH and E.oN Ruhrgas have 20 % each of the share. The Dutch gas infrastructure company N.V. Nederlandse Gasunie has the remaining 9 % of the shares in the joint venture.[146]

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[142] The Nord Stream Gas Pipeline and its Strategic Implications (2007), p. 1.
[143] http://www.nord-stream.com/en/the-pipeline/construction.html (2010-05-02)
[144] Estimation of the construction costs only. The operation, maintenance and decommissioning costs are not included. Nord Stream AG estimates that the shareholders will take 30% of the costs and 70% will be financed through loans and export credit agencies.
[145] http://www.idsa.in/idsacomments/NordStreamtakesshapeAbigvictoryforRussia_agupta_120410 (2010-05-02)
[146] http://www.nord-stream.com/en/our-company/shareholders.html (2010-05-02)

4.2 International Consultation Process[147]

4.2.1 The Espoo Convention

The cross-border pipeline Nord Stream is subject to the UNECE Convention on EIA in a Transboundary Context (Espoo Convention). Nord Stream will run through the EEZ of Russia, Finland, Sweden, Denmark and Germany as well as through the territorial waters Russia, Denmark and Germany. These are the "Parties of Origin" defined in the Convention.

However, since Russia is not a party to the Espoo Convention, there is a voluntary compliance to the Convention.[148] The Nord Stream Consortium has however decided to comply with the general obligation of states to notify and consult each other on all major projects under consideration that are likely to have environmental impact across national borders.[149] The Espoo Convention sets out the obligations of parties to assess the environmental impact of certain activities at an early stage of planning. According to Art. 2 of the Convention, The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities. Furthermore, transport of oil and gas through pipelines with a large diameter are included in appendix 1 (8). If these large-diameter gas pipelines are likely to cause a significant adverse transboundary impact, the party of origin shall notify any party that may be an affected party.

The EIA prepared by the Nord Stream consortium must include possible alternatives to the proposed activity, including a no-action alternative.[150] The international consultation process set out in the Espoo Convention has shown to be a good instrument for the private sector to prevent delays in obtaining authorizations, identifying mitigation measures involving recycling and recovery of components of waste streams, creating a cleaner working environment and identifying lower cost alternatives.[151]

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[147] The fundamental applicable legal rules concerning the Nord Steam Pipeline project and international environmental law issues are the 1982 Law of the Sea Convention, 1992 Convention on Biological Diversity, 1992 Helsinki Convention, 1996 London Protocol, (ASCOBANS) 1991 Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas, 1972 World Heritage Convention (and Underwater Cultural Heritage), 1998 Aarhus Convention on Access to Information, Public Precipitation in Decision-Making and Access to Justice in Environmental Matters, 1994 Energy Charter Treaty and Protocol on Energy Efficiency and Related Matters and Customary International Law obligations.

[148] This was a problem at first due to the fact that one state under whose jurisdiction the pipeline is proposed to traverse is not a party to the Convention, but despite the fact that Russia has not ratified the Espoo Convention and is only a signatory power, the state have decided to take part in the EIA process, however, within the limits of its own legislation.

[149] http://www.nord-stream.com/fileadmin/Dokumente/1__PDF/8__Factsheets/Nord_Stream_1_Fact_Sheet_The_Nord_Stream_Pipeline_Project_ENG.pdf (2010-05-03)

[150] Whist (2008), p. 7.

[151] Bekhechi and Mercier (2002), p. 140.

The purpose of an EIA is to identify, envisage and estimate ways to mitigate the impact of a planned project on the biophysical and social environment.[152] It has been shown that private companies, especially in relation to large development projects, are willing to undertake EIAs to respond to the growing demand for better environmental management and sustainable development of natural resources.[153] It has been proven that companies tend to comply with the regulatory frameworks initiated by the Governments that include sound EIA procedures and review processes, as well as pollution control guidelines in order to avoid environmental risks and high-cost insurance for their projects.[154]

The Espoo Convention requires the Parties of Origin to consider whether the project could potentially affect them and the four other Baltic Sea states, which are Estonia, Latvia, Lithuania and Poland, known under Espoo as ”Affected Parties". [155] In March 2009, Nord Stream provided the Baltic Sea countries with the transboundary environmental Espoo report and the purpose of the report was to inform the countries affected about potential transboundary impacts of construction and operation.[156] It should also be mentioned that the EU Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment (85/337/EEC) is applicable to the construction of pipelines for the transport of gas with a diameter of over 800 millimetres and a length of over 40 kilometres. The directive has been implanted in the member states of the EU, and Russia has implemented similar legislation.

4.2.2 The timeline and the submission of transboundary environmental report (“Espoo Report”)

During 2008-2009, the Nord Stream consortium submitted national permit applications for construction and operation and materials for the Environmental Impact Assessments (EIAs).[157] Construction permits are given by Parties of Origin when the parties have accepted that the EIA is adequate and reasonable. In March 2009, the consortium submitted the “Espoo report” and Denmark’s Energy Authority was the first state to grant a permit to Nord Stream to construct the pipeline in Danish waters in

[152] http://www.nord-stream.com/fileadmin/Dokumente/1__PDF/8__Factsheets/Nord_Stream_1_Fact_Sheet_The_Nord_Stream_Pipeline_Project_ENG.pdf (2010-05-03)
[153] Bekhechi and Mercier (2002), p. 140.
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] http://www.nord-stream.com/fileadmin/Dokumente/1__PDF/8__Factsheets/Nord_Stream_1_Fact_Sheet_The_Nord_Stream_Pipeline_Project_ENG.pdf (2010-05-03)

October 2009. This permit was followed up by the Swedish and Finnish governments, which granted Nord Stream to construct the pipeline their EEZs in November 2009. The German and Russian authorities granted Nord Stream permits to construct the pipeline through their territorial waters and EEZs in December 2009. The last permit was granted by the Finnish government concerning a water permit, which lead to the commencement of the laying of the pipeline in April 2010.[158]

4.3 The Arguments

In September 2005, the companies in the joint venture agreed to construct the North European Gas Pipeline. Present at the signing of the agreement were the then Russian President Vladimir Putin and former German Chancellor Gerhard Schro□der.[159] One fact that was debated intensely in Germany was the fact that the German Chancellor Gerhard Schroeder, was pushed hard for the deal just before leaving office, only to be named chief of Nord Stream's shareholder's committee after leaving office. The Nord Stream pipeline has been subject to the EIA in accordance with the Espoo Convention and the national legislation in the concerned states. It is however only the states[160] whose EEZs' or territorial waters the pipeline passes trough that have the ability to veto the project in accordance with the Espoo Convention.[161] The Baltic States and Poland have thus no veto power because they are defined as "Affected Parties" and not "Parties of Origin".[162] It should nevertheless be acknowledged that the veto power could not be used for political reasons.

As mentioned earlier, Art. 79 LOS, declare that all states are entitled to lay offshore pipelines and cables on the continental shelf of another state. The coastal state may not impede the laying of pipelines *per se*, but it may take reasonable measures to preserve the environment and its natural resources. The delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal state. These measures can be required in the consultation process.

The Nord Stream project has been subject to debate in the states affected by the project. The arguments used have been, among others, environmental concerns when laying the pipeline since the Baltic Sea is heavily polluted by heavy metals, chemical weapons and dumped ammunition. However, the possibility for the party of origins to prevent the laying of the Nord Stream pipeline is very limited if the EIA does not evidently show that the impact on the environment would be harmful. The alternative would be for the

[158] *Id.*
[159] Whist (2008), p. 5.
[160] Russia, Finland, Sweden, Denmark and Germany
[161] The Nord Stream Gas Pipeline and its Strategic Implications (2007), p. 2.
[162] The "Affected Parties" have no legal say in the approval and licensing process, but are however being informed about the project and there is a possibility to raise concerns and issue statements on the pipeline project.

government to change the location of the pipeline, but it cannot impede the laying of pipelines *per se*.

Furthermore, the fact that the European energy dependence on Russia will increase has raised some concerns. Previous conflicts such as the Russian – Ukrainian/Georgian, in which Russia used its energy for political purposes, have been one of the arguments to deny further dependency on Russian gas. One of the arguments used have been the high degree of sensitivity in combination with Russia's development away from democracy, western market practice and rule of law, which leads to European vulnerability.[163]

The dependency on gas creates less encouragement for the power industry to modernise and implement modern technology, and one example of this have been Swedish plans for increased production of bio fuel, which assumed to be hampered by competition from Russian natural gas. [164] Other energy political issues that has been debated is the fact that the Nord Stream project will boost Russia's ambitions to enter the European energy sector.
The majority stake holding of the Russian state, Gazprom, with 51 % of the shares in the consortium, has interests in the European downstream market, but is unwilling to open its domestic upstream energy sector to European competition.[165]

In the beginning of this study, it was shown that there is a European dependency on import of natural gas. The impacts of this factor in an economical perspective is that a huge financial flow is created towards foreign producers outside the EU, but also in a political perspective EU becomes the weaker side negotiating with players with massive resources. If a producer is state owned bound by political decisions and strictly connected with their global economy and political strategies, some implications may rise, especially if the producer follow the rules that typically govern private enterprise. The high dependency one on single producer, namely Russia can effect the competition.

On the contrary, the EU Commission has however given the pipeline status as a priority project under the TEN-E guidelines[166], which are meant help increase competitiveness in the energy market and increase security to supply. This means that the Nord Stream is considered to accelerate the implementation and construction of connections and to increase incentives for private investors. [167] However, the opposition emphasize that this does not mean that the project is of interest of interest of the whole EU, and that the TEN-E guidelines does not either imply that all Europe will benefit from it. In reality, many of the projects under the TEN-E guidelines are and have been local or sub regional. The TEN-E guidelines does in fact support the

[163] Larsson (2007), p. 7.
[164] Claeson (2006), p. 2.
[165] Larsson (2007), p. 7.
[166] Trans-European Energy Network
[167] Whist (2008), p. 11.

project, but it does not consider if it should be onshore or offshore, which leads further considerations to alternative routes. [168]

However, the advocates of the Nord Stream project, most notably Germany, Russia and the other shareholders in the Nord Stream consortium, have principally ruled out the concerns as unjustifiable and assert that the pipeline is a common European project that all EU-members should embrace, as it will provide much-needed gas to an increasingly energy- thirsty union.[169] The proponents of the project also state the fact that Russia has been a reliable supplier of gas to Europe for forty years; even during the Cold war and that there is no incentive for Russia to disrupt supplies due to the fact that Russia also is dependant on its export to Europe.[170] The advocates have to the Nord Stream have furthermore emphasizes the fact that the EU is energy thirsty and transporting the same amount of energy through the Baltic Sea by ship would employ 500-600 LNG tankers annually. [171]

Additional difficulties and grounds for common energy partnership between the EU and Russia is that bilateralism still overcome common EU precedence which will have negative effects on the common solidarity of the EU. Poland, a EU member and one the "Affected Parties", without a veto right according to the Espoo Convention, has particularly complained that Germany did not consult it before taking a decision.[172] The argument from Poland is that an onshore pipeline would have been more economically logical. The current onshore pipelines which supplies Western Europe with gas from Russia goes through the Ukraine or Belarus and Poland making these countries transit states. The polish analysis is that the offshore Nord Stream pipeline makes it possible for Russia to cut off gas supplies to Poland in the situation of a political crisis while still providing Western Europe with gas through the Nord Stream.[173] However, Germany did in fact propose a EU energy solidarity clause in response to the Polish concern.[174] The fact that Poland has an economical interest proposing an onshore pipeline route due to lucrative transit fees should nevertheless not be neglected. In spite of this, there is a growing consciousness and awareness in Russia that its reputation and standing as a reliable energy supplier would be critically damaged if there were any attempt to use the Nord Stream pipeline for political-security purposes. [175]

[168] Whist (2008), p. 12.
[169] Whist (2008), p. 2.
[170] The Nord Stream Gas Pipeline and its Strategic Implications (2007), p. 5.
[171] The Nord Stream Gas Pipeline and its Strategic Implications (2007), p. 2.
[172] The Nord Stream Gas Pipeline and its Strategic Implications (2007), p. 3.
[173] *Id*.
[174] *Id.*
[175] The Nord Stream Gas Pipeline and its Strategic Implications (2007), p. 7.

4.4 Nord Stream AG

The consortium Nord Stream is registered and has its headquarters in Switzerland in a joint venture between the Russian state-owned Gazprom, the German energy companies BASF SE/Wintershall Holding GmbH, E.oN Ruhrgas and the Dutch gas infrastructure company N.V. Nederlandse Gasunie.[176] The private law aspects of the Nord Stream project will mainly be in the contract, which will have to reflect compulsory legal requirements that may be based in public law. Consequently, this calls for comprehensive analysis of the private legal setting, which this subchapter will not deal with.

The shareholders bear the ultimate risks and the project does not allocate for a large shift of any risk to contractors or financial guarantors, which means that it is of great importance that the pipeline is functioning. It is also of great significance that the timetable of the project is followed, as there are gas supply contracts and clauses in the purchase contracts for the gas to be transported by the pipeline.[177] [178]

A further factor of interest is that the consortium is not a public company, but the majority of the main shares are held by the Russian state. Russia is neither a party to the International rules on Public Procurement nor an EC public entity. The consortium does not operate under an exclusive or special license of an EC state.[179] Another question of interest is private law aspects, which is not in focus in this study. The determination of the national law applicable to the transportation contract may be unclear and one may refer to Swiss law in view of the incorporation and seat of the company, Russian law in view of the input state, German law in view of the output state, English law in the view of rules for financing, the flag state's law in view of the status of and jurisdiction for the pipeline.[180] Since the seat of the company is in Switzerland, the organization of Nord Stream AG will be under Swiss law. The company officials will have Swiss employment contracts, but the applicable law can be Swiss law, the flag state law or the law of a business establishment on territorial ground in Russia or Germany, if branch offices are established in Russia or Germany.

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[176] http://www.nord-stream.com/en/our-company/shareholders.html (2010-05-02)
[177] http://www.internat-recht.uni-kiel.de/veranstaltungen/pipeline-conference/beitraege/Boerner1.pdf, p. 3. (2010-05-02)
[178] Gazprom has signed contracts for about 20 billion cubic meters per year next to the 9 billion cubic meters for WINGAS and 4 billion cubic meters for E.ON Ruhrgas. Furthermore, Dong Energy from Denmark and Gaz De France has signed contract with 1 billion cubic meters and 2.5 billion cubic meters per year respectively. Lastly, Gazprom Marketing & Trading based in the UK have signed a contract with 4 billion cubic meters per year.
[179] http://www.internat-recht.uni-kiel.de/veranstaltungen/pipeline-conference/beitraege/Boerner1.pdf, p. 2. (2010-05-02)
[180] http://www.internat-recht.uni-kiel.de/veranstaltungen/pipeline-conference/beitraege/Boerner1.pdf, p. 6. (2010-05-02)

5 CONCLUSIONS

5.1 On a coastal state's means to safeguard its interests as a transit state in an offshore pipeline project

Art. 79 LOS, declare that all states are entitled to lay offshore pipelines and cables on the continental shelf of another state. The coastal states have sovereign rights in the EEZ, but this does not mean sovereignty over the EEZ. For that reason, a coastal state have only those rights given by LOS and cannot interfere with commercial activity by other states in the EEZ unless such activity directly challenges the coastal state's sovereign rights. Beyond the territory of coastal states, there is a potential conflict of interests between the rights of all nations (*jus communicationis*) and the functional jurisdiction of coastal states. The functional jurisdiction according to LOS, gives the coastal state a right to exercise, without expressed proclamation, functional jurisdiction on the continental shelf and submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin.

The coastal state may not impede the laying of pipelines *per se*, but it may take some reasonable measures to safeguard its interests, by taking reasonable measures to preserve the environment and its natural resources, and the delineation of the pipeline by proposing an alternative route if it would be found suitable with reasonable environmental grounds. This gives a coastal state the right to control the route and affirm conditions concerning the route. The coastal state's right to take reasonable measures comprises to protect offshore development areas and ongoing exploration and exploitation of its natural resources on the continental shelf. Consequently, the coastal state can require an entity to reallocate the route of the pipeline if it endangers these projects. However, this depends on local circumstances, and another reasonable ground is to reflect on environmental considerations. The entity that wishes to lay an offshore pipeline is required to get a permit from the coastal state. A permit shall be combined with the conditions necessary to allow the exploration of the continental shelf and exploit its natural resources, to prevent, limit and control pollution from pipelines and to protect the possibility use and repair existing cables and pipelines. The possibility for a coastal state to prevent the laying of an offshore pipeline is very limited if an EIA not clearly demonstrates that the impact on the environment would be negative. The EIA is nevertheless an instrument for the coastal state to use to safeguard its interest to make sure that environmental considerations are implemented in the planning and investigation, selection of the most appropriate solution, construction, pre-commissioning and operation. However, one might speculate whether a coastal state can refuse to conduct survey or through other means make unnecessary delay of an entity wishing to lay a pipeline. Can the coastal

state abuse its right given by LOS? LOS requires that a coastal state must act *bona fide*, meaning that the state must act in good faith with honest intentions and beliefs.

According to LOS Art. 300, states party to the LOS shall fulfill the obligations in good faith assumed under the convention and shall exercise the rights, jurisdiction and freedoms recognized in the convention in a manner that would not constitute an abuse of right. Consequently, a state cannot apply LOS Art. 79 (3) and assign routes that would make it impossible for an entity to lay a pipeline.

The laying of offshore pipelines are recognized as a method of communication such as shipping and air transportation, which gives all nations a right to lay offshore pipelines across the continental shelves and EEZs' of other states. This does not however imply that a coastal state does not have means to safeguard its interests in an offshore pipeline project. A coastal state can impede the laying of a pipeline not conforming to its reasonable measures for the protection of the environment or due regard to cables and pipelines already in position. A coastal state has in fact the duty according LOS to adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction. LOS gives the coastal state the right to enforce that legislation.

Another principle, which gives a coastal state some rights to safeguard its interests offshore, is the protective principle. The protective principle gives a coastal state the right to take reasonable measures for the prevention, reduction and control of pollution from pipelines crossing the state's continental shelf. The coastal state can thus apply this principle to control pollution from pipelines event though the pollution occurs outside its territory. The coastal state can consequently claim jurisdiction regarding other activities that can be connected to the operation and construction of the offshore pipeline which have a harmful effect to the coastal state's environment. International law and LOS gives no rights to a foreign entity to lay an offshore pipeline across another states territorial sea. The coastal state enjoys absolute sovereignty over its territorial sea and the relevant domestic law governs an entity wishing to lay a pipeline there. The same applies in the situation where the coastal state's territorial sea is only transiting area for the pipeline. If the coastal state refuses an entity to lay the offshore pipeline despite lucrative and well-paid tariff income, the entity has no further legal saying. The non-coastal entity would then be bound to rely on its own government to negotiate with the coastal state. The Swedish government granted the permit to utilize its EEZ for the Nord Stream pipeline in November 2009.

For further remarks regarding the Nord Stream project, see chapter 4-4.4, but I will point out some concluding remarks. The Nord Stream project has been subject to debates in the states affected by the project. The arguments used have been, among others, environmental concerns since the Baltic Sea

is heavily polluted by heavy metals, chemical weapons and dumped ammunition, but also energy political issues, such as increased energy dependency on Russia and potential threat to energy supplies. However, the possibilities for the coastal states' around the Baltic Sea to prevent the laying of the Nord Stream pipeline is very limited if the EIA does not evidently show that the impact on the environment would be harmful. According to the Espoo Convention, the possibilities are even more limited to the states with EEZs' that are not crossed. These states are "Affected Parties" and the veto power given to the "Parties of Origin" is not applicable for these parties. However, even if a state can apply the veto power given by the Espoo Convention, it cannot be used for political reasons.

It has been pointed out that there is a European dependency on import of natural gas. But, what impacts does this have? A huge financial flow is created towards foreign producers, which in the Nord Stream case will be the Russian-German-Dutch consortium, Nord Stream AG. Some complications can be created if a foreign producer is largely influenced by political decisions and do not follow the principles that typically govern private enterprise. EU becomes the weaker side negotiating with players with massive resources, which can be bound by political decisions and strictly connected with their global economic and political strategies. This is predominantly the fact in the Energy Sector since the members of the EU mainly trade with a world of monopolies where competition is totally absent.

5.2 On conflicting jurisdiction

Upon my discussion and concluding remarks in chapter 3.6.9, some comments will be made here. Conflicting jurisdiction may arise in issues such as the operation of a pipeline, safety, transportation and environmental protection. Depending on who the parties are in a disagreement or dispute, there will be a different outcome. By referring to the Nord Stream project, different states can have conflicting jurisdiction claims. Russia, as a sending state, where the pipeline originates, and Germany, as a receiving state of the pipeline may have claim conflicting jurisdiction in different issues. Sweden, as coastal state acting as a transit state, may apply protective measures for the prevention, reduction and control of pollution from pipelines crossing its shelf.

One way of measuring the adequacy of claiming extraterritorial jurisdiction is the balance of interests' approach, which gives a state the right to apply legislative jurisdiction extraterritorial after balancing all interests involved. The balance of interests approach gives however different results, which gives little opportunity to predict the outcome.
The question that arises is which state's interests overcome? As discussed previously predictability is of importance in a costly pipeline project and different states can exercise legislative and enforcement jurisdiction over a cross-border pipeline. The conflicting jurisdiction that arises between a

sender and a receiver state are solved by bilateral agreements with provisions regarding the nationality of the pipeline and the jurisdiction over the pipeline. There is a close relationship between the nationality of the pipeline and the exercise of extraterritorial jurisdiction. The nationality of the pipeline is determined by way of reference to the companies' owning it and generally, the pipelines are owned by joint ventures in which the companies take part.

This can thus lead to the scenario where a sender, a receiver and a coastal state exercise concurrent jurisdiction over environmental issues, and between the sender and receiver in issues such as transportation, safety and fiscal jurisdiction. The bilateral agreement solves many issues between the sender and the receiver, but a coastal state that is a transit state in an offshore pipeline project is not a party to the bilateral agreement, and may apply protective measures given by international law and LOS to safeguard its interests offshore.

Bibliography

Articles and Publications

Akehurst, Michael Barton, and Peter Malanczuk. *Modern Introduction to International Law* (1997) Routledge, Glasgow. Cit: [Akehurst & Malanczuk (1997)]

Arentsen, Maarten J. and Rolf W. Kunneke. *National Reforms in European Gas* (2003) Elsevier Ltd. Cit: [Arentsen & Kunneke (2007)]

Bekhechi, Mohammad A., and Jean-Roger Mercier. *The legal and regulatory framework for environmental impact assessments: a study of selected countries in Sub-Saharan Africa* (2002) The International Bank for Reconstruction and Development/The World Bank, Washington D.C. Cit: [Bekhechi and Mercier (2002)]

Claeson, T. *Nord Stream Pipeline Raises Concerns, Energy & Natural Resources Sweden* (2006) International Law Office Publications. Cit: [Claeson (2006)]

Commission of the European Communities. *Green Paper towards a European strategy for the security of energy supply* (2000) Brussels, COM 2000, 769 Final. Presented by the Commission. Cit: [Green Paper (2000)]

Commission of the European Communities. *Europe's current and future energy position. Demand - resources - investments* (2008) Brussels, SEC 2008, 2871 Volume 1. Cit: [Europe's current and future energy position (2008)]

Crowley, John. *International Law and Coastal State Control over the laying of Submarine Pipelines on the Continental Shelf - The Ekofisk-Emden Gas Pipeline* (1987) Nordic Journal of International Law, Vol. 56, Issue 1, pp. 39-68. Cit: [Crowley (1987)]

Directorate General Internal Policies of the Union, Policy Department C, Citizens Rights and Constitutional Affairs, European Parliament. *The Nord Stream Gas Pipeline Project and its Strategic Implications.* (2007) Briefing note, PE 393. 274. Cit: [The Nord Stream Gas Pipeline and its Strategic Implications (2007)]

Dixon, Martin. *Textbook on International Law* (2007) Oxford University Press. Cit: [Dixon (2007)]

Dulaney, Michael and Robert Merrick. *Legal Issues in Cross-Border Oil and Gas Pipelines* (2005) Journal of Energy & Natural Resources Law, Vol 23, Issue 3, pp. 247-265. Cit: [Dulaney & Merrick (2005)]

Dupuy, Rene Jean, and Daniel Vignes. *A Handbook on the New Law of the Sea* (1991) Kluwer Academic Publishers. Cit: [Dupuy & Vignes (1991)]

Gavouneli, Maria. *Functional Jurisdiction in the Law of the Sea* (2007) Koninklijke Brill NV, Leiden. Cit: [Gavouneli (2007)]

Gawdat, Bahgat. *North Africa and Europe: energy partnership* (2009) Blackwell, OPEC Energy Review. Cit: [North Africa and Europe: energy partnership (2009)]

Gilardoni, Andrea. *The World Market for Natural Gas - Implications for Europé* (2008) Springer – Verlag Berlin Heidelberg. Cit: [Gilardoni (2008)]

Grigoryev, Yuli. *The Russian Gas Industry, Its Legal Structure, and its Influence on World Markets* (2007) Energy Law Journal, Volume 28, No. 1, p. 125-146. Cit: [Grigoryev (2007)]

Guo, Boyun, Shanhong Song, Jacob Chacko, and Ali Ghalambor. *Offshore Pipelines* (2005) Elsevier Inc. Cit: [Guo et al. (2005)]

Helcom Ministerial Meeting, Krakow, Poland, 15 November 2007. *HELCOM Baltic Sea Action Plan.* Cit: [Baltic Sea Action Plan (2007)]

Herbert-Burns, Rupert, Sam Bateman, and Peter Lehr. Lloyd's MIU Handbook of Maritime Security (2009) Taylor & Francis Group. Cit: [Herbert-Burns et al. (2009)]

Herbert Smith Publications Online. *The Energy Charter Treaty and the Protection of Energy Investments* (2002) Publications from 2002, 11 October. Available at http://www.herbertsmith.com/Publications/archive/2002/il11oct2002c.htm?wbc_purpose=Bas. Cit: [Herbert Smith Publications (2002)] (2010-05-10)

Hunt, Martin, and Erik Eisele. *Far From Disaster: Ukraine's Energy Sector Seeks Investments and Growth* (2009) Houston Journal of International Law, Vol 31 Issue 2, p. 243-263. Cit: [Hunt & Eisele (2009)]

Inazumi, Mitsue. *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (2004) Intersentia, Utrecht. Cit: [Inazumi (2004)]

Kaye, Stuart. *Threats from the Global Commons: Problems of Jurisdiction and Enforcement* (2007) International Law Studies. Us Naval War College, Vol. 83, Issue 1, pp. 69-82. Cit: [Stuart (2007)]

Kaye, Stuart. *International Measures to Protect Oil Platforms, Pipelines, and Submarine Cables from Attack* (2007) Tulane Maritime Law Journal, Vol. 31, Issue 2, pp. 377-424. Cit: [Kaye (2007)]

Kwiakowska, Barbara. *Equitable Maritime Boundary Delimitation - A Legal Perspective* (1988) International Journal of Estuarine and Coastal Law, Vol. 3, Issue 4, pp. 287-304. Cit: [Kwiakowska (1988)]

Larsson, Robert L. *Nord Stream, Sweden and Baltic Sea Security* (2007) Totalförsvarets forskningsinstitut (FOI) Swedish Defence Research Agency, Stockholm. Cit: [Larsson (2007)]

Lagoni, Rainer. *Legal Aspects of High Voltage Direct Current (Hvdc) Cables.* (1998) Lit, Hamburg. Cit: [Lagoni (1998)]

Macdonald, Ronald, and Douglas M. Johnston. *The Structure and Process of International Law* (1986) Kluwer, Boston. Cit: [Macdonald & Johnston (1986)]

Messen, Karl Matthias. *Extraterritorial Jurisdiction in Theory and Practice* (1996) Kluwer Law International, London. Cit: [Meesseen (1996)]

Parrish, Austen. *Territory, Territoriality, and the Resolution of Jurisdictional Conflict* (2009) American Journal of Comparative Law, Vol. 57, Issue 3, pp. 631-676. Cit: [Parrish (2009)]

Riksdagen (2007) Utrikesutskottets och miljö- och jordbruksutskottets offentliga utfrågning den 12 december 2006 om en gasledning i Östersjön – fakta om projektet – internationell rätt – tillvägagångssätt vid tillståndsprövning [The Foreign Committee and Environmental – and Agriculture Committee's Public Hearing 12 December 2006 on a Gas pipeline in the Baltic Sea – Facts of the project – International Law – process of Permission], Stockholm: Swedish Parliament, January 2007

Roggenkamp, Martha M. *Petroleum Pipelines in the North Sea: Questions of Jurisdiction and Practical Solutions* (1998) Journal of Energy & Natural Resources Law, Vol. 16, Issue 1, pp. 92-109. Cit: [Roggenkamp (1998)]

Stein, Stephen W. *Introduction to the Financing of Cross-Border Gas Pipelines in Emerging Nations* (2003) Journal of Energy & Natural Resources Law, Vol 21, Issue 3, pp. 277-284. Cit: [Stein (2003)]

Vinogradov, Sergei. *Cross-Border Pipelines in International Law* (1999) Natural Resources & Environment, Vol 14, Issue 2, pp. 75-80. Cit: [Vinogradov (1999)]

Whist, Bendik Solum. *Nord Stream: Not Just a Pipeline. An analysis of the political debates in the Baltic Sea region regarding the planned gas pipeline from Russia to Germany.* (2008) Fridtjof Nansens Institutt, FNI Report 15/2008. Cit: [Whist (2008)]

Websites

http://ec.europa.eu/energy/security/index_en.htm,

http://ec.europa.eu/environment/climat/adaptation/index_en.htm

http://www.nord-stream.com/fileadmin/Dokumente/NORD_STREAM__FACTS/English/NORD_STREAM_FACTS_ISSUE_2_ENGLISH_DOWNLOAD.pdf

http://www.nord-stream.com/en/safety-environment/turvallisuustandardit/offshore-pipelines.html

http://www.unlawoftheseatreaty.org/

http://www.internat-recht.uni-kiel.de/veranstaltungen/pipeline-conference/beitraege/Redgwell.pdf

http://www.internat-recht.uni-kiel.de/veranstaltungen/pipeline-conference/beitraege/Boerner.pdf

http://www.internat-recht.uni-kiel.de/veranstaltungen/pipeline-conference/beitraege/Boerner1.pdf

http://www.nord-stream.com/en/the-pipeline/construction.html

http://sakhalinenergy.jp/en/documents/doc_32_pipelines.pdf

http://www.idsa.in/idsacomments/NordStreamtakesshapeAbigvictoryforRussia_agupta_120410

http://www.nord-stream.com/en/our-company/shareholders.html

http://www.nord-stream.com/fileadmin/Dokumente/1__PDF/8__Factsheets/Nord_Stream_1_Fact_Sheet_The_Nord_Stream_Pipeline_Project_ENG.pdf

Conventions

United Nations Convention on the Law of the Sea of 10 December 1982. Available at: http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf (2010-05-20)

Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo, on February 1991. Available at: http://www.unece.org/env/eia/documents/legaltexts/conventiontextenglish.pdf (2010-05-20)

Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992 (Helsinki Convention). Available at: http://www.helcom.fi/stc/files/Convention/Conv1108.pdf (2010-05-20)

Table of Cases