

# Transboundary Environmental Impact Assessment in the Case of the Baltic Sea Gas Pipeline

**Timo Koivurova\***

Research Professor, Northern Institute for Environmental and Minority Law, Arctic Centre,  
University of Lapland, Finland

**Ismo Pölönen**

Senior Researcher, Faculty of Law, Economics and Business Administration, University of  
Joensuu, Finland

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## Abstract

The article examines the transboundary environmental impact assessment (EIA) procedure that was applied to the Baltic Sea Gas Pipeline (BSGP). The BSGP is not only the longest offshore pipeline ever planned, but also the transboundary EIA procedure that was applied to it was the most challenging transboundary EIA procedure ever conducted. The procedure involved five origin and nine affected states, that is, all the coastal states of the Baltic Sea. The article examines how the transboundary EIA was organized in this challenging case. It is useful to show how the national EIA system of Finland was integrated into the functioning of the overall transboundary EIA procedure in order to show the complexity involved in organising such large-scale transboundary EIAs. The article ends with an evaluation of whether the responsible officials were able to organise the transboundary EIA in this case in a quality manner and with conclusions as to what can be learned of this procedure for future large-scale transboundary EIAs.

## Keywords

environmental impact assessment (EIA); transboundary; Baltic Sea; Espoo Convention, pipelines

## Introduction

Most modern international treaties related to environmental protection have to come to grips with changing circumstances. This adaptive capacity is often

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built into a regime from the outset by first concluding a framework convention with broad and general obligations that are later complemented by protocols or by inserting flexible amendment/adjustment mechanisms into the treaty. Another modern development is the conclusion of treaties that create a plenary organ which is given powers to establish subsidiary bodies that elaborate the convention regime.<sup>1</sup> This approach contrasts starkly with some of the older international environmental treaties which established no institutional mechanisms to develop the regime.<sup>2</sup>

The 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention) is clearly a modern dynamic international treaty regime, designed to adapt to changing and more complex circumstances.<sup>3</sup> The Espoo Convention was negotiated under the auspices of the United Nations Economic Commission for Europe (UN ECE) and signed in Espoo, Finland, in 1991.<sup>4</sup> Following six meetings of the signatories,

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<sup>1</sup> Good examples of such treaty regimes are the near-universal conventions adopted at the 1992 Rio Conference on Environment and Development, namely the regime based on the United Nations Framework Convention on Climate Change, 9 May 1992, New York, in force 21 March 1994, 1771 *UNTS* 107 and the one created under the 1992 Convention on Biological Diversity, 5 June 1992, Rio de Janeiro, in force 29 December 1993, 31 *ILM* 818 (1992). This has also led to interesting suggestions from scholars, e.g., Churchill and Ulfstein perceive these types of regimes to be Autonomous Institutional Arrangements (AIA), entities comparable to inter-governmental organizations, with the concomitant possibility that the decisions of their plenary organs are binding on the states parties. See R. Churchill, G. Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law" (2000) 94 *American Journal of International Law* (AJIL) 623–659.

<sup>2</sup> Two examples of such international environmental treaties are the 1974 Nordic Environment Protection Convention, 19 February 1974, Stockholm, in force 5 October 1974, 13 *ILM* 591 (1974) and the 1973 Agreement on the Conservation of Polar Bears, 15 November 1973, Oslo, in force 26 May 1976, 13 *ILM* 13 (1974). Both were negotiated, concluded and left at that, although the Polar Bear Agreement was to some extent developed under the IUCN Polar Bear Specialist Group. In addition, with the rising awareness of the problems polar bears will face with melting sea ice, Norway recently hosted the first formal treaty meeting between the five polar bear treaty partners. See N. Bankes, "Climate Change and the Regime for the Conservation of Polar Bears," in: T. Koivurova, E. Carina, H. Keskkitalo and N. Bankes (eds.), *Climate Governance in the Arctic* (2009) UK: Springer, 351–382.

<sup>3</sup> The Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991, 30 *ILM* 800 (1991) [hereinafter Espoo Convention], entered into force 10 September 1997. There is an increasing body of literature on transboundary EIA; see, e.g., the special issue on transboundary EIA, 26 *Impact Assessment and Project Appraisal* (IAPR) (2008); *Theory and Practice of Transboundary Environmental Impact Assessment* (2008) K. K. Bastmeijer, T. Koivurova (eds.) Leiden: Martinus Nijhoff Publishers; N. Craik, *The International Law of Environmental Impact Assessment, Process, Substance and Integration* (2008) Cambridge, UK: Cambridge University Press.

<sup>4</sup> For an overview of the negotiations, see R. Connelly, The UN Convention on EIA in a

the Espoo Convention entered into force in 1997 and the first meeting of the parties (MoP) took place in Oslo in 1998. Three MoPs have been held since, at three-year intervals: in 2001 in Sofia, Bulgaria; in 2004 in Cavtat, Croatia; and in 2008 in Bucharest, Romania. At present, there are 42 parties to the Espoo Convention. The Strategic Environmental Assessment (SEA) Protocol to the Espoo Convention was signed in 2003 as part of the “Environment for Europe” process and has been signed by 37 states as well as by the European Community.<sup>5</sup>

Before moving to the more recent challenges for the Espoo Convention regime, it is important to review the basic content of the Espoo Convention. The Espoo Convention regulates situations where a significant adverse transboundary impact is likely to be caused to a state’s environment by a proposed activity in another contracting state (the origin state). The Espoo Convention tries to manage these situations by requiring the parties to cooperate with each other before the activity is undertaken. In order for this procedure to function effectively, the Espoo Convention requires the states parties to establish national environmental impact assessment (EIA) procedures that allow for the integration of foreign impacts and foreign actors.<sup>6</sup>

The origin state is first required to notify the potentially affected state of the likely significant adverse transboundary impact and to provide basic information regarding the proposed activity. The affected state must next confirm that it wants to participate in the procedure.<sup>7</sup> The origin state is then obligated to study the transboundary impacts together with the affected state and allow the public<sup>8</sup> of that state to participate in the process on the same terms as its own public would be entitled to.<sup>9</sup> After the impact assessment, the affected state has an opportunity through consultations with the origin

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Transboundary Context: A Historical Perspective (1999) 19 *Environmental Impact Assessment Review* 37–46.

<sup>5</sup> Available at: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-4-b&chapter=27&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4-b&chapter=27&lang=en) (last accessed 1.6.2009). The Protocol requires 16 parties for it to enter into force; currently 13 have accepted the Protocol as binding and it is thus not yet in force. (European Community approval cannot be counted for this purpose.)

<sup>6</sup> Espoo Convention, Art. 2 (2, 3 and 7).

<sup>7</sup> *Ibid.*, Art. 3 (1, 2 and 3).

<sup>8</sup> *Ibid.* The expression “The public” was defined in Article 1 (x) of the Espoo Convention simply as “one or more natural or legal persons”. Due to the influence of the Aarhus Convention on Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters (25 June 1998, Aarhus, Denmark, in force 30 October 2001, 38 *ILM* 517 (1999)), the second Meeting of the Parties, held in Sofia in 2001, adopted an amendment to the Espoo Convention, adding the following to Article 1 (x): “and, in accordance with national legislation or practise, their associations, organizations or groups”.

<sup>9</sup> *Ibid.*, Art. 3 (1, 2 and 3), Art. 3 (4–8) and Art. 2 (6) on non-discrimination.

state to comment on the proposed activity and its likely impacts; the public of the affected state is entitled to provide its comments on the proposed activity on the same terms as apply to the public of the origin state.<sup>10</sup> The final decision taken on the proposed activity in the origin state must take due account of the comments from the potentially affected state and its public and must be delivered to the affected state.<sup>11</sup> The states parties are not required to determine whether the impacts studied ultimately materialize, as post-project analysis is optional.<sup>12</sup>

One of the most recent challenges to the Espoo Convention has arisen from its being applied to an ever-increasing number of activities, currently some 30 to 50 new ones per year, and to increasingly complex projects as well.<sup>13</sup> The parties to the Espoo Convention have confronted situations that were not originally envisaged or that in other ways pose challenges to the application of the regime. A note prepared by the Espoo Convention Secretariat<sup>14</sup> lists the following examples of “complex activities”:

- (a) Pipelines, roads or other linear infrastructure projects that are part of an energy or transport network crossing several Parties;
- (b) Nuclear power plants and related installations, such as waste storage facilities, which generate concerns in several Parties or which might have long-range impacts;
- (c) Large industrial installations located on the banks of water bodies shared by several Parties;
- (d) Large energy projects that could affect sub-regional policies.

Clearly, one of the reasons why the Espoo Convention Secretariat prepared the note (discussion paper) is the challenge faced in organizing the trans-boundary EIA for the proposed Baltic Sea Gas Pipeline (BSGP),<sup>15</sup> which

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<sup>10</sup> *Ibid.*, Arts. 4 and 5.

<sup>11</sup> *Ibid.*, Art. 6.

<sup>12</sup> *Ibid.*, Art. 7 and Appendix V.

<sup>13</sup> This emerges from the Second Review of Implementation of the Espoo Convention, (ECE/MP.EIA/11), available at: <http://www.unece.org/env/documents/2008/eia/ece.mp.eia.11.pdf> (last accessed 2.6.2009).

<sup>14</sup> “Exchange of Good Practices, Large-Scale Transboundary Projects, Application of the Espoo Convention to complex activities,” Note by the Secretariat (ECE/MP.EIA/WG.1/2009/4, 2 March 2009), Economic Commission for Europe Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context, Working Group on Environmental Impact Assessment, Twelfth meeting, Geneva, 11–13 May 2009, Item 5(a) of the provisional agenda, available at: <http://www.unece.org/env/documents/2009/eia/wg.1/ece.mp.eia.wg.1.2009.4.e.pdf> (last accessed 1.6.2009).

<sup>15</sup> The project’s name is Nord Stream and it is referred to here as the Baltic Sea Gas Pipeline (BSGP); it is being developed by the joint venture company Nord Stream AG.

would cross the jurisdictions of five Baltic Sea littoral states (Denmark, Finland, Germany, the Russian Federation, Sweden) and potentially affect the entire Baltic Sea.<sup>16</sup> Recently, the Working Group on EIA—one of the sub-bodies of the Espoo Convention—decided to establish a task force to discuss how to apply the Espoo Convention to such large-scale, complex activities.<sup>17</sup>

Now, as the BSGP transboundary EIA process approaches its conclusion, it is useful to examine how the states concerned were able to apply the Espoo Convention to an activity whose complexity was not envisaged when the Espoo Convention was negotiated. It is also important to examine whether the BSGP transboundary EIA could have been handled better, given that the note prepared by the Espoo Convention Secretariat advances a different view on how the Espoo Convention should be applied to such large-scale multi-jurisdictional projects. That views on the issue vary naturally prompts questions on whether lessons can be learned from the BSGP transboundary EIA for similar types of activities in the future, a discussion to which this article will also contribute. The Espoo Convention Secretariat has drawn its own conclusions and recommended in its discussion paper that the parties consider future guidance to overcome some of the challenges posed in the case of particularly complex activities.<sup>18</sup>

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<sup>16</sup> Formally speaking, the note was prepared at the request of the Commission of the European Communities, further to the work plan adopted at the fourth Meeting of the Parties (ECE/MPEIA/10, decision IV/7, annex).

<sup>17</sup> “The Task Force on Complex Activities” is to begin its work in 2010 by examining the need for detailed recommendations on the application of the Espoo Convention to complex activities. If the Task Force concludes that detailed recommendations are needed, it will then draft them, taking into account: (a) lessons learned from past experiences in the application of the Espoo Convention; and (b) existing guidance prepared under the Espoo Convention. The Task Force will focus on joint EIA of large-scale transboundary activities, further to appendix VI, para. 2 (g), of the Espoo Convention. The recommendations will be considered by the Working Group on EIA and, later, the Meeting of the Parties. The delegations of Romania, Ukraine, the European Commission and, subject to confirmation, Georgia and the Russian Federation, have indicated their willingness to join the Task Force. In addition, other EU Member States may agree to participate in the Task Force after the Baltic Sea sub-regional workshop in October 2009. The Working Group agreed that NGOs would be invited by the Task Force on a case-by-case basis to assist in its work. Information obtained from the Secretary of the Espoo Convention, Wiek Schrage, by e-mail on 1 June 2009. The Seminar on Cooperation on the EIA Convention in the Baltic Sea sub-region (Vilnius, 22–23 October 2009) discussed the issue of whether there are more states parties willing to join the Task Force on Complex Activities, but no volunteers appeared. It was agreed that some of the Baltic Sea states could join the 2010 Moscow seminar on the topic. Information obtained from the official responsible in the Finnish Ministry of the Environment, via e-mail (10.12.2009), On file with the author.

<sup>18</sup> See *supra* note 14.

The focus of this article is to examine carefully how the transboundary EIA was organized in the planned BSGP. It is only with such an in-depth study that it is possible to gain knowledge as to why the BSGP transboundary EIA was designed in a certain manner and whether it was done in a legally appropriate, practically effective and even commendable manner. The article proceeds as follows. It first takes up the important question why the BSGP presents a challenge for the Espoo Convention. This will show what the contact points of the Espoo Convention had to confront when they started to design the transboundary EIA. This is followed by an examination of how the transboundary EIA in effect proceeded, which is needed in order to understand how the system ultimately performed in practise. Because the transboundary EIA had to be linked to the five national EIA procedures of the four origin states and the Russian Federation, the next section studies how this linking was accomplished in the case of one of these systems, the Finnish EIA procedure. It is useful to take the Finnish case as an illustrative example, given that the Finnish EIA authorities—both those supervising the national EIA and those overseeing the international EIA—faced the most challenges in organizing the EIA procedures, as will be shown below.

Even though an argument will be made that the transboundary EIA was organized in a responsible manner by the states concerned, it is also clear that many difficulties were encountered; these manifested themselves in the very critical comments by the affected states (and others) on the impact assessment studies made by the project proponent, Nord Stream AG.<sup>19</sup> Before proceeding as outlined, however, it will first be useful to say a few words about the BSGP project.

The BSGP has its origins back in the 1990s, when feasibility studies of pipeline routings were performed by North Transgas, whose major shareholders were the Russian Federation energy company Gazprom and the Finnish company Fortum Oil and Gas. Various routing options were considered that included different combinations of onshore and offshore segments. The project was subsequently taken over by Gazprom—due to a change of overall company strategy at Fortum—which in 2004 contracted with PeterGaz to produce a conceptual design for a system of two parallel offshore pipelines connecting the Russian Federation to Germany and extending further to the

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<sup>19</sup> For instance, the European Parliament has taken a critical stance towards the project; see European Parliament resolution of 8 July 2008 on the environmental impact of the planned gas pipeline in the Baltic Sea to link up the Russian Federation and Germany (Petitions 0614/2007 and 0952/2007) (2007/2118(INI)), INI reference available at: <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=en&procnum=INI/2007/2118> (last accessed 24.01.2010).

Netherlands and the United Kingdom. In late 2005, an agreement was signed between Gazprom, BASF AG and E.ON AG to form Nord Stream AG, which has now taken over to develop and implement the offshore project in the Baltic Sea. The company is registered in Switzerland.

The project involves a natural gas pipeline transmission system (two parallel pipelines) from the Russian Federation to Germany with connections to onshore systems in the Russian Federation and Germany. As planned, the pipeline passes through the Exclusive Economic Zone (EEZ) of five countries: Denmark, Finland, Germany, the Russian Federation and Sweden, and the territorial waters of the Russian Federation and Germany (and recently, due to re-routing, Denmark). At full capacity, it will supply 55 billion cubic metres/yr to consumers in northwest Europe, provided it passes the EIA and meets the permitting requirements of the five coastal states.

The pipeline will run from Portovaya Bay near Vyborg on the Russian Federation's coast of the Gulf of Finland to Greifswalder Bodden in Germany. Plans originally called for a service platform to be built in the Swedish EEZ, east or northeast of Gotland, but these have now been abandoned. The company intends to have both pipelines in use by about 2012. The BSGP is the longest offshore pipeline ever planned. Similarly, the transboundary EIA procedure that was applied to it was the most challenging transboundary EIA procedure ever conducted by the international community; the procedure involved five origin and nine affected states.<sup>20</sup>

From the beginning, there were various concerns about the environmental impacts of the pipelines. For instance, what is the effect of seabed interventions—when the pipelines are laid down to the seafloor—on the resuspension of sediments, and in particular on organic particles that can travel long distances via sea currents? The commissioning and de-commissioning of the pipelines were thought to be harmful to the fish stocks and therefore to fisheries in the Baltic Sea. The planned pipeline route also traversed areas which were identified as key wintering and staging sites for a large variety of waterfowl and harbour porpoise populations, with obvious problems, especially when these were already protected under NATURA 2000 sites. Detonations of wartime munitions dumped onto the seabed were another concern, given that these had the potential of causing dispersal of seabed sediments and thus increase the environmental load in the already vulnerable Baltic Sea. Of particular concern were sites of dumped chemical weapons, which, when the

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<sup>20</sup> A thorough overview of the various stages is provided in chapter 2 of the Nord Stream so-called “Espoo Report”, the international EIS document (Espoo Report), available at: [http://www.nord-stream.com/fileadmin/Dokumente/eia\\_permitting/Chapter\\_02/Nord\\_Stream\\_Espoo\\_Report\\_English\\_Chapter\\_02.pdf](http://www.nord-stream.com/fileadmin/Dokumente/eia_permitting/Chapter_02/Nord_Stream_Espoo_Report_English_Chapter_02.pdf) (last accessed 2.6.2009).

seabed was disturbed, also could disperse chemicals into the upper water column and accumulate in marine populations.

### **Transboundary EIA in the Case of the BSGP—A Challenge to the Espoo Convention**

As the BSGP passes through the jurisdiction of four contracting parties (Denmark, Finland, Germany and Sweden)<sup>21</sup> to the Espoo Convention, it was clear that the Espoo Convention had to be applied to the project.<sup>22</sup> The scope of the Espoo Convention covers large-diameter gas pipelines that are likely to cause significant adverse transboundary impacts.<sup>23</sup> However, the BSGP is also to be located in marine areas under the jurisdiction of the Russian Federation, causing an obvious problem for the smooth application of the Espoo Convention: the Russian Federation has signed the Espoo Convention but has not ratified it, meaning that it is not legally bound by the instrument.<sup>24</sup>

If the Espoo Convention does not cover the whole planned pipeline route, one obvious question that can be raised is whether there are international conventions that would apply to all the Baltic Sea littoral states and include

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<sup>21</sup> These countries can be regarded as parties of origin because the BSGP passes through their territorial waters and/or their Exclusive Economic Zone (EEZ). See *infra* note 33.

<sup>22</sup> See, however, E. Karm, “Environment and Energy: The Baltic Sea Gas Pipeline” (2008) 39 *Journal of Baltic Studies* (JBS) 99–121.

<sup>23</sup> Espoo Convention, Art. 3(1) and Appendix I, paragraph 8.

<sup>24</sup> However, signature already requires some measures from the contracting states according to the Vienna Convention on the Law of Treaties, 23 May 1969, Vienna, Austria, in force 27 January 1980, 8 *ILM* 679 (1969) and, arguably, in the customary law of treaties. According to Article 18 of the Vienna Convention and the identical norm in the customary law of treaties: “A state is obligated to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty... until it shall have made its intention clear not to become a party to the treaty”. In the case of the Espoo Convention, it can be argued that at least some kind of notification must be made to the potentially affected state even if no comprehensive transboundary EIA procedure is organized; otherwise the object and purpose of the treaty, “to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities”, would be frustrated. Also interesting is that when signing the Espoo Convention, the signatories adopted a resolution: “to strive for the entry into force of the Convention as soon as possible and to seek to implement the Convention to the maximum extent possible pending its entry into force; 2. Consider that, pending the entry into force of the Convention, the necessary authority should be given to the Economic Commission for Europe and to its Executive Secretary to provide for a sufficient secretariat and, in the framework of the existing budgetary structure, for the appropriate financial means; 3. Continue to co-operate in bringing closer together their policies and strategies in relation to environmental impact assessment”. The resolution is on file with the authors.

provisions on transboundary EIA. There are, in effect, two such conventions: the Law of the Sea Convention (LOS Convention) includes two articles covering transboundary EIA, but these are too general in nature to be used for organizing transboundary EIA.<sup>25</sup> However, the LOS Convention refers to a competent international organization that could play a useful role in transboundary EIA. One such body is the Helsinki Commission (HELCOM), established by the 1992 Baltic Sea Convention, which has all the coastal states of the Baltic Sea as its members.<sup>26</sup> The Baltic Sea Convention contains a specific provision on transboundary EIA in its Article 7.<sup>27</sup> Yet, as is readily apparent from the wording of the Article, the Baltic Sea Convention refers to other international treaties and supranational regulations when it comes to governing transboundary EIA.<sup>28</sup> Hence, even though the LOS Convention

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<sup>25</sup> Article 206, LOS Convention (10 December 1982, Montego Bay, Jamaica, in force 16 November 1996, 21 *ILM* 1261) [hereinafter the “1982 LOSC”], provides: “When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205”. Article 205, 1982 LOSC, then specifies how such results are to be published and communicated: “States shall publish reports of the results obtained pursuant to article 204 or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States”.

<sup>26</sup> The 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area, 9 April 1992, Helsinki, in force 17 January 2000, 2099 *UNTS* 197. This Convention, with the amendments, can be found on the home page of the Helsinki Commission (Baltic Marine Environment Protection Commission), with the most recent amendment, available at: <http://www.helcom.fi/stc/files/Convention/Conv1108.pdf> (last accessed 2.6.2009).

<sup>27</sup> Article 7 stipulates: “1. Whenever an environmental impact assessment of a proposed activity that is likely to cause a significant adverse impact on the marine environment of the Baltic Sea Area is required by international law or supra-national regulations applicable to the Contracting Party of origin, that Contracting Party shall notify the Commission and any Contracting Party which may be affected by a transboundary impact on the Baltic Sea Area. 2. The Contracting Party of origin shall 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. 3. Where two or more Contracting Parties share transboundary waters within the catchment area of the Baltic Sea, these Parties shall cooperate to ensure that potential impacts on the marine environment of the Baltic Sea Area are fully investigated within the environmental impact assessment referred to in paragraph 1 of this Article. The Contracting Parties concerned shall jointly take appropriate measures in order to prevent and eliminate pollution including cumulative deleterious effects”. Even though HELCOM has not been directly in charge of the transboundary EIA, Finland and other countries have sent all the pertinent documents to it.

<sup>28</sup> Interestingly, however, there was an attempt within HELCOM to adopt practical guidance on how to apply Article 7 in the Baltic Sea. A working group was tasked to prepare this

and the Baltic Sea Convention are generally applicable to the BSGP, they do not contain specific obligations that are suitable for organizing transboundary EIA. This task is, however, specifically handled by the Espoo Convention and the EIA Directive—instruments of international and EC law that apply to all parts of the BSGP other than the section in the Russian Federation.<sup>29</sup>

The problem of the Espoo Convention and the EIA Directive not being applicable to the Russian Federation was resolved in April 2006, at a meeting of the countries under whose jurisdiction the pipeline will traverse, in which they decided how to apply the Espoo Convention to the BSGP transboundary EIA. The Russian Federation agreed to apply the Espoo Convention to the extent permitted by its own national legislation.<sup>30</sup> Indeed, it is difficult to

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guidance and it produced a document entitled “Guidance on the Practical Application of HELCOM Requirements on Conducting Environmental Impact Assessment”, where specific recommendations were given. Interestingly, the guidance document based itself on the customary law principle of good neighbourliness and other relevant conventions, also mentioning the Espoo Convention. Oddly enough, it does not touch upon public participation at all, which is normally seen as an integral part of a transboundary EIA. Another interesting aspect is that the recommendations envisage HELCOM points of contact and HELCOM itself playing a clear role in the international coordination of transboundary EIA. There are even provisions requiring the HELCOM points of contact and HELCOM to be in touch with the Espoo points of contact and the Espoo Convention Secretariat where HELCOM coordinates the transboundary EIA. All the Baltic Sea littoral states, with the exception of the Russian Federation, endorsed the guidelines document, but due to the Russian Federation’s resistance they were not adopted. Guidance on the Practical Application of HELCOM Requirements on Conducting Environmental Impact Assessment, HELSINKI COMMISSION, HELCOM 26/2005 Baltic Marine Environment Protection Commission, 26th Meeting, Helsinki, Finland, 1–2 March 2005, Agenda Item 3, Matters arising from the subsidiary bodies, Document code: 3/1, Date: 14.1.2005 Submitted by: Executive Secretary. The document is on file with the authors.

<sup>29</sup> The amendment to the EIA Directive (97/11/EC) incorporated the Espoo Convention requirements as part of the European Community Law as the EC is a party to the Espoo Convention. There are some minor requirements of the EIA Directive on transboundary EIA that go further than those of the Espoo Convention. For instance, the Espoo Convention requires in its Article 6(2) that the origin state deliver the final decision to the affected state, but it does not specifically require it to forward this information to the public of the affected state, a requirement that is contained in Article 9(3) of the EC EIA Directive. In addition, the EC EIA Directive states that the final decision on the proposed activity “must” take into account the results of transboundary consultations and comments from the public of the affected state, whereas the Espoo Convention uses the weaker wording “take due account”. Council Directive 97/11/EC of 3 March 1997 Amending Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment, OJ No. L 073, 14/03/1997.

<sup>30</sup> See chapter 3 of the Espoo Report, p. 62, available at: [http://www.nord-stream.com/file-admin/Dokumente/eia\\_permitting/Chapter\\_03/Nord\\_Stream\\_Espoo\\_Report\\_English\\_Chapter\\_03.pdf](http://www.nord-stream.com/file-admin/Dokumente/eia_permitting/Chapter_03/Nord_Stream_Espoo_Report_English_Chapter_03.pdf) (last accessed 2.6.2009).

imagine that the Russian Federation would have consented to having European Union (EU) internal rules—the EIA Directive—govern the EIA. In addition, because the Espoo Convention was negotiated under the auspices of the UN ECE, of which North American, European, Central Asian states and the Russian Federation are members, the forum seems best suited to governing transboundary EIA involving EU Member States and the Russian Federation. Furthermore, even though it is not a party to the Espoo Convention, The Russian Federation is still a signatory.<sup>31</sup>

It was clear from the very beginning that organizing a transboundary EIA for the BSGP would be very challenging. The typical situation which the Espoo Convention was originally negotiated to address is one where a proposed activity in state A, located close to an international border between states A and B, is likely to cause a significant adverse transboundary impact on the environment of state B. These situations are characterized for the most part by state A benefiting economically from the proposed activity and state B suffering the environmental consequences, thus creating at least potentially an adversarial relationship between the two neighbouring states. Accordingly, the Espoo Convention includes provisions that aim to help the parties find a solution enabling them to organize the transboundary EIA in a mutually beneficial manner.<sup>32</sup> In these typical situations, state A integrates the transboundary impacts and foreign actors into its national EIA, the goal being to examine the entire area of likely impact.

Contrast these typical situations with that of the BSGP. A private company (Nord Stream AG) with Swiss headquarters proposes to build a gas pipeline traversing the maritime areas under the jurisdiction of five states, with the activity potentially causing environmental consequences for all the littoral states of the Baltic Sea. The benefits of the proposed activity would accrue to its shareholders and would serve to diversify the natural gas supply of Western Europe. This does not mean that the Espoo Convention does not apply to the BSGP. As mentioned above, the scope of the Espoo Convention covers large-diameter gas pipelines that are likely to cause a significant adverse transboundary impact. And, according to Article 1, from its inception the Espoo Convention was designed to accommodate activities with a plurality of origin and affected states.<sup>33</sup> Yet, what exactly the Espoo Convention

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<sup>31</sup> See *supra* note 24.

<sup>32</sup> T. Koivurova, “The Convention on Environmental Impact Assessment in a Transboundary Context”, in: G. Ulfstein, T. Maruhn, A. Zimmermann (eds.) *Making Treaties Work* (2007), Cambridge, UK: Cambridge University Press, 218–239.

<sup>33</sup> Article 1 (ii and iii) provides: “Party of origin” means the Contracting Party or Parties to this Convention under whose jurisdiction a proposed activity is envisaged to take place; (iii)

requires from the four Espoo contracting states and The Russian Federation in the case of the BSGP is not altogether clear. The party or parties of origin are obligated to notify the other state(s) if a significant adverse transboundary impact is likely to ensue from the proposed activity within its jurisdiction; the presumption here is that under normal circumstances the activities listed in Appendix I trigger the duty for the origin state to commence a transboundary EIA by notifying the affected state(s). However, the Espoo Convention leaves this decision ultimately to each and every origin state. Hence, one of the origin states might decide to notify one or more of other littoral states on the basis of Article 3, while others may take a different course, perhaps even concluding that no littoral state will suffer a significant adverse transboundary impact. Even though this was never a likely scenario in the case of a project as large and complicated as the BSGP, it is useful to keep this in mind in order to understand the innovative solutions that the concerned states came up with during the EIA procedure.

### **How the Transboundary EIA Was Organized in the Case of the BSGP**

#### *Arrangements at the Transboundary Level*

The basic features of the BSGP transboundary EIA were decided in a meeting on 19 April 2006 between the contact points from all the states under whose jurisdiction the planned pipeline would fall (Denmark, Finland, Germany, the Russian Federation and Sweden).<sup>34</sup> The officials decided that there are three categories of concerned states:

1. Four origin states and the Russian Federation, whose jurisdiction the planned pipeline will traverse<sup>35</sup> and whose national EIA and permitting procedures the company must undergo.
2. The nine Baltic Sea coastal states are deemed to be affected states.
3. Four sole affected states (Estonia, Latvia, Lithuania and Poland), whose jurisdiction the pipeline will not traverse and whose national EIA procedures and permitting procedures will not be triggered.

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“Affected Party” means the Contracting Party or Parties to this Convention likely to be affected by the transboundary impact of a proposed activity”.

<sup>34</sup> See p. 32 of the Project Information Document (Espoo scoping document) by the company, available at: [http://www.nord-stream.com/fileadmin/Dokumente/1\\_\\_PDF/2\\_\\_PIDs/PID\\_ENGLISH.pdf](http://www.nord-stream.com/fileadmin/Dokumente/1__PDF/2__PIDs/PID_ENGLISH.pdf) (last accessed 2.6.2009).

<sup>35</sup> The Russian Federation is not called an origin state because it is not a party to the Espoo Convention.

It bears emphasizing here how important this decision is from the legal perspective. By accepting the position of origin states, the four states and the Russian Federation—to the extent permitted by its legislation—committed themselves legally to all the obligations in the Espoo Convention *vis-à-vis* all nine affected states. Hence, each one of the four origin states and the Russian Federation opened its national EIA procedure to the eight other states and their public,<sup>36</sup> vastly increasing the level of complexity of organizing the transboundary procedure.

What might have been missing, then, was an EIA procedure that could examine the proposed activity in its entirety, not only each sector of the pipeline individually. This prompted another innovative move on the part of the concerned states: they decided to establish international Espoo contact-point meetings (international coordination meetings) for the duration of the BSGP transboundary EIA. The affected states and the company attended most of these meetings; sixteen have been held to date.<sup>37</sup> The main task of these meetings has been to ensure that the company makes an environmental impact statement (EIS) for the whole BSGP (hereinafter the Espoo Report), in addition to assessing the individual sectors on the basis of national EIA legislation. The international coordination meetings took it upon themselves to oversee that the minimum technical requirements of the Espoo Convention were met. These meetings also served other important purposes:

1. They performed the immensely necessary task of coordinating the way the five national EIA procedures functioned. Also important was the direct communication between the contact points and the company to ensure that the Espoo Report which the company was preparing met the technical requirements of the Espoo Convention.
2. One of the main challenges faced by the international coordination meetings related to how the sets of data from the four origin states and the Russian Federation could be harmonized. If national EIA systems are very close to each other, it is possible to conduct a joint EIA, for instance, by establishing a steering committee. In the present case, such a committee would have the task of overseeing how the company studied each sector of the pipeline and

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<sup>36</sup> This meant that, in principle, with this decision a large number of origin state-affected state legal relations were created, which were then governed by the Espoo Convention (in the case of the Russian Federation, to the extent permitted by its national legislation).

<sup>37</sup> See the dates and places of these meetings, available at: [http://www.nord-stream.com/fileadmin/Dokumente/Other\\_Publications/Nord\\_Stream\\_Espoo-meetings.pdf](http://www.nord-stream.com/fileadmin/Dokumente/Other_Publications/Nord_Stream_Espoo-meetings.pdf) (last accessed 2.6.2009). There have also been two expert meetings; the experts were designated by the affected states. See chapter 3 of the Espoo Report, available at: [http://www.nord-stream.com/fileadmin/Dokumente/eia\\_permitting/Chapter\\_03/Nord\\_Stream\\_Espoo\\_Report\\_English\\_Chapter\\_03.pdf](http://www.nord-stream.com/fileadmin/Dokumente/eia_permitting/Chapter_03/Nord_Stream_Espoo_Report_English_Chapter_03.pdf) (last accessed 2.6.2009).

the overall impacts of the pipeline. Yet, in the case of the BSGP, there was one non-party to the Espoo Convention, making a joint EIA practically impossible. The international coordination meetings were, however, able to push the company to compile the Espoo Report on the impacts of the entire pipeline system, an approach which achieved the dual goal of having the company produce data sets both for the entire pipeline and for each sector.

3. Another challenge related to how public participation was to be organized, given that each of the four origin states and The Russian Federation had committed itself to involving the public of the affected states on an equal footing with its own, as stipulated in Article 2 (6) of the Espoo Convention. The most important function played by the international coordination meetings was that they provided a forum that enabled the concerned states to agree that the international scoping document produced by the company, and the final Espoo Report, would be publicly displayed and opened for comment at the same time in all the nine countries. The various assessment documents the company prepared—culminating in the final Espoo Report—were either delivered via contact points to become part of the material in national EIA procedures in the four origin states and the Russian Federation, or forwarded to the contact points in the sole affected states, most of whom placed them on public display and made them available for comment. The four documents prepared by the company were translated into all nine languages; the two most important documents, the initial scoping document and the final Espoo Report, were also translated into English. One result of the international coordination was that some of the countries where national EIA does not contain a scoping stage nevertheless publicly displayed the international scoping document and organized opportunities to comment on it.<sup>38</sup>

The international coordination meetings were limited to the nine affected states and, by invitation, to the company. This caused some concern about the transparency of such meetings, which was conveyed in a note prepared by the Espoo Convention Secretariat in the part urging future guidance:

Increase the transparency of preparatory meetings between focal points of concerned Parties, e.g., by making meeting reports available to the public. This would allow all stakeholders to know how the EIA procedure for complex activities would be coordinated and, possibly, how to make comments.<sup>39</sup>

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<sup>38</sup> For an overview of how the Espoo process and domestic procedures have proceeded, see chapter 3 of the Espoo Report, available at: [http://www.nord-stream.com/fileadmin/Dokumente/eia\\_permitting/Chapter\\_03/Nord\\_Stream\\_Espoo\\_Report\\_English\\_Chapter\\_03.pdf](http://www.nord-stream.com/fileadmin/Dokumente/eia_permitting/Chapter_03/Nord_Stream_Espoo_Report_English_Chapter_03.pdf) (last accessed 2.6.2009).

<sup>39</sup> Note by the Secretariat, 58 (a.vi).

This is a commendable approach indeed. It would further legitimize the way in which projects on the scale of the BSGP are coordinated by increasing the transparency of international coordination meetings, yet at the same time keep them confined to a manageable number of authorities from the affected states.

Given the complexity of the EIA system thus created, it is useful to once more summarize the main elements of the procedure. First, it is imperative to differentiate between the two levels of EIA, which ultimately proceeded hand in hand: a) The company prepared the Espoo Report on the entire BSGP project, with the assessments making up the Report mainly supervised by the international coordination meetings of the Espoo contact points from each of the nine affected states; and b) The five national EIA procedures were conducted in which the respective sectors of the pipeline were assessed on the basis of national EIA legislation and the quality of the assessments was assured under the rules of each national system. The way in which these two levels were coordinated was and still is of vast importance.

Synchronizing the functioning of the two levels of EIA were the national Espoo contact points. They were in charge of making sure that the international assessment of the entire project fulfilled the minimum technical requirements of the Espoo Convention, supplying the assessment documents of this international EIA procedure as part of the scoping and assessment information of the respective national EIA procedures, and notifying the other affected states of the comments made in the respective national EIA procedures. Overall, the system proceeded in the following way:

1. The company prepared an international-level scoping document at the end of 2006 (Project Information Document),<sup>40</sup> identifying which issues and impacts should be examined in the assessments. This was delivered to all the countries of origin and the Russian Federation, as well as to the four sole affected states, and translated into all the region's languages. In order for all nine affected states and their public to participate in one or more of the national EIA procedures, the countries of origin and the Russian Federation sent a notification to all nine affected states. The five national EIA procedures were commenced at the same time so that the international scoping document could be included as material in those states where the national EIA contains a scoping stage with public participation.
2. The company prepared a mid-term study at the end of 2007 (Project Information. Status of Nord Stream Pipeline Route in the Baltic Sea),<sup>41</sup> explaining what kind of choices it had made with regard to the issues identified as

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<sup>40</sup> English version, November 2006, available at: [http://www.nord-stream.com/fileadmin/Dokumente/1\\_\\_PDF/2\\_\\_PIDS/PID\\_ENGLISH.pdf](http://www.nord-stream.com/fileadmin/Dokumente/1__PDF/2__PIDS/PID_ENGLISH.pdf) (last accessed 2.6.2009).

<sup>41</sup> The document is on file with the authors.

meriting study. This was put on public display and opened for comment in all nine affected states.

3. The company prepared a specific routing document at the end of 2008 (the Status of the Nord Stream Pipeline Route in Denmark and in Germany)<sup>42</sup> concerning only one specific sector of the BSGP. This was again sent to all nine affected states, but was subjected to detailed scrutiny in Denmark and Germany.
4. The company, after approval from an international coordination meeting, submitted the Espoo Report, which was put on public display and opened for comment at approximately the same time in all nine affected states (at the beginning of March 2009). The completion of this document triggered all five national EIA procedures, as all of them contain a stage where the public and officials can comment on the final EIS. From the perspective of the national EIA procedure, the Espoo Report became part of the overall assessment material produced under the national EIA procedure. Hence, in principle, all nine affected states and their public could, by participating in one of the national EIA procedures, receive and comment on a) information on the entire project and b) the specific information produced on the sector under the jurisdiction of that state.

### **The Transboundary EIA as Linked to the Finnish EIA Procedure**

As a party of origin, Finland notified the eight other affected states of the BSGP project in November 2006. In the notification letter,<sup>43</sup> Finland requested that the affected countries indicate whether they intended to participate in the EIA procedure and provide comments concerning the scope of the assessment of the environmental impacts on their EEZ and territory. In addition, the affected countries were asked to submit the comments received from their public. The notification contained a scoping document prepared by the company entitled “Project Information Document”. Concurrently, Denmark, Germany, the Russian Federation and Sweden notified Finland of the project and offered Finland the opportunity to participate in their EIA procedures.<sup>44</sup> The four parties of origin and the Russian Federation had agreed to send out identical notification letters to all affected parties.

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<sup>42</sup> *Ibid.*

<sup>43</sup> Finland sent the notification letter, dated 14 November 2006, to all eight other affected states, available at: <http://www.ymparisto.fi/download.asp?contentid=76086&lan=fi> (last accessed 2.6.2009).

<sup>44</sup> Finland responded on 16 February 2007, indicating its willingness to participate in these countries’ respective EIA processes, available at: <http://www.ymparisto.fi/download.asp?contentid=66885&lan=fi> (last accessed 2.6.2009). All the affected countries informed Finland that they would participate in the Finnish EIA procedure.

At the same time, the national scoping document (assessment program<sup>45</sup>) required by the Finnish EIA legislation was submitted by the company to the Uusimaa Regional Environmental Centre (UREC), which acts as the liaison authority in the case. The liaison authority, a distinguishing feature of the Finnish EIA system compared to those in other jurisdictions, coordinates the EIA process from the very beginning and plays a central role in ensuring the quality of impact studies and public participation in the EIA. The crucial role of the liaison authority in the Finnish EIA system has been confirmed by court rulings. For example, the Finnish Supreme Administrative Court has given significant weight to the opinion of the liaison authority when reviewing the adequacy of environmental impact statements.<sup>46</sup>

The project information document and the assessment program were put on public display and made available for comment in Finland from 27 November 2006 to 26 January 2007. A total of 50 comments were received from the public authorities and the public dealing with the project plan as a whole and, in particular, with the sector set to traverse the Finnish EEZ. After the commenting period, the liaison authority submitted its statement on the assessment program along with a summary of other statements and opinions.<sup>47</sup> In its statement, the liaison authority pointed out several salient considerations when preparing the EIS under the Finnish EIA legislation. It also took the responses received from Denmark, Estonia, Germany, Latvia, Lithuania, Poland and Sweden into consideration when preparing the statement.<sup>48</sup>

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<sup>45</sup> The assessment program describes the strategy for the assessment of environmental impacts and public participation and it must also include, on a sufficient scale, alternatives for implementing the project which are studied during the EIA process. Specific content requirements for assessment programs are laid down in Section 9 of the Finnish EIA Decree (713/2006).

<sup>46</sup> For an extensive case law analysis from the perspective of EIA quality, see I. Pölönen, "Ympäristövaikutusten arviointimenettely, Tutkimus YVA-menettelyn oikeudellisesta asemasta ja kehittämistarpeista ympäristöllisen vaikuttavuuden näkökulmasta" (Environmental Impact Assessment Procedure, The Legal Status of EIA and Improvement Needs from an Environmental Effectiveness Perspective) (2007) *Suomalaisen Lakimiesyhdistyksen julkaisuja*, A-sarja N:o 280. Jyväskylä, 181–186 and 192–204; I. Pölönen & T. Koivurova, "Rajat ylittävä ympäristövaikutusten arviointi—vaihtoehtotarkastelun riittävyys ja suhde lupapäätöksentekoon" (Environmental Impact Assessment in a Transboundary Context: Standards for Adequate Study of Alternatives and Their Relationship to Decision-making) (2009) 3 *Lakimies* 371–393.

<sup>47</sup> Statement (27.2.2007, UUS-2006-R32–531) of the Uusimaa Regional Environmental Centre on the environmental impact assessment programme, Nord Stream, the Russian Federation-Germany offshore gas pipeline in the Finnish exclusive economic zone. Unofficial translation, available at: <http://www.ymparisto.fi/default.asp?contentid=320766&lan=EN> (last accessed 2.6.2009).

<sup>48</sup> Statement of the Uusimaa Regional Environmental Centre (27.2.2007, UUS-2006-R32-531), p. 16.

UREC's statement—together with the summary of other comments on the scoping document and the Ministry of the Environment (MoE)'s own opinion—was forwarded by the MoE to Denmark, Germany, the Russian Federation and Sweden in the form of an additional answer to the notification.<sup>49</sup> In this answer, the MoE took up issues that had been raised in the comments nationally and suggested what the parties of origin and the Russian Federation should take up in the negotiations during the assessment process.<sup>50</sup> Finland's response to the Russian Federation's notification contained special comments on the assessment in the eastern part of the Gulf of Finland.<sup>51</sup>

There was fairly heavy criticism from the MoE in its responses to the other origin states and the Russian Federation. The assessment program was said to be too general in nature, the timetable for implementing it extremely tight, and the evaluation lacking in detail. In addition, Finland argued that the methods used and the bases of knowledge were not presented in nearly enough detail and that some research findings relied on in the document were out of date and might thus be inaccurate. Finland also urged the company to examine other alternatives for the routing of the pipeline and pointed out some important impacts needing further study.<sup>52</sup> The Finnish notification contained an annex prepared by the Finnish Institute of Marine Research that would serve as a monitoring program.<sup>53</sup>

It is good to keep in mind that at this early stage of the national EIA procedures—especially those that contain a scoping phase, such as Finland's—

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<sup>49</sup> According to the Finnish EIA Act (468/1994), the Ministry of the Environment (MoE) has a duty to coordinate Finland's reply to the notification.

<sup>50</sup> The additional answer by the MoE is available at: <http://www.ymparisto.fi/download.asp?contentid=63992&lan=en> (last accessed 2.6.2009).

<sup>51</sup> Additional answer to the Russian Federation, which raises special concerns Finland has with the Russian Federation (Assessment of impacts in the Russian Federation that concern Finland), available at: <http://www.ymparisto.fi/download.asp?contentid=66886&lan=fi> (last accessed 2.6.2009).

<sup>52</sup> For instance, seabed sediments, remains of weapons and munitions, bird life, impact on fish and fishing, extending the Natura 2000 network to the EEZ and shipwrecks. See *supra* note 43. Finland also submitted that the developer may want to consider setting up an international advisory board to act as an independent discussion forum for the project. Another proposal was for the developer to organize joint workshops with NGOs that had shown interest in the transboundary EIA procedure. Finland suggested various ways in which the parties of origin and the Russian Federation could harmonize their respective national EIA procedures, for example: in examining the alternatives, aiming for the same level of precision in the impact assessments, coming up with a monitoring program and disseminating information and data to authorities, researchers and the general public.

<sup>53</sup> Available at: <http://www.ymparisto.fi/download.asp?contentid=66889&lan=fi> (last accessed 2.6.2009).

the responsible authorities could have asked the company to evaluate other alternatives for implementing the section of the BSGP that was under the jurisdiction of each coastal state. This applies in particular to Finland, given that the liaison authority, UREC, was obligated by law to request the company to analyze all routing alternatives, including land-based ones. However, UREC did not explicitly require such alternatives to be studied and presented in the EIS. Instead, it called for more detailed explanations of why the land-based alternatives were excluded from the EIA. This lack of explicit scoping advice to the company on the part of UREC had a distinct effect on the final EIS review, as the Finnish EIA legislation is built on the idea that the alternatives for the proposed activity should be outlined already in the scoping phase of the assessment.<sup>54</sup> Indeed, after this initial decision by UREC not to ask for a more extensive study of alternatives in the scoping phase, it becomes difficult to argue subsequently in the EIS phase that the assessment is insufficient when it comes to land-based alternatives.

The second document produced by the company—Project Information. Status of the Nord Stream Pipeline Route in the Baltic Sea (October 2007)<sup>55</sup>—described the on-going research and current situation on the basis of comments received. Finland displayed this document publicly and the MoE received 24 comments from both the public and the authorities. Again, the MoE sent a notification letter on 18 January 2008, to the other affected states, airing many of its concerns on how the impact assessments were carried out.<sup>56</sup>

Finland stated in its notification that from the beginning of the trans-boundary EIA procedure, it had had concerns about how the company studies alternatives. Two specific points related to the routing near the Russian Federation's island of Gogland and the routing in the Gulf of Finland. The company had informed Finland on 13 December 2007—after consultation with the Russian Federation's authorities—that it did not intend to study the

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<sup>54</sup> Under the EIA Act (Section 10), the developer is required to “investigate the effects of the project and its various alternatives on the basis of the assessment programme and coordinating authority statement”.

<sup>55</sup> The third document received in Finland was entitled “the Status of the Nord Stream Pipeline Route in Denmark and in Germany” (October 2008). This document, which studied the alternative routings in Denmark and Germany, was also put on public display in Finland and a number of comments were received. These were only assembled by the MoE and notified to the other affected states. It is important that the MoE points out—in a letter dated 22 January 2009—that because the data in the document are still very general, it can only properly review the adequacy of the EIA documentation when the EIS is completed. Available at: <http://www.ymparisto.fi/download.asp?contentid=97436&lan=fi> (last accessed 2.6.2009), p. 1.

<sup>56</sup> Available at: <http://www.ymparisto.fi/download.asp?contentid=79195&lan=fi> (last accessed 2.6.2009).

alternative route south of Gogland.<sup>57</sup> According to the Finnish view, the decision by the company cannot be justified, especially without any supporting information.<sup>58</sup>

This view is well reasoned from the viewpoint of the Espoo Convention's objective of preventing and minimizing negative environmental impacts. The purpose of the Espoo Convention is to prompt the states concerned to find the best possible alternative from the environmental perspective by identifying various alternatives for implementing the proposed activity. However, the Espoo Convention leaves it for the country of origin to determine which alternatives within its jurisdiction are to be examined. Consideration of reasonable alternatives, including the no-action alternative, is stipulated in Article 4(1) and Appendix II of the Espoo Convention with the qualification "where appropriate". The implementation of this requirement seems to be thus largely left for the contracting states to decide. It can reasonably be argued that the Espoo Convention does not require examination of alternatives beyond the jurisdiction of the country of origin.<sup>59</sup> Even though Finland can try to influence the Russian Federation and the company to examine other alternatives, in the end it will be the Russian Federation (in preparing its national EIS) and the company (in preparing the final Espoo Report) that determine, within the jurisdiction of the Russian Federation, which alternatives are studied.

The problem in the Gulf of Finland was that the proposed route follows very closely the outermost sections of the Finnish EEZ without any sound justification from the perspective of environmental protection. In fact, according to the status report, the company had performed desk studies of the route which indicated that the sea bed was deeper and more even on the Estonian side of the Gulf—in Estonia's EEZ—and thus would seem to point to more favourable pipe-laying conditions.<sup>60</sup> However, the developer's application for survey permits was rejected by the Estonian Ministry for Foreign

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<sup>57</sup> This alternative is located in the Russian Federation's territorial seas. However, the southern alternative also creates a small deviation for the pipeline route in the Finnish EEZ. Environmental Impact Assessment Report (EEZ of Finland), p. 365.

<sup>58</sup> *Ibid.*

<sup>59</sup> On the requirement to consider project alternatives under the Espoo Convention, see P. Birnie, A. Boyle, *International Law and the Environment*, 2nd ed, Oxford: Oxford University Press (2002) at 135; Craik, *op. cit.*, *supra* note 3, at 139–140, 158; Pölönen & Koivurova, *op. cit.*, *supra* note 46, at 382, 383.

<sup>60</sup> Available at: <http://www.ymparisto.fi/download.asp?contentid=79195&lan=fi> (last accessed 2.6.2009), p. 2.

Affairs, and it thus was impossible in practise for the company to study the alternatives on the Estonian side of the Gulf.<sup>61</sup>

The final EIS—the Espoo Report—was to be completed by the company in January 2009. However, in their meeting on 15–16 December 2008, the Espoo contact points indicated that this timeline would not be met because there were still too many gaps and shortcomings of knowledge in the document.<sup>62</sup> Finally, in their 16th meeting, on 13 February 2009, the representatives of the nine Baltic Sea littoral states agreed that the Espoo Report as it stands fulfils the minimum technical requirements imposed by the Espoo Convention.

### **Comments on the Espoo Report**

The final Espoo Report is clearly an improvement over the previous versions. One good example is how the report addresses the concerns Finland had about the way the mid-term report by the company (October 2007) dealt with the alternative southern routing via the island of Gogland, discussed above. In the final report, this request was taken into consideration. The southern alternative was taken up, even though the investigations were not as thorough as those dealing with the route north of Gogland.<sup>63</sup> This indicates that the active role of the contact points of the concerned states had clear impacts on the content of the EIA report.

Even though the contact points accepted that the company had now fulfilled the minimum technical requirements of the Espoo Convention with its Espoo Report, they also stressed that the quality of the information, the viability of the conclusions and the possible need for further studies would be examined via the national EIA procedures. This phase started at the beginning of March 2009 in all the origin states and the Russian Federation. Finland reported that, in keeping with its national EIA legislation, the EIS would be put on public display and opened to all affected states and their public for comment. Several public hearings would be organized as well.<sup>64</sup>

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<sup>61</sup> Tallinn, 21 September 2007, no. 60 (Refusal to give consent to conduct marine research), available at: [http://www.valitsus.ee/brf/failid/otsus\\_21\\_09\\_2007\\_eng.pdf](http://www.valitsus.ee/brf/failid/otsus_21_09_2007_eng.pdf) (last accessed 2.6.2009).

<sup>62</sup> Press release, only in Finnish, available at: <http://www.ymparisto.fi/default.asp?contentid=307254&clan=fi&clan=fi> (last accessed 2.6.2009).

<sup>63</sup> See pp. 321–322 of the Espoo Report.

<sup>64</sup> Press release, only in Finnish, available at: <http://www.ymparisto.fi/default.asp?contentid=313477&clan=fi> (last accessed 2.6.2009).

After the completion of the Espoo Report, the international and national aspects of the EIA split into two from the Finnish perspective. The MoE was in charge of commenting on the Report, which it did on 8 June 2009. UREC—as liaison authority in the Finnish national EIA procedure—is obligated by the national EIA legislation to give an authoritative statement on the quality of the assessment material submitted by the company. This took place on 2 July 2009.<sup>65</sup> The statement was attached to the final permit application. UREC focused its comments on the specific assessments related to the environmental impacts of the pipeline crossing the Finnish EEZ; the MoE's comments embrace the entire Espoo Report and thus all transboundary impacts likely to cause harm to the Finnish environment, livelihoods, and the Baltic Sea environment in general.

In its comments to other points of contact and the Russian Federation on 8 June 2009,<sup>66</sup> the MoE—on the basis of comments received from the public (16), authorities and research institutes (70)—expressed its concerns as to the quality of the Espoo Report in some aspects, as well as possible ways to remedy some of the shortcomings. The MoE requested more specific information from two of Finland's neighbour states, as well as from Denmark and the company.

The most problematic sector of the pipeline from the Finnish viewpoint is that which falls under the Russian Federation's jurisdiction, given that, as a non-party, the Russian Federation has only agreed to apply the Espoo Convention to the extent permitted by its national legislation. While recognizing this, Finland still requested that the Russian Federation provide specific assessment information, which will be made available to Finns, and reserve an opportunity for consultation as stipulated in Article 5 of the Espoo Convention. More specifically, Finland was still dissatisfied with the way the Espoo Report describes the alternative route south of Gogland, even though the company did carry out additional studies on the matter. Finland asked for “a more thorough description of the basis on which the south of Gogland alternative was developed and a more detailed comparison of the two routes”,<sup>67</sup> and wants to discuss this issue in the consultations.

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<sup>65</sup> See further *infra* note 74.

<sup>66</sup> Comment released on 8 June 2009, “Consultation in accordance with Articles 4 and 5 of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) for the Nord Stream Gas Pipeline” (dated 5.6.2009), available at: <http://www.ymparisto.fi/download.asp?contentid=104223&lan=fi> (last accessed 10.6.2009).

<sup>67</sup> *Ibid.*, 4. Finland is also concerned about the proposed detonations of munitions close to its border and requests further data—both from the Russian Federation and the company—on this, as well as on the possible mitigation measures available.

There are concerns in Finland that the pipeline construction in the Russian Federation and Swedish sectors would cause adverse impacts on Finland. According to the MoE, general information has been provided on this in the Report, but there are no specific data on transboundary impacts on Finland, and the MoE has now requested these from Sweden and the Russian Federation.<sup>68</sup> It has also asked the company to provide more specific data on the dispersal of sediments from the Russian Federation's and Swedish sectors of the planned pipeline, given that "cumulative transboundary impacts from constructing two pipelines with repeated seabed interventions should be addressed more specifically".<sup>69</sup>

There are several shortcomings that Finland would like Nord Stream AG to address or remedy. For example, Finland has requested the identification of possible restricted fishing areas and an assessment of the losses and adverse socio-economic impacts they and the pipeline in general will have on fisheries,<sup>70</sup> and points out that the forecasts of maritime transport used in the Espoo Report are inadequate.<sup>71</sup> The country also takes up the important issue of decommissioning the pipeline after the end of its life-cycle, urging the company to provide further information on comparing the environmental consequences of the alternatives of removing the pipeline or leaving it in place.<sup>72</sup> In addition, Finland suggests that the international coordination between all the Baltic Sea coastal states continue in the form of a monitoring program by exercising the option to commence post-project analysis provided for in Article 7 of the Espoo Convention.<sup>73</sup>

The Finnish national EIA procedure runs parallel to the international one. As stated above, in the next stage UREC gave its statement on 2 July 2009. As a liaison authority, UREC is obligated under national law to evaluate

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<sup>68</sup> *Ibid.*, 3. "With regard to the above impacts, Finland requests Sweden and the Russian Federation to provide information that is specific to the border locations, including information about the construction activities taking place in the vicinity of the border, the baseline data of the environment, an impact assessment of these areas, and individual mitigation measures".

<sup>69</sup> *Ibid.*, 4. Finland is also concerned about the planned routing of the pipeline in the Swedish and Danish sectors as regards the dispersal of wartime dumping sites of chemical weapons, in particular the worst-case scenario that the dispersal of such chemicals might accumulate in marine populations and thus have a very wide area of impact across the ecosystems. Therefore, Finland has asked Sweden and Denmark—in the case that these routes are chosen—to carry out "proper risk assessments and management plans, including a description of transboundary impacts". *Ibid.*, 6.

<sup>70</sup> *Ibid.*, 5.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*, 7.

<sup>73</sup> *Ibid.*, 7.

whether the EIS prepared by the company contains an adequate level of information from the viewpoint of Finnish national EIA legislation. UREC required additional studies, given the concerns it has had with the assessments prepared by the company thus far, and in particular the company's scoping document. The Finnish EIA will be completed when the liaison authority submits its statement on the quality of the EIS to the developer.<sup>74</sup> After the EIA procedure, the EIS and the opinion issued by UREC will be attached to the permit applications, and the process will enter the stage of making the final decisions. In the case of the BSGP, the final decisions will be first made by the Finnish Government<sup>75</sup> and then by the Western Finland Environmental Permit Authority.<sup>76</sup>

### **How Should the BSGP Transboundary EIA Have Been Done?**

From the legal perspective, there is no doubt that the parties to the Espoo Convention and the Russian Federation performed their duties better than the minimum requirements of the Espoo Convention stipulate. The Espoo Convention leaves it for each state to determine whether a proposed activity is likely to cause significant adverse transboundary impacts and, if so, on which countries. As noted above, this could have resulted in a “fragmented” approach to the transboundary EIA of the BSGP, with one or only some states notifying this or that state. This fragmented approach could have indeed

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<sup>74</sup> The UREC issued its statement on 2 July 2009. It stated that the EIS—as it concerns the part of the pipeline traversing the Finnish EEZ—is adequate, although it also requested clarifications and explanations from the company with respect to several issues to be submitted to the permit decision-maker, for instance, more specific risk assessment, in particular on how the pipeline relates to increasing vessel traffic in the Gulf of Finland; detailed assessment of the impacts on the fisheries over the whole life cycle of the proposed pipeline, including impacts on cross-border fisheries; and more specific monitoring programmes that need to be done together with the officials and expert organisations (altogether 15 clarification requests). Available at: <http://www.ymparisto.fi/download.asp?contentid=105588&lan=fi> (last accessed 10.12.2009).

<sup>75</sup> This will be done on the basis of the Act on EEZ (1058/2004). The Finnish Government made this decision on 5 November 2009. It granted permission to the developer on the basis of the Act on EEZ, but subjected it to 11 conditions altogether, e.g., that the project must be implemented in accordance with the principle of precaution, paying particular attention to the fragility and vulnerability of the Baltic Sea. The Finnish Government expects that the developer can satisfy the requirements of the Finnish Water Act in these respects. The decision is to be taken in the near future by the Western Finland Environmental Permit Authority. See the decision in Finnish by the Finnish Government, available at: [http://www.tem.fi/files/25067/307\\_VN\\_NordStream\\_suostumus\\_051109.pdf](http://www.tem.fi/files/25067/307_VN_NordStream_suostumus_051109.pdf) (last accessed 10.12.2009).

<sup>76</sup> This will be done on the basis of the Water Act (264/1961).

been chosen, for if one looks only at the likely transboundary impacts, it is clear that in some sectors the pipeline would cause only minor harm to some of the littoral states.

Yet, the contracting parties abandoned this “minimalist” reading of the Espoo Convention from the beginning in favour of a “community” approach, making it possible to examine the environmental impacts of the BSGP in their totality, not only its impacts on each sector separately. In addition, the way they decided to apply the Espoo Convention allowed all individuals, associations and officials to comment via various fora on the stages of assessment of the entire BSGP project and each individual sector.

It should not be forgotten, however, that from the beginning of the transboundary EIA procedure, criticism was heard from some of the affected states and, from, for example, the European Parliament.<sup>77</sup> The main focus of this criticism was the fact that the alternatives for the proposed activity (the BSGP) were not studied in their totality. Some of the states—especially the solely affected states—argued that the on-shore alternatives for routing the pipeline should have been studied as well,<sup>78</sup> and some, like Finland, argued that in general the alternatives should have been investigated in greater depth.<sup>79</sup>

Yet, the main criticism came from the Espoo Convention Secretariat. In the discussion paper it prepared on how complex activities should be better processed in the Espoo regime, there is veiled criticism of the way the BSGP transboundary EIA was carried out.<sup>80</sup> Throughout the paper the Espoo Convention Secretariat uses the example of a gas pipeline crossing several jurisdictions (“[a]n example of the strategic dimension for a large-scale energy project concerning several countries might be the routing of a gas pipeline”),<sup>81</sup> while talking of the challenges faced by “complex” activities.

The Espoo Convention Secretariat’s discussion paper advances a rather different view on how the Espoo Convention should address proposed activities such as the BSGP. In its consideration, a strategic element is prevalent in

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<sup>77</sup> See *supra* note 19.

<sup>78</sup> See, e.g., Estonia’s response to the company’s mid-term (October 2007) report (Status of the Nord Stream Pipeline Route in the Baltic Sea), No. 13-3-1/07/57953, 17 January 2008, available at: <http://www.ymparisto.fi/download.asp?contentid=80150&lan=fi> (last accessed 2.6.2009) and Poland’s response, DOOS-082/8412–3/08/IS, Warsaw, 18 January 2008, available at: <http://www.ymparisto.fi/download.asp?contentid=80161&lan=fi> (last accessed 2.6.2009).

<sup>79</sup> *Ibid.*, available at: <http://www.ymparisto.fi/download.asp?contentid=79195&lan=fi> (last accessed 2.6.2009).

<sup>80</sup> Application of the Convention to complex activities, note by the Secretariat (ECE/MP.EIA/WG.1/2009/4, 2 March 2009, *supra* note 14).

<sup>81</sup> *Ibid.*, para. 13.

cases which it terms “complex activities”, and many parts of the note clearly describe features of the BSGP. The paper advances a very broad idea as to what types of issues should be taken up in assessment where a strategic element is prevalent:

Geopolitical issues, economic interests and relations between Parties could influence the pipeline route, thus diminishing the alternatives considered in the EIA. In addition, the pipeline project could significantly influence the regional energy market, affecting countries’ energy and climate policies and strategies. Finally, a large energy project could also make regional integration more difficult if there is no consensus among affected Parties. All these aspects form parts of the project’s strategic dimension.<sup>82</sup>

For the Espoo Convention Secretariat, ideally, the strategic dimension of such activities would be considered in the Strategic Environmental Assessment (SEA) of the plans, programs or policies (PPP),<sup>83</sup> but “in practice, a complex activity might not be planned on the basis of a PPP, or if it is, the PPP might not be subject to SEA. Complex projects might arise from an informal or non-statutory process, i.e., not following an established planning scheme of PPP”.<sup>84</sup> The solution to addressing the strategic dimension would be to broach it at the EIA stage: “the [Espoo][Convention does not stop Parties from assessing strategic issues within EIA”.<sup>85</sup>

The discussion paper was an agenda item for the meeting of one of the sub-bodies of the Espoo Convention, the Working Group on EIA that met on 12 May 2009.<sup>86</sup> The EIA unit of the European Commission organized a special seminar related to “complex activities” as part of the Working Group’s meeting, although the seminar focused almost exclusively on how the BSGP

<sup>82</sup> *Ibid.*

<sup>83</sup> The most important international convention here is the 2003 Protocol on Strategic Environmental Assessment (SEA Protocol; 21 May 2003, Kiev, Ukraine, available at: [http://untreaty.un.org/English/notpubl/27\\_4bE.pdf](http://untreaty.un.org/English/notpubl/27_4bE.pdf) (last accessed 24.1.2010)) to the Convention on Environmental Impact Assessment in a Transboundary Context, which, even though not yet in force, will likely enter into force soon, given that out of the sixteen instruments of ratification (which will trigger the process for its entry into force according to Article 24), 13 have already been deposited (European Community approval cannot be counted for this purpose). Available at: <http://www.unece.org/env/eia/documents/legaltexts/protocolenglish.pdf> (last accessed 10.12.2009). For a comprehensive study, see S. Marsden, *Strategic Environmental Assessment In International & European Law: A Practitioner’s Guide* (2008) London: Earthscan Publications.

<sup>84</sup> *Ibid.*, para. 14.

<sup>85</sup> *Ibid.*, para. 16.

<sup>86</sup> The provisional agenda is available at: <http://www.unece.org/env/documents/2009/eia/wg.1/ece.mp.eia.wg.1.2009.1.e.pdf> (last accessed 2.6.2009).

transboundary EIA was organized. The seminar started with a presentation by the origin states' contact points on why and how they organized the BSGP transboundary EIA as they did. Overall, the civil servants felt that even though they encountered challenges throughout this transboundary EIA—one unprecedented in scale, complexity and public attention—they had succeeded in organizing it in a sound manner.<sup>87</sup> After the seminar part of the Working Group's meeting, the Espoo Convention Secretariat proposed that a task-force be designated to examine guidance for these complex activities, and invited countries to join this group.<sup>88</sup> In the ensuing discussion, two starkly contrasting approaches to how the transboundary EIA of projects like the BSGP should be arranged were aired: the one apparent in the Espoo Convention Secretariat's discussion paper and the one presented by the origin states of the BSGP transboundary EIA.

The German delegate—who has been one of the key persons in organizing the transboundary EIA of the BSGP—emphasized that if one raises issues related to the impacts of proposed activities on the geopolitics of the region and its energy and climate policies, this will be close to opening Pandora's Box.<sup>89</sup> In his view, a transboundary EIA procedure is primarily an administrative process and therefore the only way to carry out a manageable transboundary EIA is to focus on environmental issues, as was done in the BSGP transboundary EIA. He also expressed the view that an EIA is an environmental tool to improve decision-making processes, and that the parties involved in the BSGP project took great care to avoid an in-depth discussion of political issues while defining the procedural steps of the transboundary EIA. He asked how it would be possible to conduct an Espoo process appropriately if the impacts of proposed activities on a region's geopolitics and/or national energy and climate policies were also to be addressed during the procedure, given that it was already difficult enough to coordinate the BSGP transboundary EIA with only environmental issues on the table.<sup>90</sup>

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<sup>87</sup> One of the present authors (T.K.) was invited to present in this seminar; Observations by Timo Koivurova during the seminar in Geneva on 12 May 2009.

<sup>88</sup> See *supra* note 15.

<sup>89</sup> For a useful illustration as to how many ways there are to perceive the Baltic Sea Gas Pipeline project, see, e.g., R. L. Larsson, *Nord Stream, Sweden and Baltic Sea Security* FOI-R--2251—SE, Base data report, March 2007, Defence Analysis. Available at: <http://lsa.umich.edu/UMICH/ceseuc/Home/ACADEMICS/Research%20Projects/Energy%20Security%20in%20Europe%20and%20Eurasia/Nord%20Stream,%20Sweden%20and%20Baltic%20Sea%20Security.pdf> (last accessed 10.6.2009).

<sup>90</sup> Observations by Timo Koivurova during the Working Group on EIA meeting on 12 June 2009. Confirmation received from Matthias Sauer from the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety Division as to the correctness of the observation (on 3 June 2009).

These two perspectives on the way the Espoo Convention should have been applied to the BSGP are fairly contradictory as to how ambitious an approach the Espoo regime should take in assessing such projects. The Espoo Convention Secretariat's discussion paper contains interesting, and to some extent realistic, suggestions. In the final part of that paper, where the Espoo Convention Secretariat suggests issues for future guidance, the following is recommended:

(b) Regarding methodology:

(i) Define how to proceed when the strategic dimension of a complex activity was not assessed in a previous SEA, and give guidance on how to incorporate a formal analysis of strategic issues at the EIA stage. This would allow formal and transparent discussion of all important early decisions, such as the project's final aim and the means to achieve it, and for public participation at early stages of decision-making.<sup>91</sup>

From the legal viewpoint, this is easier said than done. Even if it can be argued that “the Convention does not stop Parties from assessing strategic issues within EIA”,<sup>92</sup> it should be made clear that in the case of the BSGP, the parties cannot legally obligate the company to assess strategic issues. A distinction must be made here between what the domestic officials are mandated to do in their national EIA procedures and what the contact points can require from the company in international coordination meetings on how to apply the Espoo Convention. In some national EIA systems the officials can in fact require a private company to examine more strategic issues in an EIA, although this is certainly the exception rather than the rule. Yet, the power of the contact points of the Espoo Convention does not extend to requiring Nord Stream AG to examine geopolitical, energy and climate policy issues as part of a transboundary EIA.

To be sure, nothing would have prevented the four origin states and the Russian Federation at their meeting with the company in April 2006 from proposing to the company that it examine all these issues. But it is equally certain that the company had no legal obligation whatsoever to conduct such an extensive transboundary EIA. The contact points of the Espoo Convention cannot dictate how the national EIA procedures, which are all carried out on the basis of national EIA legislation, should be conducted. In this very specific respect, the parties cannot assess strategic issues within EIA, and they have no bargaining power *vis-à-vis* the company by which they might

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<sup>91</sup> *Ibid.*, para. 58 (b.i.).

<sup>92</sup> *Ibid.*, para. 16.

induce it to conduct such studies. From the company's perspective, it would seem counterproductive to voluntarily commit itself to assessing the activities' potential impacts on the region's geopolitical situation or climate and energy policies. Why would it want to raise issues that would broaden the concerns associated with the BSGP?

But perhaps even more crucially, what would be the reason for addressing these broad concerns, such as the activities' impacts on geopolitics, energy and climate policy, if these cannot be included in the working of the national permitting procedures linked to the EIA? The permitting procedures do not allow security or like considerations to be included as part of the reasoning for whether a permit is granted for the construction of a gas pipeline and, if so, under what conditions.

### **Concluding Remarks**

It seems fair to argue that the way in which the responsible authorities organized the assessment of the BSGP was as ideal a way as the Espoo Convention could be applied in the specific circumstances of the case. Much depends in such cases on the willingness of the private company to conform to what the contact points of the Espoo Convention want it to do. If the company does not behave as required by international coordination meetings, this may have a negative influence on the decisions made by the national authorities when applying the national EIA and permitting procedures and may persuade the company to adhere to the soft guidance from these meetings. Such a consideration would leave at least some room for attempting to provide recommendations for “complex activities”—a job now undertaken by the task force established by the Working-Group on EIA—and for using the lessons learned from the BSGP transboundary EIA for this work.<sup>93</sup>

At least some lessons emerge when studying the BSGP transboundary EIA. As argued above, the BSGP establishes an important and qualitative “precedent” for future transboundary EIAs concerning large-scale multi-jurisdictional proposed activities. After the BSGP transboundary EIA, it is difficult for any contracting party to the Espoo Convention to avoid establishing a well-structured international coordination modelled on the procedure pioneered by the littoral states of the Baltic Sea, in particular the four origin states and the Russian Federation. The origin states and the Russian Federation chose to adopt a “community” approach to transboundary EIA, an ideal

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<sup>93</sup> See *supra* note 17.

way to adapt the Espoo Convention to such a challenging project. Even though the BSGP transboundary EIA was conducted in an innovative manner, this does not mean that it was executed perfectly, a realization that prompts suggestions on how to improve transboundary EIAs for large-scale multi-jurisdictional activities.<sup>94</sup>

The present authors consider that the Espoo Convention Secretariat's discussion paper brings out interesting suggestions for future guidance, especially the possibility of including strategic elements in large-scale transboundary EIAs. Yet, it does seem too much to try to include geopolitical scenarios and impacts on a region's climate and energy policy as part of transboundary EIA. A more viable approach would be to emphasize those issues that are already part of transboundary EIA, in particular the identification and rigorous comparison of alternatives (including zero action). Applied to the BSGP transboundary EIA, the origin states and the Russian Federation could have asked the company at their meeting in April 2006 to make a broader international study and comparison of alternatives between land-based and sea-based routing alternatives.

Another lesson relates to harmonization of the data sets produced by national EIA procedures. As was discussed above, because of the differences in the national EIA procedures between the countries of origin and the Russian Federation, it was not possible to harmonize the way the procedures functioned, but only their timing. Yet, if large-scale multi-jurisdictional projects are planned that fall within the jurisdiction of countries with comparable national EIA procedures, it should also be possible to embark on more ambitious harmonization as regards the data sets produced by these procedures. This could take the form of an agreement between the origin states on the methods to be used in various assessments or on which issues need to be studied. If the national EIA procedures are very similar, it might even be possible to carry out a joint EIS, ideally using the strictest national standards to be found among the origin states as the basis for the quality requirements for the joint EIS. If an international steering committee could see to it that only one EIS is produced for the entire multi-jurisdictional proposed activity, it would certainly increase the credibility of the assessment results, especially if these are produced using the strictest of national standards available.

Overall, the BSGP transboundary EIA should be seen as a case where the Espoo regime functioned well, even though the Espoo Convention was not originally geared to these types of situations. The origin states and the Rus-

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<sup>94</sup> For interesting suggestions, see B. Flyvberg, "Policy and Planning for Large-Infrastructure Projects: Problems, Causes, Cures" (2007) 34 *Environment and Planning B: Planning and Design* (EPB) 578–597.

sian Federation opted from the beginning for a “community” approach, enabling all the littoral states of the Baltic Sea and their public to influence the assessments made on the national and international levels of the environmental impacts of the BSGP. Even though critical comments have been voiced regarding how the BSGP transboundary EIA was organized, it will likely serve as an important precedent for future large-scale projects. The case has also prompted important discussions about the lessons to be learned from the BSGP which could be used to strengthen the regime over the long term. Some of these have been presented above.

The Espoo Convention clearly constitutes a very dynamic international environmental treaty regime, one capable of adjusting to new circumstances. This has been clearly demonstrated in the case of the BSGP transboundary EIA, where the various participants in the regime started to think about how to better regulate these “complex activities” or how transboundary EIAs, such as that for the BSGP, require sub-regional normative development within the regime, a development that has been on-going for some time.<sup>95</sup>

The fact that there are clear conflicts between the various actors in the regime can be seen as a negative aspect. One such conflict was played out in the meeting of the Working Group on EIA, where the Espoo Convention Secretariat provided a discussion paper that advanced ideas that were clearly not shared by the parties who had organized the BSGP transboundary EIA. Yet, this can be seen as a positive sign as well. The fact that an international environmental treaty regime finds problematic elements in the BSGP transboundary EIA, which clearly was carried out in an innovative manner from the legal perspective, can only mean that the regime in question is a robust one, prepared to adapt itself to new circumstances and challenges.

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<sup>95</sup> The sub-regions are the following: Baltic Sea (Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland, Russian Federation, Sweden), Black Sea (Bulgaria, Georgia, Romania, Russian Federation, Turkey, Ukraine), Caspian Sea (Azerbaijan, Iran (Islamic Republic of), Kazakhstan, Russian Federation, Turkmenistan), Caucasus (Armenia, Azerbaijan, Georgia), Central Asia (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan), Eastern Europe (Belarus, Republic of Moldova, Ukraine), Mediterranean Sea, South-Eastern Europe (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Greece, Montenegro, Romania, Serbia, The former Yugoslav Republic of Macedonia), available at: <http://www.unece.org/env/eia/subregions.html> (last accessed 10.6.2009). For a recent discussion on this topic, see the paper prepared for the meeting of the Working Group on EIA (ECE/MPEIA/WG.1/2009/32 March 2009), available at: <http://www.unece.org/env/documents/2009/eia/wg.1/ece.mp.eia.wg.1.2009.3.e.pdf> (last accessed 10.6.2009).

