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Evaluation of the Nord Stream Project from the Perspective of the Law of the Sea

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I. Nord Stream Pipeline and the Polish national interest

The anticipated route of the Nord Stream Pipeline will join Germany and Russia. For a few years now the Polish government has been protesting its construction, despite the fact that the pipeline will circumvent Polish territorial waters and even the Polish exclusive economic zone. Is that correct considering that the project will be situated outside our maritime territory, hence outside Polish jurisdiction?

Three factors compel Poland to assume a position on the Nord Stream Pipeline:

- **Polish national interest;**
- **Environmental safety of the Baltic Sea;**
- **International justice.**

Legal status of the seabed

The sea and ocean bed ("Area") outside national jurisdiction is the **common heritage of mankind** - says art. 136 of the United Nations Convention on the Law of the Sea signed in Montego Bay in 1982 (UNCLOS). Part XI of the Convention presents numerous technical prescriptions concerning the management of the Area. No activity or rights granted in the Area can violate the legal status of the waters and air space situated ahead of the Area (**international waters** and **international air space**).

Legal regulations governing the use of the seabed for peaceful purposes can be characterized from the perspective of their legislative formation as complex structures, which in addition to subject-matter related to public law include technical and organizational guidelines. Their fundamental nature is expressed in guiding principles, which systemize this peculiar area of international law. These principles are:

- Using the Area exclusively for peaceful purposes - without nuclear arms positioned on the seabed;
- Acting in the Area for the good of the entire mankind;
- Refraining from claiming or appropriating any part of the Area and mineral deposits located therein;
- The Area can be explored and exploited by the International Seabed Authority with its seat in Jamaica, which groups all states parties to the Convention on the Law of the Sea. ISA holds the resources of the Area and manages them on behalf and to the benefit of the entire mankind;
- Freedom of scientific research;
- Protection of the marine environment;
- Protection of human life;
- Effective participation of developing states in activities in the Area;
- Protection (preservation) and disposal for the benefit of mankind of objects of an archaeological nature found in the Area.

The convention incorporates and promotes the **principle of good neighbourly relations** in using the high seas and in activities conducted in the Area, in conducting marine scientific research and in protecting the marine environment.

Question: Considering that the Nord Stream Pipeline will run outside the Polish national jurisdiction, does Poland have any legal means of expressing its will and misgivings in respect of the anticipated laying of a pipeline on the Baltic seabed? Why is it that the fundamental principle of the international legal order – **good neighbourly relations** – has not been seen so far in the activities promoting the pipeline construction?

II. Is it permitted to lay a gas pipeline on the bed of the high seas? Freedoms of the high (open) seas.

Yes, it is permitted as the following freedoms apply on the high seas:

- Freedom of navigation;
- Freedom of passage by air;
- Freedom of fishing;
- Freedom of scientific research.

The freedom to lay submarine cables and pipelines is a traditional freedom of the high seas. All countries are entitled to lay submarine cables and pipelines at the bottom of the high seas outside the continental shelf, inasmuch as they do not interfere with cables and pipelines already there. No coastal state can obstruct the process of laying or repairing submarine cables or pipelines, but has specific prerogatives as concerns exploitation of natural resources within the boundaries of its section of the continental shelf.

Breaking or injuring a submarine cable or pipeline is a punishable offence subject to penal sanctions provided for in national law (art. 113 of the Convention on the Law of the Sea).

A person subject to the jurisdiction of a given state who owns a submarine cable or pipeline laid in the high seas and who breaks or injures a third-party cable or pipeline while installing or maintaining his equipment must bear the cost of the repairs in accordance with national laws and regulations which every state must adopt (art. 114 of the Convention on the Law of the Sea). Disputes may also arise in connection with issuing permits, specifying routes, removing obsolete pipelines, etc. Submarine cables and pipelines may be owned by states or private companies. Therefore, it is important to establish a regime of accountability and indemnification for damages thus occurred.

Question: Have Germany and Poland issue legislation and other legal provisions necessary to ensure that owners of a gas pipeline resting on the bed of the high seas who break or injure a third-party cable or pipeline while laying or repairing theirs can be held legally liable?

III. Environmental restrictions to economic activities on the Baltic Sea are anchored in numerous international agreements and conventions.

1. Convention on the Law of the Sea of 1982

The Baltic Sea is a semi-enclosed sea in the meaning of art. 122 of the Convention. The semi-enclosed sea status determines the necessity of cooperation between coastal states within the framework of international organizations or international agreements governing diverse aspects of the presence in the high seas.

Protection of the marine environment has been recognized as *ius cogens* which binds states in their use of the entitlement to exploit natural resources.

2. Convention on the Protection of the Marine Environment of the Baltic Sea Area of 1974, supplemented by the subsequent convention of 1992

The convention of 1992 came into effect on 17th January 2000. It obligates both parties (the states bordering on the Baltic Sea and the European Commission) to pursue all individual and collective measures and activities to counteract pollution of the Baltic Sea. The convention applies to air, water and land pollution in the Baltic Sea area. The fulfilment of these objectives is within the competence of the Baltic Marine Environment Protection Commission (HELCOM), which performs the following tasks:

- Assessment of the impact of human activity on the Baltic Sea environment;
- Studies of direct consequences of the impact of toxic substances on the marine environment;
- Identification of serious environmental threats and localization of pollution sources;
- Cooperation with other international organizations that implement similar programs;
- Facilitating dissemination of information about the environmental status of the Baltic Sea.

Many other common vital issues concerning the Baltic Sea have been resolved by formal means: straits (1857), Kiel Canal (1919), fisheries and protection of live marine resources (Gdańsk Convention of 1993 - it does not bind Poland since 1st January 2007 as the Polish president gave notice thereof in 2005).

Question: What is HELCOM's position in respect of the construction of the Nord Stream Pipeline?

Perhaps the time has come to sign a new international agreement governing the laying, operation and repair of submarine cables and pipelines in the Baltic Sea? Are current rights of coastal states and states using the right of passage sufficiently specific? Participants in the present conference could act as a group initiating establishment of a new international convention. Perhaps the

time has come for Poland to call an intergovernmental conference to discuss this issue?

3. Convention of the U.N. Economic Commission for Europe on Environmental Impact Assessment in a Transboundary Context, signed in Espoo in 1991

An environmental assessment with participation of the public opinion of the threatened party must be conducted before the decision to go ahead with a given project is made. In mid-November 2006, five states bordering on the Baltic Sea – Finland, Sweden, Denmark, Germany and Russia – stated within the framework of procedures set forth in this convention that the anticipated Nord Stream pipeline was ecologically clean. Poland did not participate in that meeting.

4. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus on 25th June 1998.

The objective of this convention is to protect the right of every person to live in an environment adequate to his or her health and well-being by guaranteeing the rights of:

- Access to information;
- Public participation in decision-making;
- Access to justice in environmental matters.

The proceeding of this convention may end in mid-February 2007 when the parties meet in Finland.

Question: Will Poland's voice expressing various legal and technical misgivings in respect of the construction of the Nord Stream Pipeline (i.e. the position of the Polish government and society) be taken into account prior to deciding to go ahead with it? Will the Environment Ministry stop playing "sleeping beauty", get actively involved in the process of informing the population about the project and try to enforce our rights under international conventions?

IV. Hard cases concerning the Nord Stream Pipeline as the target of a terrorist attack

Terrorism has become omnipresent also on the sea. In 1985, the United States Naval Institute Proceedings (USNIP) reported that more than 200 major acts of maritime terrorism have taken place since the end of World War II. Their

range is broad as they also include specific attacks on petroleum tanks, pipelines and drilling facilities. Many times, ransom had to be paid in return for refraining from attacking a drilling platform. The number of criminal acts performed on sea or from sea to land is growing steadily. Who are these terrorists: mentally unstable political activists, gangs, fuel mafias, workers, foreign agents, environmental protection fanatics? They often establish terrorist networks. Currently it is not possible to establish the magnitude of the maritime terrorism threat for many reasons. The situation has become even more complicated after September 11th, 2001.

Diverse drilling installations and pipelines are particularly attractive terrorist targets. A well-placed explosive or a remote-controlled missile can destroy any drilling platform or pipeline. We now also have environmental terrorism and nuclear terrorism. This is an important issue as a terrorist attack can disturb the ecological balance of the Baltic basin or trigger an environmental disaster.

Question: What anti-terrorist safety features are anticipated for the Nord Stream pipeline? Is there an anti-terrorist action plan in place?

Afterword:

The construction of international justice adopted in international law is characterized by its foundation on the equality of rights of the subjects of international law, whereas that equality is founded on formal reciprocity. However, international law, particularly law of the sea, contains expressions of divergence from equality in the form of the principle of privileging certain subject states. Unequal are treated unequally, equal equally.

Would the construction of the Nord Stream Pipeline “behind Poland’s back” be a confirmation of that statement? What is the position of the European Commission on this issue?

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