

Article 7(4) – Transit

Notes and General comments regarding the whole Article

Final Act (17/12/94) <i>Declaration 3 - With respect to Article 7</i>	CONF 104 (Text for adoption) (14/09/94) <i>Declaration 2 - With respect to Article 7</i>
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The **European Community** and its **Member States** and **Austria, Norway, Sweden** and **Finland** declare that the provisions of Article 7 are subject to the conventional rules of international law on jurisdiction over submarine cables and pipelines or, where there are no such rules, to general international law.

They further declare that Article 7 is not intended to affect the interpretation of existing international law on jurisdiction over submarine cables and pipelines, and cannot be considered as doing so.

ECT 7 [CONF 96] (17/03/94) [Article 8] - Transit
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Norway waiting reserve. **Norway** accepts that the new definition of Area in Article 1 is helpful in this context but points out that the issues covered by Article 8 do not fall within the sovereign rights or jurisdiction exercised by coastal states over their Continental Shelf or exclusive economic zones. For the purpose of clarity **Norway** therefore suggests using the word “territory” instead of “Area” in the definition of Transit in paragraph (10)(a), and whenever the word is used in this Article.

Canada reserve on paragraphs (5), (6) and (7) pending a solution to the pre-emption of its regulatory authorities' statutory powers to interrupt energy flows.

ECT 6 [CONF 82] (20/12/93) ECT 5 [CONF 72] (11/10/93) ECT 4 [CONF 64] (07/07/93) [Article 8] – Transit
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Subject to discussion in Plenary on Article 36, **Russian Federation** noted that there might be a need for transitional provisions covering Article 8, in relation to transit between CIS countries.

Norway waiting reserve. **Norway** accepts that the new definition of Area in Article 1 is helpful in this context but points out that the issues covered by Article 8 do not fall within the sovereign rights or jurisdiction exercised by coastal states over their Continental Shelf or exclusive economic zones. For the purpose of clarity **Norway** therefore suggests using the word “territory” instead of “Area” in the definition of Transit in paragraph (10)(a), and whenever the word is used in this Article.

USA supported by **Japan** suggests explicit exclusion of maritime transport from Article 8 (as well as from the Charter Treaty as a whole) - see footnote 8.12.

Canada contingency reserve pertaining to paragraphs (5), (6) and (7) pending a solution to the pre-emption of its regulatory authorities' statutory powers to interrupt energy flows.

ECT 3 [CONF 60] (01/06/93)
[Article 8] - Transit

Norway general reserve (see footnote 8.4).*

Canada contingency reserve pertaining to paragraphs (3), (5), (6) and (7).

ECT 2 [CONF 56] (01/05/93)
[Article 8] – Transport and Transit
Ministerial Declaration 5- To Article 8

Norway and Canada general reserve.

Ministerial Declaration 5 : Ministers recognise that the transit of Energy Materials and products may require transport and port facilities other than those detailed in paragraphs (4), (6) and (7) and that the terms of access to and use of such facilities may unfairly impede trade and transit of Energy Materials and Products. They invite the Charter Conference to consider whether the provisions of paragraphs (1) and (3) of Article 8 are sufficient safeguard against such possible impediments or whether the provisions of paragraphs (4), (6) and (7) should be extended perhaps through Protocols on coal and other energy sectors to cover any other facilities dedicated to the transport of Energy Materials and Products if such extension can be achieved without prejudicial effects on the trade and transport of non-energy materials and products.

(Compromise text) ECT 1 [CONF 50] (15/03/93)
Ministerial Declaration 4 - To Article 8

Ministers recognise that the transit of Energy Materials and Products may require transport and port facilities other than those detailed in paragraphs (4), (6) and (7) and that the terms of access to and use of such facilities may unfairly impede trade and transit of Energy Materials and Products. They invite the Charter conference to consider whether the provisions of paragraphs (1) and (3) of Article 8 are sufficient safeguard against such possible impediments or whether the provisions of paragraphs (4), (6) and (7) should be extended perhaps through Protocols on coal and other energy sectors to cover any other facilities dedicated to the transport of Energy Materials and Products if such

* *Ed. note:* Footnote 8.4 states:

“It was agreed that in relation to paragraph (4), the terms of that paragraph should apply only within the territory of the Contracting Party and that the substance of article 79 of the Convention of the Law of the Sea should be made applicable to the Continental Shelf. In addition it was agreed that when the Law of the Sea Convention enters into force Contracting Parties will give serious consideration to limiting the field of application of Article 8 in the Charter Treaty and to leaving pipelines crossing the Continental Shelf to the Law of the Sea Convention. In Norway’s opinion the Charter Treaty should not interfere with, the regime relating to submarine cables and pipelines on the Continental Shelf already established in international law. The territorial scope of application of Article 8 should therefore be limited to land territory, internal waters and territorial sea.

Legal Sub-Group was asked to draft appropriate provisions. Insofar as coastal states possess no rights in relation to the Continental Shelf relevant to the obligations in a particular paragraph of this Article, that paragraph should not apply to pipelines and cables on the Continental Shelf. Insofar as the coastal states have rights relating to the Continental Shelf relevant to the obligations of any particular paragraph, then the obligations should apply in relation to pipelines and cables on the Continental Shelf.

Informal discussion is to continue.”

extension can be achieved without prejudicial effects on the trade and transport of non-energy materials and products.

The Contracting Parties declare that it is their common understanding that the provisions of the Energy Charter Treaty do not oblige any Contracting Party to introduce mandatory Third Party Access.

BA-37 (01/03/93)

[Article 11] – Transport and Transit
Ministerial Declaration - To Article 11

After resequencing paragraphs in Article 11, Russian Federation footnote 11.14 from BA-31 can not be easily referred to any text in the draft of this Article. Russian Federation agreed to reconsider it in the light of new proposal on this Article.

During the WG II meeting on 22-27 February 1993 it was discussed whether the BA should contain any provisions which address the problems of emergency situations (not only for oil and gas, but also for electricity) since Article 27 does not deal with short-term breakdowns. CIS countries in particular supported this idea. At the same time it was recognised that this is complex, mostly unexplored territory, in which problems arise such as repair obligations, sharing of costs, distribution of remaining flows etc. The OECD countries were invited to make available, if possible, texts of contracts or agreements dealing with these problems. The interested CIS countries were invited to consider draft language.

The WG II Chairman will suggest to the Chairman of the Charter Conference how to proceed with this issue. For ease of future handling, the two draft texts for a new paragraph proposed by certain CIS countries are recorded below:

a) Armenia and Kazakhstan proposal: “In cases of breakdown in the energy transport network, the Contracting Party on whose territory the breakdown occurred shall undertake all necessary measures to eliminate its consequences as promptly as possible, without awaiting the results of analysis of the reasons for the breakdown. The costs of rectifying the consequences of the breakdown shall be shared between the parties to the transit in proportions determined in specific agreements which shall be concluded between the parties. When the volume of energy in transit is reduced, whatever the reasons for this reduction, the remaining volume shall be shared between all the parties using the transport network in accordance with specific agreements which shall be concluded between the parties to the transit.”

b) Ukraine proposal: “In cases of breakdown in the energy transit network, the Contracting Parties shall without delay undertake all necessary measures to eliminate the breakdown and its consequences. The costs for the parties of eliminating breakdowns and their consequences, operational concertation and allocation of transit supplies between parties concerned during the time of breakdown, shall be determined by multilateral and bilateral agreements.”

Canada, Norway, Japan and Azerbaijan general reserve on whole Article.

Ministerial Declaration to Article 11: [Ministers recognize that the transit of Energy Materials and Products may require transport and port facilities other than those detailed in paragraphs (4), (6) and (7) and that the terms of access to and use of such facilities may [unfairly] impede trade and transit of Energy Materials and Products. They invite the Charter Conference to consider whether the provisions of paragraphs (1) and (3) of Article 11 are sufficient safeguard against such Possible impediments or whether the provisions of paragraphs (4), (6) and (7) should be extended to cover any other facilities dedicated to the transport of Energy Materials and Products if such extension can be achieved without prejudicial effects on the trade and transport of non-energy materials and products.]¹

BA-35 (09/02/93)
[Article 11] - Transport and Transit

After resequencing paragraphs in Article 11, Russian Federation footnote 11.15 from BA-31 can not be easily referred to any text in the draft of this Article. Russian Federation agreed to reconsider it in the light of new proposal on this Article.

Canada, Norway, Japan and Azerbaijan general reserve on whole Article.

There are three major issues to be addressed when finalising this Article:

- how to take forward matters indicated in footnote 11.9 and 11.15,
- whether Polish idea on solving disputes under para (6) can be expressed in an acceptable form.
- following the Armenian proposal at footnote 11.16 in Room Document 13 of 3 February 1993, whether BA should contain any provisions which address the problems of emergency situations since Article 27 does not deal with short-term breakdowns.

BA-31 (21/12/92)
BA-26 (25/11/92)
BA-22 (21/10/92)
BA-15 (12/08/92)
BA-14 (24/06/92)
[Article 11] – Transport and Transit

Canada, Australia, Norway, Japan and Azerbaijan general reserve on whole Article.

Work has been completed on this Article in WGII and is being referred to Plenary.

¹ General scrutiny reserve. Chairman will consider whether the notion of a coal protocol might be introduced in the text.

BA 13 (19/06/92)
[Article 11] – Transport and Transit

Canada, Australia, Norway, Japan and Azerbaijan general reserve on whole Article. Chairman will return on this at conclusion of discussion.

Work has been completed on this Article in WGII and is being referred to Plenary.

BA 12 (09/04/92)
[Article 11] - Transport and Transit

On a basis of the first reading of this Article at the WG II meeting on 9 April 1992, the Chairman invited delegations of Austria, Australia, Norway, Russian Federation and USA chaired by the Secretariat for redrafting. The working sub-group will meet as soon as possible.

Canada general reserve on whole Article.

BA 6 (21/01/92)
Article 11 - Transport and Transit

Completely rewritten former Article 11 on "Freedom of Movement".

BA 4 (31/10/91)
Article 11 - Freedom of Movement

New text based on Austrian and EC suggestions. Former subpara (c) deleted and subpara (d) renumbered as para (2).

BP 2 (11/09/91)
Explanatory Memorandum

Article 11 provides for (a) the facilitation of transit of Energy Materials and Products through the Territory of Contracting Parties (Source: GATT Article V); (b) the limitation of fees and charges to the approximate cost of Article 11 services rendered, including a reasonable commercial rate of return, and the avoidance of fiscal protection of domestic products (Source: GATT Article VIII); and (c) the absence of prohibitions or restrictions (other than duties, taxes and other charges) on imports and exports from and to any Contracting Party (Source: GATT Article XI). Under paragraph (d), Contracting Parties' security of supply is protected.

Article 7.4

Final Act and ECT as adopted (17/12/94)
CONF 104 (Text for adoption) (14/09/94)
Article 7.4 – Transit
Understanding 8 – With respect to Article 7(4)

In the event that Transit of Energy Materials and Products cannot be achieved on commercial terms by means of Energy Transport Facilities the Contracting Parties shall not place obstacles in the way of new capacity being established, except as may be otherwise provided in applicable legislation which is consistent with paragraph(1).

Understanding 8 – With respect to Article 7(4)*

Interim text (25/06/94)
Article 8.4 – Transit
Understanding 8 – To Article 8(4)

In the event that Transit of Energy Materials and Products cannot be achieved on commercial terms by means of Energy Transport Facilities the Contracting Parties shall not place obstacles in the way of new capacity being established, **subject to** except as may be otherwise provided in applicable legislation which is **compatible** consistent with paragraph (1).

Understanding 8 – With respect to Article 8(4)*

Interim text (20/06/94)
Article 8.4 - Transit
Understanding 8 – To Article 8(4)

In the event that Transit of Energy Materials and Products cannot be achieved on commercial terms by means of Energy Transport Facilities the Contracting Parties shall not place obstacles in the way of new capacity being established, subject to applicable legislation which is compatible with paragraph (1).

Understanding 8 – With respect to Article 8(4)*

Compromise text [CONF 98] (22/04/94)
Article 8.4 - Transit
Ministerial Declaration 7 – To Article 8(4)

[In the event that Transit of Energy Materials and Products cannot be achieved on commercial terms by means of Energy Transport Facilities the Contracting Parties shall not place obstacles in the way

* *Ed. note:* Same text since Interim text 20/06/94 “The applicable legislation would include provisions on environmental protection, land use, safety, or technical standards.”

of new capacity being established, subject to applicable legislation which is compatible with paragraph (1) of this Article.]²

Ministerial Declaration 7 - To Article 8(4)

The applicable legislation referred to in Article 8(4) would include provisions on environmental protection, land use, safety, or technical standards.

ECT 7 [CONF 96] (17/03/94) [Article 8]4 - Transit <i>Ministerial Declaration 7 (To Article 8(4))</i>	ECT 6 [CONF 82] (20/12/93) [Article 8].4 - Transit <i>Ministerial Declaration 6 (To Article 8(4))</i>
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[In the event that Transit of Energy Materials and Products cannot be achieved on commercial terms by means of Energy Transport Facilities the Contracting Parties shall not place obstacles in the way of new capacity being established, subject to applicable legislation which is compatible with paragraph (1) of this Article.]^{3,4}

Ministerial Declaration 7/6 - To Article 8(4)

Such applicable legislation would include provisions on environmental protection, land use, safety, technical standards.

ECT 5 [CONF 72] (11/10/93) ECT 4 [CONF 64] (07/07/93) [Article 8].4 - Transit <i>Ministerial Declaration 6 (To Article 8(4))</i>

[In the event that Transit of Energy Materials and Products cannot be achieved on commercial terms by means of Energy Transport Facilities the Contracting Parties shall not place obstacles in the way of new capacity being established, subject to applicable legislation which is compatible with paragraph (1) of this Article.]^{3 4}

Ministerial Declaration 6/5 – To Article 8(4)*

² In the previous version of the Treaty (CONF 96), a general scrutiny reservation was entered to consider the effect of the definition of “Area” on this paragraph.

³ General scrutiny reserve to consider the effect of the new definition of Area on this paragraph.

⁴ **Norway** reserve. Suggests substituting “Making Investment” for concept of establishment, and seeks clarification on coverage of transport investments by Part III of this Treaty [*Editor’s note*: CONF 64 – ECT 4 uses the wording “Agreement” instead of “Treaty” in this footnote].

* *Ed. note*: same text since ECT 3 [CONF 60] “Ministers agree that such applicable legislation would include provisions on environmental protection, land use, safety, technical standards.”

ECT 3 [CONF 60] (01/06/93)
[Article 8].4 – Transit
Ministerial Declaration 5 (To Article 8(4))

[In the event that access to Energy Transport Facilities cannot be obtained on commercial terms for Transit of Energy Materials and Products the Contracting Parties shall not place obstacles in the way of establishing new capacity - subject to applicable legislation which is compatible with paragraph (1) of this Article].⁵

Ministerial Declaration 5 – To Article 8(4)

Ministers agree that such applicable legislation would include provisions on environmental protection, land use, safety, technical standards.

ECT 2 [CONF 56] (01/05/93)
Article 8.4 - Transport and Transit

[In the event that access to high-pressure gas transmission pipelines, high-voltage electricity transmission grids, crude oil transmission pipelines, coal slurry pipelines and other facilities specifically for handling Energy Materials and Products cannot be obtained on commercial terms for transit of Energy Materials and Products from another Contracting Party to a third Contracting Party, the Contracting Parties shall not place obstacles in the way of establishing new capacity - subject to [their applicable legislation [in areas such as]⁶ safety, technical standards, environmental protection, land use and competition].⁷⁵

(Compromise text) ECT 1 [CONF 50] (15/03/93)
Article 8.4 - Transport and Transit

In the event that access to existing high-pressure gas transmission pipelines, high-voltage electricity transmission grids, crude oil transmission pipelines or coal slurry pipelines within a Contracting Party cannot be obtained on commercial terms for transit of Energy Materials and Products from another Contracting Party to a third Contracting Party, the Contracting Parties shall not place

⁵ It was agreed that in relation to paragraph (4), the terms of that paragraph should apply only within the territory of the Contracting Party and that the substance of article 79 of the Convention of the Law of the Sea should be made applicable to the Continental Shelf. In addition it was agreed that when the Law of the Sea Convention enters into force Contracting Parties will give serious consideration to limiting the field of application of Article 8 in the Charter Treaty and to leaving pipelines crossing the Continental Shelf to the Law of the Sea Convention. In Norway's opinion the Charter Treaty should not interfere with the regime relating to submarine cables and pipelines on the Continental Shelf already established in international law. The territorial scope of application of Article 8 should therefore be limited to land territory, internal waters and territorial sea.

Legal Sub-Group was asked to draft appropriate provisions. Insofar as coastal states possess no rights in relation to the Continental Shelf relevant to the obligations in a particular paragraph of this Article, that paragraph should not apply to pipelines and cables on the Continental Shelf. Insofar as the coastal states have rights relating to the Continental Shelf relevant to the obligations of any particular paragraph, then the obligations should apply in relation to pipelines and cables on the Continental Shelf.

Editor's note: in ECT 3 [CONF 60] a final sentence is added: "Informal discussion is to continue."

⁶ **Poland** and **Hungary** reserve.

⁷ WG II Chairman proposes following compromise: "any applicable legislation which is not in conflict with paragraph (1) of this Article".

obstacles in the way of establishing financially and economically viable new capacity - subject to their applicable legislation, inter alia, on safety, technical standards, environmental protection and land use.

BA-37 (01/03/93)
[Article 11].4 - Transport and Transit

In the event that access to existing [high-pressure gas transmission pipelines or high-voltage electricity transmission grids or crude oil transmission pipelines [or coal slurry pipelines]⁸]⁹ within a Contracting Party cannot be obtained on commercial terms for transit of Energy Materials and Products from another Contracting Party to a third Contracting Party, the Contracting Parties shall not place obstacles in the way of establishing [financially and economically viable]¹⁰ new capacity - subject to their applicable legislation, [[inter alia on]¹¹ safety, technical standards, environmental protection and land use.]⁶

BA-35 (09/02/93)
[Article 11].4 - Transport and Transit

In the event that access to existing [[high-pressure]¹² transmission pipelines or high-voltage transmission grids]⁹ within a Contracting Party cannot be obtained on commercial terms for transit of energy from another Contracting Party to a third Contracting Party, the Contracting Parties shall not place obstacles in the way of establishing [financially and economically viable]¹⁰ new capacity - subject to their applicable legislation, [[inter alia on]¹¹ safety, technical standards, environmental protection and land use.]⁶

BA-31 (21/12/92)
BA-26 (25/11/92)
BA-22 (21/10/92)
BA-15 (12/08/92)
BA-14 (24/06/92)
BA 13 (19/06/92)
[Article 11].4 - Transport and Transit

¹³In the event that access to existing [high-pressure transmission pipelines or high-voltage transmission grids]¹⁴ within a Contracting Party cannot be obtained [on commercial terms for transit of energy from another Contracting Party to a third Contracting Party, the Contracting Parties shall

⁸ General scrutiny reserve.

⁹ **Australia** supported by **Russian Federation** and **Armenia** asks for replacing with: “facilities for the transport of Energy Materials and Products and harbour facilities”. **USA**, **Japan** and **EC** strongly oppose this suggestion. Chairman suggests that the Charter Conference could be invited to look into the possibility of applying para (4) to port facilities which are dedicated to the transport of Energy Materials and Products, on the condition that this does not Interfere with the possible use of these facilities for other goods and products. General reserve on this suggestion.

¹⁰ **Norway** scrutiny reserve.

¹¹ **Norway** wants substituting with: “In areas such as”. **EC** reserve on Norway proposal.

¹² **Canada** proposes deletion.

¹³ **Greece** reserve.

¹⁴ **Australia** asks for replacing with: “facilities for the transport of Energy Materials and Products and harbour facilities”.

not place obstacles in the way of establishing financially and economically viable new capacity-subject to their applicable legislation, inter alia on safety, technical standards, environmental protection and land use]¹⁵.

BA 12 (09/04/92)
[Article 11].4 - Transport and Transit

In the event that access to existing high-pressure pipelines or high-voltage transmission grids within a Contracting Party cannot be obtained on commercial terms for transit of energy from another Contracting Party to a third Contracting Party, the Contracting Parties shall not place obstacles in the way of establishing financially and economically viable new capacity-subject to their applicable legislation, inter alia on safety, technical standards, environmental protection and land use.

BA 6 (21/01/92)
Article 11.6 - Transport and Transit

In the event that access to existing pipelines or transmission lines within a Contracting Party cannot be obtained on acceptable terms for transit of [Energy Materials and Products] from another Contracting Party to a third Contracting Party, the Contracting Party shall permit new capacity to be established in accordance with its applicable legislation inter alia on safety, environmental protection and land use.

¹⁵ **Greece** suggests substituting with “for transit of energy from another Contracting Party, the first Contracting Party shall, if requested, attempt to resolve the issue - including if appropriate by considering the possibility of new capacity being established - in accordance with its applicable legislation, inter alia on safety, environmental protection and land use”.