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GAS PIPELINE THROUGH THE BALTIC SEA

RUROCIĄG GAZOWY PRZEZ MORZE BAŁTYCKIE

Gazociąg północny (Nord Stream) od momentu ujawnienia projektu międzynarodowej opinii publicznej stał się najgłośniejszą i najbardziej kontrowersyjną inwestycją w Europie w ostatnich latach. Projekt zakłada budowę rurociągu z Federacji Rosyjskiej do Niemiec na międzynarodowych wodach wyłącznych stref ekonomicznych, w których obrębie prawo morza zapewnia wolności komunikacyjne, włącznie z układaniem tego typu instalacji. Wybór przez konsorcjum Nord Stream jednej z najdłuższych możliwych tras gazociągu, którego budowa jest znacznie droższa niż budowa na lądzie, świadczy o podjęciu decyzji na podstawie przesłanek politycznych, a nie ekonomicznych. Doprowadziło to do niespotykanego od dawna podziału politycznego w regionie na państwa, które potencjalnie odniosą korzyści z inwestycji, i na państwa, w których interesy ta inwestycja godzi.

W związku z tym planem pojawiły się problemy związane z zasięgiem jurysdykcji krajowej na morzu, a nawet delimitacją obszarów morskich (spór polsko-duński). Jedną z istotnych z tego punktu widzenia kwestii jest istnienie w Zatoce Fińskiej pasa wód międzynarodowych – „korytarza morza pełnego”, którego likwidacja poprzez rozszerzenie morza terytorialnego i ustanowienie granicy fińsko-estońskiej mogłoby uniemożliwić realizację projektu. Bardzo ważną rolę odgrywa tu także aspekt ekologiczny związany z budową i użytkowaniem gazociągu oraz z oceną oddziaływania inwestycji na środowisko, ze szczególnym zwróceniem uwagi na zagrożenie uwolnienia zalegających dno Morza Bałtyckiego bojowych środków trujących z czasów drugiej wojny światowej. W publikacji podkreślono przede wszystkim wybrane prawne i polityczne możliwości oddziaływania przez Polskę na inwestycję, a poza tym zasygnalizowano znaczenie działań wewnątrz Unii Europejskiej oraz słabe strony polskiej administracji rządowej w kontekście planów rosyjsko-niemieckich.

Po przedstawieniu założeń projektu w artykule zwrócono uwagę kolejno na zagadnienia ekologiczne związane z budową gazociągu, problem korytarza morza pełnego i gazociągu oraz związek między projektem a delimitacją polskiej i duńskiej wyłącznej strefy ekonomicznej w rejonie Bornholmu.

1. INTRODUCTION

The Nord Stream¹ offshore gas pipeline with a total length of about 1220 kilometers, is planned to connect the Russian part of the Gulf of Finland coast near the town of Vyborg with the German part of the Baltic Sea coast near Greifswald (Mecklenburg-Vorpommern)². After becoming operational in 2011 with an initial transport capacity of some 27.5 billion cubic meters a second pipe will be laid which will double the transport capacity to around 55 billion cubic meters of natural gas per year. The total investment for the pipeline is estimated to be at least 5.5 billion euros.

According to the Nord Stream consortium, this construction is being preceded by thorough studies concerning the observance of ecological standards and the identification of a 2 km-wide belt of seabed around the pipeline (a total of 2.400 km² of seabed), taking into consideration, above all, the risk related to dumped chemical munitions, present on the seabed since World War II³.

The Russian Federation owns the world's largest gas deposits and supplies (by the Kremlin-dominated company) over 25% of gas consumed in Europe. Import of Russian natural gas to Europe takes place through three main routes, whereof 80% of the gas is in transit through Ukraine. The remaining 20% of the natural gas import is in transit through the Yamal-Europe transit pipeline from the Yamal fields to Germany across Belarus and Poland.

¹ The Russian-German joint venture Nord Stream (formerly the North European Gas Pipeline Company) was established in December 2005 with the purpose of carrying out feasibility studies and building the new gas pipeline. Gazprom holds a 51% interest in the joint venture, Wintershall and E.ON Ruhrgas hold 20% each and N.V. Nederlandse Gasunie 9% since 2008. On March 30, 2006 the members of the Shareholders' Committee of the Company held their first official meeting in Moscow. Of the eight seats on the Shareholders' Committee Wintershall and E.ON Ruhrgas each have two seats and Gazprom occupies the other four. Ex-German Chancellor Gerhard Schröder was elected as chair of the Shareholders' Committee and Matthias Warnig, Chairman of the Board of Directors of Dresdner Bank ZAO in the Russian Federation, as Managing Director of the Company. On October 4, 2006 the Company officially opened its office in Zug, Switzerland. More than three quarters of the total staff of about 70 will work there. To carry out auxiliary activities a branch office in Moscow was established. www.nord-stream.com

² In December 2005, Gazprom began construction of the 917 km long onshore gas pipeline link Gryazovetz – Vyborg, 351 km east of St. Petersburg. This link will connect the existing gas lines from Siberia to the St. Petersburg Region and the Nord Stream. Total length of offshore pipeline will be approximately 1220 km which includes: 118 km inside the Russian territorial sea and EEZ, 369 km inside the Finnish EEZ, 482 km inside the Swedish EEZ, 138 km inside the Danish jurisdiction in the area south of Bornholm (48 km within the Danish EEZ and 92 km in the Danish territorial waters) 78 km inside the German EEZ and territorial sea. From Greifswald natural gas may be transported onward to the markets in Germany, Denmark, the UK, the Netherlands, Belgium, France and also Poland. The design option envisages pipelines with an outside diameter 1220 mm, design pressure up to 220 bar, without midway compression. *Ibidem*.

³ Information taken from: *Project Information Document. Offshore Pipeline through the Baltic Sea, Nord Stream*, November 2006. The Document with other project documentation were handed over to Poland under Article 3 of the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention) on November 14, 2006. Access to the document see www.nord-stream.com.

As regards energy security of Poland, the imported gas from Russia covers about 53% of domestic consumption (import from Ukraine about 8%, from Norway about 4% and from Germany 3%). Moreover, Poland's economy is dependent on the imports of crude oil (90% of domestic consumption) and import from Russia covers about 94.5% of supplies⁴. Estonia, Latvia and Lithuania's dependence on imports of hydrocarbon fuels from Russia is even greater. Therefore the four countries insist on the construction of a transportation route through their territory, which is much cheaper to build and exploit and allows avoiding transport through unstable Belarus and Ukraine. It is surprising that the new ground pipeline through these countries makes them not so dependent on Russia as in the case of the offshore pipeline through international waters. They would get control and the rights as transit states over the new ground pipeline going to Germany. Both Poland and the three Baltic countries claimed that the Nord Stream project is motivated by political calculations and the wish of Russia⁵ to use the energy levers for expanding political influence⁶.

Taking into consideration the attitude towards the construction of the northern gas pipeline, the Baltic countries may be divided into those absolutely opposing the construction (Poland, Estonia, Latvia and Lithuania), those hesitating due to ecological reasons and, in a way, due to defense issues (Sweden⁷ and Finland), as well as countries participating in the project and Denmark, which

⁴ As regards crude oil imports, it must be noted that Poland has the logistics infrastructure which allows for alternative supplies of crude oil from two directions: by "Przyjaźń" pipeline from Russia through Belarus, and by sea with unloading at the North Port in Gdańsk. The nominal transshipment capacity of this port amounts to nearly 34 mln tons per year (when the domestic demand for crude oil for processing in 2004 stood at the level of about 18 mln tons). This infrastructure meets the security of supply demands of the domestic refineries to a satisfactory degree: in the event of disruptions of crude oil supplies from the East, the ongoing demand could be covered by imports from other directions. "Energy Policy of Poland until 2025". Document adopted by the Council of Ministers on January 4, 2005. See www.mgip.gov.pl (in English).

⁵ "The interests of Russia in the project are evident. Firstly, it is a way to secure its dominant position in the European market and in particular in Germany. Secondly, the ending point of the NEGP in Germany will provide Gazprom with the possibility to participate in the developing spot market for natural gas and hence in the independent gas price setting. Thirdly, Gazprom will not depend on the whims of transit countries for its gas export." T. Romanova, *Struggle around the North-European Gas Pipeline: A Review of the Argument Voiced Against the Project*, *Stosunki Międzynarodowe – International Relations* 2006, vol. 33, no. 1-2, 189.

⁶ The threat to energy security of any country comes not from the import of fuels itself, but it may originate from bad structure of this import, dubious suppliers, or disadvantageous clauses of the contract. For example, Russian usage of the energy levers include 59 incidents and 35 cut-offs against former Soviet Union republics since 1991 (including 20 times against Lithuania). R.L. Larsson, *Security Analyst Swedish Defence Research Agency, The Nord Stream and Political Security in the Baltic Sea Area*, paper given at the Conference on Environmental Hazards in the Baltic Sea Area, Warsaw, Senate of the Republic of Poland, 28 May, 2007. See: www.senat.pl/k6/agenda/wydarz/2007/070528.htm

⁷ The development of the project of gas pipeline through the Baltic Sea sparked a lot of controversy in Sweden mainly due to the possible risks to the environment but to the national security as well. Some experts think that Russian Navy might locate on the pipeline underwater military systems for monitoring of navigation.

are involved in its completion⁸. To convince the undecided, the Nord Stream planned to build branches in the preferred variant to Nyköping (Sweden) and Hanko (Finland).

The paper was divided into two main parts to examine some legal and political arguments against the pipeline from Polish point of view. The first part deals with the environmental issues. The second part is devoted to the territorial issues, including the high seas/EEZ corridor in the Gulf of Finland and an outstanding issue in the Bornholm area. The latter issue concerns the dispute between Poland and Denmark related to delimitation the sea area between the Polish coast and the island of Bornholm. The Nord Stream was convinced that their planned routing did not cross an area claimed by the Polish government to be the Polish EEZ⁹. Finally, the conclusion assesses the essence and strength of means of blocking the project.

2. GAS PIPELINE AND THE ENVIRONMENTAL ISSUES

In accordance with the route variant preferred by the Nord Stream, the gas pipeline was expected to run through the Russian, Finnish, Swedish, Danish (south of Bornholm) and German exclusive economic zones, as they did not take into account Polish claims mentioned before (see Figure 1).

In his exclusive economic zone the coastal state is entitled to use the rights precisely specified by the treaty law (the 1958 Geneva Conventions on the High Seas¹⁰ and the Continental Shelf¹¹ and the 1982 United Nations Convention on

⁸ On June 16, 2006, Gazprom (Russian Federation) and DONG Energy (Denmark) signed an agreement on deliveries of gas to Denmark. Under the agreement, Gazprom will start supplying gas to Denmark in 2011 via the North European Gas Pipeline (the Nord Stream). DONG Energy will purchase 1 billion cubic meters of gas a year for 20 years with an option of a substantial increase in the annual quantities. In addition, under a separate agreement, the Danish company will start next year supplying gas to a Gazprom subsidiary Gazprom Marketing and Trading in the United Kingdom market. The contract will remain in effect for 15 years and foresees annual deliveries of 600 million cubic meters. The gas will be delivered through the Langeled Pipeline, which will connect the Ormen Lange gas field (Norway) with the UK. DONG Energy is one of the leading energy groups in the Nordic region. The majority (73%) of DONG Energy shares is owned by the Danish government. See www.dongenergy.dk.

⁹ Letter dated April 12, 2007 from the Managing Director of the Nord Stream AG to the Polish Ministry of Economy: "Up to now we were convinced that our described routing does not cross the Polish EEZ, this was confirmed by different internationally acknowledged studies. [...] I appreciate very much your material comments and the detailed information on the concrete geographical coordinates, according to which our planned routing crosses a territory that is claimed by the Polish administration to be the Polish EEZ. Such a case would consequently require initiation of an application procedure not only under the international law, but also under the national laws and regulations of the Republic of Poland".

¹⁰ The Geneva Convention on the High Seas, done on 29 April 1958, entered into force on September 30, 1962. Poland ratified this Convention on May 22, 1962. Rules of the High Seas Convention, like the other three 1958 Geneva Conventions on the Law of the Sea, were developed and replaced, in fact, by the 1982 United Nations Convention on the Law of the Sea.

the Law of the Sea, the 1982 LOS Convention¹²) and customary international law, such as the sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, the exclusive right to protect and preserve the environment and to build artificial islands, installations and structures. With the exception of the above the area is international with the freedoms of high seas navigation and overflight and to lay submarine cables and pipelines under Article 87 paragraph 1 (a) (b) (c) of the 1982 LOS Convention. Article 58 paragraph 1 of Part V of the Convention entitled “Rights and duties of other States in the exclusive economic zone” clearly stated that:

In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

That is why, the country which owns the zone cannot effectively oppose construction of the pipeline using only the legal means. It can, however, hinder it severely by prolonging consultations on the issues of environmental protection and pipeline route. It has the right to express concern over a severe decrease in ecological safety – not only as a result of potential ecological damage during the arrangement of the pipeline in the areas of particular natural sensitivity, but also as a result of the threat of releasing dumped chemical munitions, which has been present in various parts of the seabed of the central Baltic Sea since World War II¹³. One may also add less probable threats such as a malfunc-

¹¹ The Geneva Convention on the Continental Shelf, done on 29 April 1958, entered into force on June 10, 1964. This Convention was ratified by Poland on May 22, 1962 and by Soviet Union on November 22, 1960. A.G. Oude Elferink, *The Law and Politics of the Maritime Boundary Delimitations of the Russian Federation: Part 1*, The International Journal of Marine and Coastal Law, vol. 11, no. 4, 538.

¹² According to the Part V (art. 55–75) of *United Nations Convention on the Law of the Sea*, done 10 December 1982, entered into force on November 16, 1994. UN Doc. A/CONF.62/122, 1833 UNTS 3. As of 25 September 2008, there are 157 parties to this treaty. Poland (since November 13, 1998), Russian Federation (since March 12, 1997), Denmark (since November 16, 2004) and all other Baltic Sea states are among them.

¹³ More than 300 thousand tons of former German chemical munitions containing 40 thousand tons of poisonous substances (yperite, phosgene, sarin, Adamsite, Clark I, Clark II and tabun) were dumped in the Baltic Sea after World War II (mainly from 1945 to 1948 but moreover, until 1970s). *Third Periodic Assessment of the State of the Marine Environment of the Baltic Sea, 1989-93*, Baltic Marine Environment Protection Commission (Helsinki Commission) 1996, 197–202.

tion or a terrorist attack against the pipeline¹⁴. These actions, though, may only prolong its construction – they cannot prevent it.

However, the problem was that the gas pipeline was to run along the entire length (149 km) of section south of Bornholm, including (according to the Nord Stream) only the Danish exclusive economic zone, which crosses, in fact, the zone that is a subject of dispute with Poland (preferred route, one of three variants considered). In the information documents presented to the Baltic states (including Poland) in November 2006, the Nord Stream does not mention this issue at all and acknowledges the exclusive territorial jurisdiction of the Danish administration¹⁵.

The substantive and formal bases for solving problems related to construction of the pipeline are included in the 1982 LOS Convention, which provides the compulsory dispute settlement procedures. During the signing of the above Convention, it was the USSR that chose an arbitral tribunal constituted in accordance with Annex VII to this agreement, as the basic means of solving disputes concerning the interpretation or application of the Convention, on the basis of Article 287. Poland did not make a declaration concerning the solving of maritime disputes. Thus, according to presumption occurring in such cases, the arbitral tribunal, appointed on the basis of Annex VII, would also be appropriate.

According to the substantive part of the 1982 LOS Convention, all countries have the right to arrange and maintain undersea cables and pipelines on the continental shelf, which cannot be hindered by the coastal country (Article 79, paragraphs 1 and 2)¹⁶. This regulation also states that consent of the coastal country is only required to the defined (planned) pipeline route. When arranging the gas pipeline, the existing cables and pipelines must also be taken into con-

¹⁴ Anticipating the threat of terrorist attack a platform to provide maintenance and security services was intended to be erected off Gotland Island. Moreover, the whole gas pipeline will be protected by Russian Navy based in Kaliningrad/Królewiec half-enclave.

¹⁵ *Project Information Document. Offshore Pipeline through the Baltic Sea* (English version), Nord Stream, November 2006.

¹⁶ Article 79 of Part VI (Continental Shelf) of the 1982 LOS Convention entitled “Submarine cables and pipelines on the continental shelf” says:

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

sideration. According to the Nord Stream, when it comes to the existing installations of this type, the gas pipeline will only cross the cable (high voltage power cable, HVDC) installed in the recent years which connects Poland's and Sweden's energy systems (the SwePol link)¹⁷. Currently there are seven HVDC in the Baltic Sea, but only one, between Karlshamn (Starnö) in Sweden and Słupsk in Poland, is crossing the Nord Stream pipeline route. The undersea electricity line between Estonia and Finland is under construction and will also be finished before the construction of the gas pipeline¹⁸. In addition, three fiber-optic cables connecting Poland with Bornholm and Denmark with Russian Federation will be crossed in the area south of Bornholm¹⁹.

Other applicable provisions of the 1982 LOS Convention include Articles 204-206 (Section 4, Monitoring and Environmental Assessment) of Part XII (Protection and Preservation of the Marine Environment), which specify the obligation to conduct and make public the evaluation of possible effects of activities carried out under their jurisdiction or control, if there are justified suspicions that these activities may damage the environment.

However, the substantive law does not provide bases for expecting a positive outcome for the coastal country refusing to give its consent to the construction, regardless of the applied means of solving disputes. It is only possible to prolong the proceedings on the basis of the formal law.

On the other hand, the means to achieve a quick solution that Russia has at its disposal are the traditional diplomatic means and the judicial means used to solve international disputes, including direct negotiations, arbitration or proceedings before the International Court of Justice. The basis for their application is the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area (the 1992 Helsinki Convention), signed and ratified by all Baltic states²⁰. Apart from the dispute settlement system under Article 26, this Convention also regulates the issues of responsibility for environmental damages and requires the evaluation of the environmental impact of the planned activities, which may possibly have a substantial detrimental effect on the sea environment.

¹⁷ *Project Information Document. Offshore Pipeline through the Baltic Sea* (English version), Nord Stream, November 2006, 57.

¹⁸ T. Romanova, *supra* note, 195.

¹⁹ Two fiber-optic cables, namely Gedebak Odde, Denmark – Mielno, Poland (110 km), maintenance authorities: Polish Telecom, TDC, in service since 1991, and Kołobrzeg, Poland – Dueodde, Bornholm (105 km), maintenance authorities: Polish Telecom, Telia Sonera, TDC, in service since 1997. www.iscpc.org.

²⁰ Signatories and parties are Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Russian Federation, Poland, Sweden and European Community. The Helsinki Convention covers the whole of the Baltic Sea including the Kattegat as far as Skagen. Internal waters are also expressly included in the Convention. For the purposes of the Convention was established the Baltic Marine Environment Protection Commission in Helsinki (Helsinki Commission). www.helcom.fi.

The construction of the pipeline and its whole exact route became the subject of proceedings in the environmental impact assessment (EIA), in accordance with the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention)²¹, the European Directive on assessment of the effects of certain public and private projects on the environment²² and the national laws of respective coastal countries²³.

As part of this procedure, contact with appropriate sea administration was established in the exclusive economic zone countries, in order to specify the scope of environmental and other studies, as well as the anticipated information. Such contact was established with appropriate Polish administration (Ministry of Environment) for evaluation purposes. In accordance with Article 3 of the Espoo Convention, the first step of these activities was the notification and presentation of the project documentation within the context of transboundary threats, on November 14, 2006²⁴. Further steps involved consultations with appropriate authorities in Finland, Sweden, Denmark and Germany. The fact that it was not considered necessary to consult any relevant authorities in Russia is of no significance for the topic. However, it must be noted that, in principle, consultations with Poland were omitted. This was at least puzzling as the gas pipeline would be located *de facto* in the exclusive zone of Poland. Under the Espoo Convention, the Baltic countries were divided into parties of origin (Finland, Sweden, Denmark and Germany) and parties subject to transjurisdictional impact (affected parties – Poland, Estonia, Latvia and Lithuania). The parties of origin, or parties under the jurisdiction of which the investment is planned, notify the parties affected by transboundary environmental impact, and the latter should conduct public consultations and present their opinion to the parties of origin and Russia. In this case, if the planned gas pipeline was to run in the exclusive economic zone south of Bornholm, Poland should be treated as party of origin, on a par with Denmark.

²¹ The Espoo Convention was signed by 30 governments and entered into force on September 10, 1997. As of 14 February 2009, there are 42 parties to this treaty. Poland is among them since January 9, 1997. Russian Federation signed on June 6, 1991 but has not yet ratified the Espoo Convention. However, Russia acts as a party of origin.

²² Council Directive on 27 June 1985 (85/337/EEC) amended by directives 97/11/EC and 2003/35/EC.

²³ In Russian Federation, for example, under Article 27 of Federal Act on the exclusive economic zone of the Russian Federation (adopted by the State Duma in November 1998 and approved by the Federation Council on December 2, 1998) entitled „State environmental assessment of economic and other activities in the exclusive” economic zone”.

²⁴ Article 3, paragraph 2 of the Espoo Convention stated that:

This notification shall contain, *inter alia*:

(a) Information on the proposed activity, including any available information on its possible transboundary impact;

(b) The nature of the possible decision; and

(c) An indication of a reasonable time within which a response under paragraph 3 of this Article is required, taking into account the nature of the proposed activity; and may include the information set out in paragraph 5 of this Article.

Currently field studies on the basis of Helcom (Helsinki Commission) data to research the maritime environment of the Baltic Sea including flora, fauna, water, sediments and dumped chemical munitions along the pipeline route were finalized²⁵. According to the Nord Stream the transboundary environmental impact assessment for the gas pipeline through the Baltic Sea will be ready for public participation in March 2009. The company aims to acquire the final environmental impact assessment approval by the end of 2009²⁶.

Due to the fact that the Polish exclusive economic zone borders with the Swedish zone, Poland, in its attempts to block the construction, may find an ally in Sweden, a country of high ecological culture and awareness, whose government and nation perfectly understand necessity to care for the Baltic Sea environment. The reaction to the Russian-German project also indicates the attitude of Sweden's public opinion. The plans of the Gazprom-dominated consortium included the construction of a fixed platform for ensuring maintenance and safety (e.g. from terrorist threats) of the gas pipeline in mid-length, north-east of the Swedish island of Gotland. From the law of the sea point of view, there should be no doubt that the construction of such installations is the exclusive right of the country that owns the exclusive economic zone and it cannot be built without this country's consent. From the political point of view, however, the issue stirs emotions in Sweden, a country that remembers the hostile activities of the USSR fleet in Swedish waters during the Cold War. These opinions were reinforced by statements of the former president Vladimir Putin, who stressed repeatedly that the gas pipeline is a strategic task of greatest importance and it will be protected by Russia's Baltic fleet based in Kaliningrad/Królewiec half-enclave²⁷. Fortunately the idea of platform was abandoned at the beginning of 2008.

Convincing other Baltic countries is without a doubt significant as well. Poland may expect a firm support of Lithuania and Estonia, whose situation in terms of energy security is similar to that of Poland's. All actors in the international Baltic theater, except Russia, are members of the European Union²⁸, for which the Baltic Sea seems like an "inland lake" (only 5% of total Baltic Sea area belongs to Russian internal waters, territorial sea and exclusive economic zone). Such a situation results in great challenges as well as various possibilities for diplomatic actions within the EU structures. As the legal instruments (except

²⁵ www.nord-stream.com

²⁶ Environmental impact assessment (EIA) process was begun by submitting documentation about the project to be used for a notification in a transboundary context in accordance with the Espoo Convention, which was done on November 14, 2006. Further steps include field studies, consultation with authorized bodies and the public (on-going in Finland, Sweden, Denmark and Germany but not in Poland), preparing an EIA program and report. At the moment, after field studies, final studies are being carried out. *Ibidem*.

²⁷ *Supra note 7 and note 42.*

²⁸ The Baltic Sea became almost completely a European Union internal sea since May 2004, when the Baltic states and Poland became part of the European Union, uniting the Baltic states.

what is described below) are insufficient to block the construction of the gas pipeline only political instruments may be used to reach the objectives. Even the ecological argument, raised by Poland, may be neutralized immediately by noting that the Polish government planned to build a pipeline connecting Poland with the Norwegian deposits (the BalticPipe). Such a connection may also run through areas (Skagerrak) where German chemical munitions was dumped after World War II²⁹. Finally, for certain reasons, Poland's situation is worse, because the pipeline may only run through the territory or territorial waters of Denmark and Sweden³⁰. It is impossible to place the pipeline in the international waters of the exclusive economic zone. Thus, the consent of at least one of the above-mentioned countries is required. It may be stated that the cheapest and natural solution is the construction of a "Polish" gas pipeline which runs through the land of Sweden and its exclusive economic zone – via the shortest route to Poland. However, it seems that this project was abandoned and the country narrowed its options to the purchase of a share in these resources³¹ and the use of Norway and Denmark's existing transmission systems. The Krakow summit, organized by Poland and Lithuania in May 2007, with the participation of Ukrainian, Georgian, Azerbaijani and Kazakh representatives, confirmed that the strategic goal is to build a connection with the Caspian Sea basin, which involves the expansion of the transmission line Black Sea – Baltic Sea (Odessa-Brody-Gdańsk)³².

It seems that one of the realistic and effective legal means is in the hands of Finland and Estonia, which are situated at the closing end of the Gulf. The bay's geographical features and its political division enable the territorial confinement of its waters by both countries, which may establish a common sea border, thus eliminating the belt of international waters (exclusive economic zone) between them. What is most important is that this could take place in compliance with the international law. It would only be a execution of rights to which both countries are entitled on the basis of the 1982 LOS Convention.

²⁹ Ships with approximately 20,000 t of chemical munitions were sunk at a depth of 200 m at a position west of Måseskär lighthouse in the Skagerrak. See *Third Periodic Assessment of the State of the Marine Environment of the Baltic Sea*, *supra* note 13, 199.

³⁰ The Baltic Straits (or the Danish Straits) are so narrow that they mainly include territorial waters of Denmark (Great Belt), Sweden and Denmark (Sund) or internal waters of Denmark (Little Belt).

³¹ In March 2007, PGNiG (Poland) and Mobil Development with ExxonMobil Production INC (Norway) signed an agreement on taking over shares in Norwegian natural gas fields and deliveries of gas to Poland. The PGNiG is owned by the Polish government.

³² Diversification of sources of supply of fuels and energy is the main aim of the energy policy of Poland under the Document adopted by the Council of Ministers on January 4, 2005 entitled „Energy policy of Poland until 2025”. *Supra* note 4.

3. GAS PIPELINE AND THE TERRITORIAL ISSUES

3.1. HIGH SEAS/EEZ CORRIDOR IN THE GULF OF FINLAND

Even today, in the world torn by particularistic interests, we can find many cases of countries curbing their “wild appetite”, in order to ensure communication freedoms of the whole international community or an individual country. An example is the Amatique Bay, where Belize applies a 3-mile width, despite its entitlement to a 12-mile territorial sea. The reason behind such a decision was the will to maintain “unimpeded transit” for Guatemala³³, despite the fact that the widening of the territorial sea would not deprive that country of the Caribbean Sea exit, thanks to the right of innocent passage. Besides, Guatemala has wide access to the Pacific Ocean on the other side of the continent.

Exactly the same reasons³⁴ made Finland and Estonia limit their claims in the Gulf of Finland, in order to maintain the high seas corridor (see Figure 2), ensuring uninterrupted sea and air navigation from/to St. Petersburg, Russia³⁵. The appropriate agreement between the two governments was concluded on the initiative of Estonia in the form of an exchange of notes on April 6, 1993 and May 4, 1994 (entered into force on July 30, 1995). However, the cross-gulf neighbors anticipated the possibility of a unilateral widening of the territorial sea, with the stipulation that such a decision would require that the partner is notified at least 12 months beforehand³⁶.

The provisions of this agreement were then confirmed in a bilateral agreement concerning the demarcation of sea territories in the Gulf of Finland and

³³ J.M. van Dyke, *An Analysis of the Aegean Disputes in International Law*, Ocean Development and International Law 2005, vol. 36, no. 1, 93; *idem*, *The Republic of Korea's Maritime Boundaries*, The International Journal of Marine and Coastal Law 2003, vol. 18, no. 4, 521.

³⁴ Note dated April 6, 1993 from the Embassy of Estonia in Helsinki to the Ministry of Foreign Affairs of Finland says: “The Embassy of Estonia in Helsinki presents its compliments to the Ministry of Foreign Affairs of Finland and respectfully informs it that the Republic of Estonia intends to increase the width of its territorial waters by 12 nautical miles by 9 April 1993. The outer boundary of Estonian territorial waters would then extend at certain points to the centre line of the Gulf of Finland. If Finland were also to extend its own territorial waters by 12 nautical miles, the international channel in the Gulf of Finland would be completely closed. In order to maintain free passage through the Gulf of Finland, the Republic of Estonia is prepared to limit the width of its territorial waters in the Gulf of Finland so that it extends no closer than 3 nautical miles from the centre line. This is presuming that Finland, for its part, is prepared to limit the width of its own territorial waters correspondingly”.

³⁵ J.M. van Dyke, *An Analysis of the Aegean...*, *supra* note 33, 93; *idem*, *The Republic...*, *supra* note 33, 520.

³⁶ “If the Republic of Estonia decides at a later stage to depart from the aforementioned and expand its territorial waters in the Gulf of Finland, it will inform Finland no less than 12 months in advance. This is presuming that Finland is also prepared correspondingly to inform Estonia of any possible expansion of territorial waters.” *Supra* note 34.

the northern part of the Baltic Sea dated October 18, 1996³⁷. It was also reflected in an earlier Finnish act on the delimitation of territorial waters (internal waters and territorial sea) dated August 18, 1956 (No. 463/1956), amended by the act of 1995 (No. 981/1995)³⁸. The Estonian law, through the act of March 10, 1993 on the boundaries of the maritime tract³⁹, also anticipates exceptions from the rule of the 12-mile width of territorial sea, if justified by obligations resulting from bi- and multilateral agreements.

It is a known fact that in the narrowest part of the gulf the distance between the Finnish Porkkala Lighthouse, located in a group of skerries, and the Estonian Island of Naissaar is only 17.5 nautical miles⁴⁰ and the belt of international waters maintained by both states is 6 nautical miles wide (3 nautical miles from the equidistance line)⁴¹. The possible widening of the territorial sea by both countries to the middle line on the Gulf of Finland would put Sankt-Petersburg and the new Russian oil port of Primorsk in a situation comparable to the Polish port of Elbląg, connected with the high seas through the Pilawska (Baltijsk) Strait⁴² and Russian territorial waters. Such widening would most probably change the scope of rights in this passage from the freedoms of navigation, overflight and to lay submarine pipelines etc. to the right of transit passage, which is binding in territorial straits and includes only navigation and overflight in accordance with art. 37 of the 1982 LOS Convention (Strait of Gibraltar, Strait of Dover, Strait of Bab el Mandeb, Strait of Hormuz, Strait of Malacca, Strait of Bonifacio). The reason is that despite the widening of the territorial sea to 12 nautical miles east of the Porkkala-Naissaar line, there would be a small

³⁷ Agreement between the Republic of Finland and the Republic of Estonia on the Boundary of the Maritime Zones in the Gulf of Finland and the Northern Baltic Sea of 18 October 1996. See *The International Journal of Marine and Coastal Law* 1997, vol. 12, no. 3, 375–376.

³⁸ Amended paragraph 5a of the act says: „In the Gulf of Finland, the outer limits of the territorial sea shall consist of a line which runs at a distance of at least three nautical miles from the median line and every point of which is located north of channels customarily used for international navigation”. See www.un.org/Depts/los.

³⁹ www.un.org/Depts/los.

⁴⁰ This part of Gulf of Finland is trafficable waterways of east- and westbound traffic of merchant ships. In the ice-free season, there is heavy crossing traffic consisting mainly of high-speed craft and ferries between Helsinki and Tallinn. Moreover, in the area between Porkkala Lighthouse and Naissaar there are fishing and recreational sailing activities in summer. Therefore, traffic separation scheme, TSS “Off Porkkala Lighthouse”, on international waters and mandatory ship reporting system, VTMS in the Gulf of Finland has been established, through the procedures involving the International Maritime Organization, with the implementation date 1 July 2003 and 1 July 2004 (Resolution MSC.139(76), adopted on December 5, 2002), respectively.

⁴¹ As a consequence, in the area between Porkkala Lighthouse and Naissaar, the territorial sea of both countries exceptionally is 3 nautical miles wide.

⁴² Pilawska (Baltijsk) Strait provides access to the ports of Elbląg (Poland) and Kaliningrad (Russian Federation). Narrow (minimum 450 metres) and short (2000 metres) strait is located between the main basin of Gulf of Gdańsk and Vistula Lagoon. There is a dispute over the right of passage through the strait. Russian Federation claims that it is “closed strait” for international navigation. However, it might be argued that international navigation through strait bases on Article 45 of 1982 LOS Convention (dead-end strait). See D.R. Bugajski, *Polska i międzynarodowa żegluga w Cieśninie Pilawskiej*, *Polski Przegląd Dyplomatyczny* 2006, no. 4 (32), 67–93.

exclusive economic zone area remaining. The right of transit passage is binding in straits connecting two areas of exclusive economic zone or high seas and the waters of such a strait form a territorial sea virtually in their entire width. Moreover, this right cannot be suspended by countries sharing the strait.

In the case the proposed solution is applied, despite the elimination of the only corridor of international airspace connecting the Russian Federation with the Kaliningrad/ Królewiec half-enclave, the Russians would retain the right of overflight within the "strait",⁴³ although they would lose the right to lay any kind of pipeline in the foreign territorial sea without the consent of the coastal country. The status of the waters would change from international exclusive economic zone waters to territorial sea with the full sovereignty of the country, limited only by the right of innocent passage (navigation), and in the discussed case of straits used in international navigation, limited also by the right of transit passage (unsuspendable navigation and overflight).

There are enough examples of limiting jurisdiction and maintaining high seas corridors in the interests of international navigation to speak of, at least, a wide practice, which could possibly transform into a customary law. Numerous other examples include the behavior of Denmark and Sweden which made an exception from the generally accepted rule of a 12-mile territorial sea in Bornholmsgat (a deep-water strait between the Danish Bornholm and the Swedish Skania, with the minimum width of 19.5 nautical miles) in order to maintain the high seas corridor in the interests of the Baltic navigation. Similar actions were taken by Germany and Denmark in the case of the Fehmarnbelt, the Kadet Rinne (Channel) and the Kiel Bight⁴⁴, Japan in the case of the Soya (La Perouse'a), Tsugaru, Tsushima and Osumi straits, as well as in many other straits⁴⁵. However, there is no doubt that due to a rather wide opposite practice, involving the widening of a territorial sea to the maximum width allowed by international law (practically to the equidistance line), i.e. 12 nautical miles, also in the places where high seas corridors (e.g. territorial straits such as the Strait of Gibraltar, Strait of Dover etc.) could exist, there is no a customary law and the states are not obliged to limit the widening of their territorial jurisdiction in such straits. In the case discussed, the author does not know of any treaty obligations of the governments of Estonia and Finland towards the Russian Federation, or any other nation, which involve maintaining the high seas corridor in this part of the Gulf of Finland. The issue of demarcation is included in the agreement

⁴³ The high seas/ EEZ corridor through Gulf of Finland with the belt of international airspace plays a particularly important military-strategic role for Russian Federation giving free aerial access to the Kaliningrad enclave.

⁴⁴ U.K. Jenisch, *The Baltic Sea: Legal Regime and Instruments for Co-operation*, The International Journal of Marine and Coastal Law 1996, vol. 11, no. 1, 52.

⁴⁵ *The Commander's Handbook on the Law of Naval Operations*, by Department of the Navy Office of the Chief of Naval Operations and Headquarters, U.S. Marine Corps and Department of Transportation U.S. Coast Guard, Newport, RI, 1995, 2–88.

between Finland and the USSR dated May 20, 1965, concerning the demarcation of sea areas and the continental shelf, where both countries only undertook not to widen the territorial sea in the Gulf of Finland to the west of the Suursaari (Gogland) Island, beyond the middle line defined by the provided geographical coordinates (Article 3)⁴⁶. The defined equidistance line was in principle confirmed in the Finnish-Estonian agreement on the boundary of the maritime zones in the Gulf of Finland and the northern Baltic Sea dated October 18, 1996⁴⁷, although the parties formally aimed at rejecting the succession of previous territorial agreements with the USSR⁴⁸.

Summing up, it may be stated that the widening of the territorial sea is more probable in the case of Estonia and less probable in the case of Finland, which prefers economic benefits related to cooperation with Russia, rather than exposing its “eastern interests” to threats such as the problem with extension of the lease of the Saimaa channel, connecting the Saimaa lake with the Gulf of Finland⁴⁹. It seems, however, that Estonia’s possible unilateral widening of the territorial sea to the middle line would trigger identical decision on the part of Finland. The claim that Tallinn is inclined to territorial solutions was confirmed by the proposal, put forward by the opposition Union Party (Isamaaliit), concerning the modification of the country’s territorial water borders, so that the gas pipeline would cross these waters, which would allow the country to “influence the project”⁵⁰.

3.2. THE DISPUTE BETWEEN POLAND AND DENMARK OVER THE EEZ AREA

There is another disputable issue related to this topic which requires consideration. As mentioned at the beginning, the plans of the southern part involved the arrangement of the gas pipeline in the “Danish” exclusive economic zone south of Bornholm, practically 37 nautical miles north of Kołobrzeg (the nearest

⁴⁶ Agreement between the Government of the Republic of Finland and the Government of the Union of Soviet Socialist Republics concerning the boundaries of sea areas and of the continental shelf in the Gulf of Finland, 20 May 1965 (566 UNTS 37).

⁴⁷ Agreement between the Republic of Finland and the Republic of Estonia on the Boundary of the Maritime Zones in the Gulf of Finland and the Northern Baltic Sea of 18 October 1996. See *The International Journal of Marine and Coastal Law* 1997, vol. 12, no. 3, 375–376.

⁴⁸ E. Franckx, *Current Legal Developments*, *The International Journal of Marine and Coastal Law* 1997, vol. 12, no. 3, 369–370.

⁴⁹ The Saimaa Canal (*Saimaan kanava*) connects the lake Saimaa with the Gulf of Finland. The canal, inaugurated in 1856, is the largest, most extensive and most trafficable inland waterways network in Finland. In the Moscow Peace Treaty of 1940, after Soviet Union aggression against Finland, the Karelian Isthmus and the city of Vyborg were ceded to the Soviet Union, thus effectively splitting the canal in half. Finland and Russia are presently negotiating the continuation of the canal area lease agreement signed in 1963 for fifty years. www.fma.fi/e/leisure/canals/saimaa.php

⁵⁰ F. Kazin, *Globalna strategia Gazpromu a narodowe interesy Rosji*, *Polski Przegląd Dyplomatyczny* 2006, no. 1 (29), 95.

port on the Polish coast). The problem was that the Danish claims to the zone overlap with the Polish claims in this region, outside the 12-mile belt of the territorial sea around the island. Thus, the Russians and Germans planned to build the gas pipeline in the Polish exclusive economic zone as well. Although there is no final decision based on international law concerning the status of the 30-year-old disputable zone with the surface area of 3,503 km² (more than area of Luxembourg or Rhode Island), the Polish law⁵¹ has been treating this area as part of Poland's exclusive economic zone since the conclusion of the delimitation agreement. However, the consortium did not take the Polish administration into consideration at all during consultations concerning the route of the pipeline⁵². The route was abandoned in early 2007 because of legal uncertainty. The issue was finally after field studies and consultations with the Danish party solved by introduction two other alternative routs from which the S-route (south of Bornholm) with overall length 138 km is preferred⁵³. Chosen route runs through the Danish EEZ (48 km) and territorial waters (92 km) 46 nautical miles north of Kołobrzeg.

It should be noted that the rather uncomplicated problem with delimiting the disputable area of the exclusive economic zone began when Poland and Denmark instituted the continental shelf. This is currently the last dispute of this kind concerning the Baltic Sea. Attempts of bilateral negotiations, which began in 1970s, failed to reconcile the contradictory claims. The last bilateral meetings took place in Copenhagen on October 29, 2003, and in Warsaw on March 15, 2007. During these talks, the previous positions were confirmed, as well as the will not to exacerbate the dispute, which should be settled through further bilateral consultations⁵⁴. For comparison, the Baltic States which gained independence at the beginning of the 1990's, managed to solve problems with delimiting sea territories between themselves and with other countries before the end of the century⁵⁵.

There are arguments in favor of arranging the gas pipeline south of Bornholm. Such location is shorter by than the location north of the island. Moreover, both strait countries left a deep-water high seas corridor, similar to the Gulf of Finland, north of the island, in Bornholmsgat. This corridor is, by far, the most frequently used sea route in the Baltic Sea. The large volumes of ship traffic do not facilitate works related to the arrangement and maintenance of the pipeline.

⁵¹ Maritime Areas and Maritime Administration Act, issued on March 21, 1991. Published in the Journal of Law of the Republic of Poland on 1991, No. 32, Item 131 (Dz.U. 1991. 32.131).

⁵² *Supra* note 9.

⁵³ *Project Information Document. Status of the Nord Stream Route in Denmark and Germany*, Nord Stream, November 2008.

⁵⁴ Letter dated March 21, 2007 from the Director of Treaties Department in Polish Ministry of Foreign Affairs to the author.

⁵⁵ T. Górski, *Delimitacja obszarów morskich między Polską a Danią*, Prawo Morskie 2005, vol. XXI, Gdańsk, 75–88.

4. CONCLUSION

It may be emphasized that the international law ensures high seas freedoms in the exclusive economic zone under Article 87 paragraph 1 (a) (b) (c) of the 1982 LOS Convention, which also include the freedom to lay pipelines, and that virtually only their location requires the consent of the coastal country⁵⁶. In the case of the gas pipeline section planned in the “dark zone” which is a subject of dispute between Poland and Denmark, both countries, in accordance with the Espoo Convention and the maritime law, should be treated as the parties of origin, with which detailed consultations concerning the evaluation of environmental impact and the route of the pipeline should be carried out.

Thus, probably the only realistic (although, undoubtedly, very hard to accomplish) legal and political means of blocking the construction of the gas pipeline is the elimination of the high sea corridor in the Gulf of Finland. Can the governments of Finland and Estonia be convinced to take such actions? It must be clearly stressed that even if both governments are not convinced to widen the territorial sea in fear of Russia’s reaction, the very raising of this issue in the international forum may be politically useful. However, it may be added that the use of the proposed solution in practice will certainly result, apart from blocking the construction of the gas pipeline, in a certain weakening of the Russian Federation’s political position in the Baltic Sea area. It is a well-known fact that all Baltic countries, maybe except Germany and Denmark, fear not so much the increase of Russia’s economic importance as the Kremlin’s practice of using economic instruments for expanding political influence. It is particularly well understood in Estonia, Latvia and Lithuania, as well as Finland and Poland. It seems that the above-mentioned group of states, together with Sweden, is able to work out a common position and plan of action towards Russia and within the European Union, the realization of which could ensure the protection of their political, economic and environmental interests through the blocking of the construction of the gas pipeline.

Finally, there is the non-legal question related to the project, concerning the choice of the route: why there are no plans to build the gas pipeline through the waters and land of Estonia or Latvia instead of Finland (none of the several

⁵⁶ J. Symonides, *Prawnomiędzynarodowe regulacje dotyczące układania podmorskich rurociągów w wyłącznej strefie ekonomicznej, na szelfie kontynentalnym i morzu otwartym*, Prawo Morskie 2006, vol. XXII, 13.

versions considered assumed such a route⁵⁷)? Taking the existing pipeline network and the location of gas deposits into consideration, this would reduce the length of the planned pipeline and, even to a greater extent, the reduction of costs of its construction, because a large part of Estonian or Latvian section could run through the land (the entire Finnish section would be in the sea). The only explanation for this is a political reason.

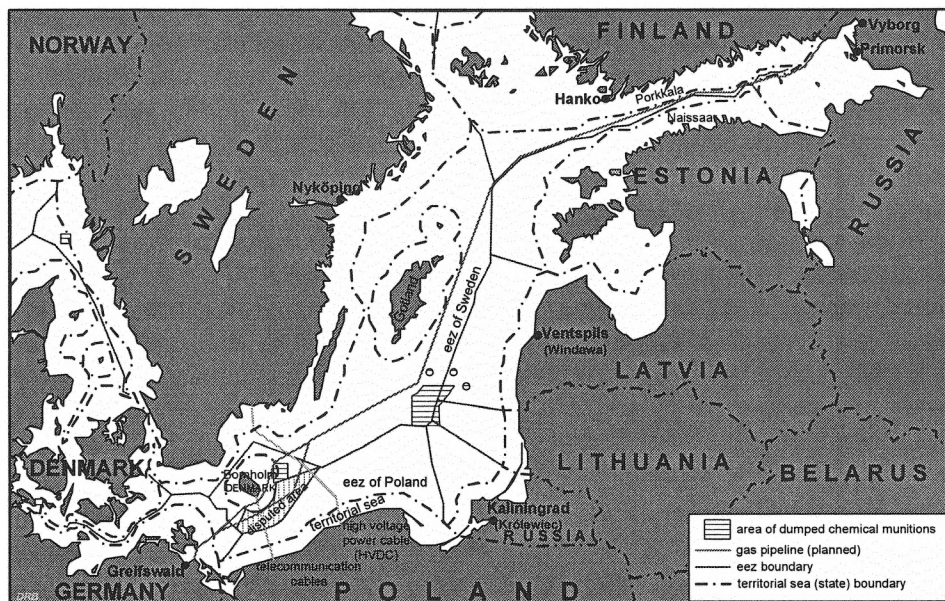


Figure 1. Baltic Sea and the Nord Stream gas pipeline route

⁵⁷ There were considered three main routes, namely:

1. Onshore pipeline from the Russian-Finnish border through Finland and Sweden to Germany.
2. Onshore from Russian-Finnish border through Finland carried offshore through the Baltic Sea to Germany.
3. Offshore route from Russia to Germany entirely in the Baltic Sea.

All alternatives included connections to Finland (Hanko) and Sweden (Nyköping).

Project Information Document. Offshore Pipeline through the Baltic Sea, Nord Stream, November 2006, 24.

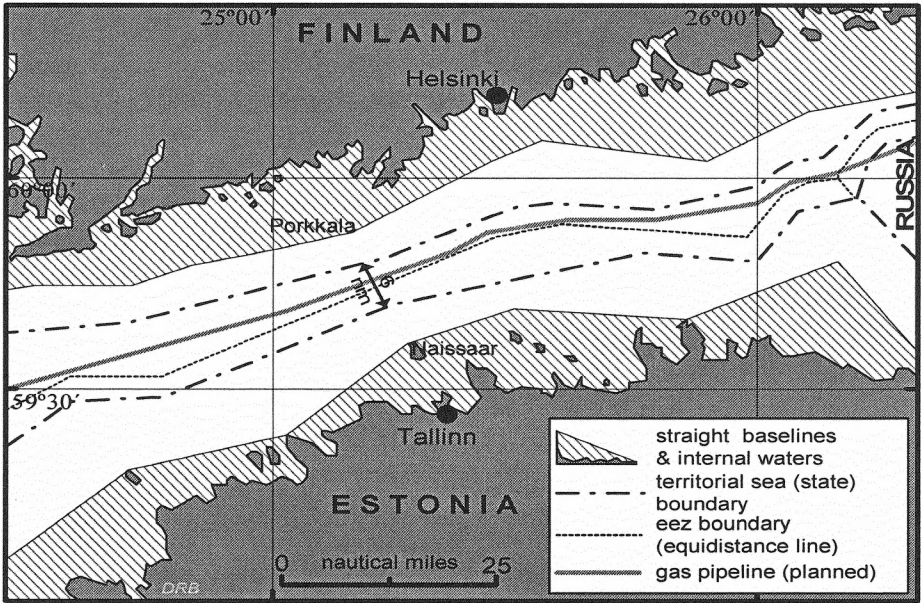


Figure 2. High Seas/EEZ Corridor in the Gulf of Finland