

Article 7(5) – 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

<p style="text-align: center;">BA-35 (09/02/93) [Article 11] - Transport and Transit</p>

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.

<p style="text-align: center;">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</p>

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 7.5

ECT as adopted (17/12/94) CONF 104 (Text for adoption) (14/09/94) Article 7.5 - Transit	Interim text (25/06/94) Article 8.5 - Transit
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A Contracting Party through whose Area Energy Materials and Products may transit shall not be obliged to

- (a) permit the construction or modification of Energy Transport Facilities; or
- (b) permit new or additional Transit through existing Energy Transport Facilities,

which it demonstrates to the other Contracting Parties concerned would endanger the security or efficiency of its energy systems, including the security of supply.

Contracting Parties shall, subject to paragraphs (6) and (7), secure established flows of Energy Materials and Products to, from or between the Areas of other Contracting Parties.

Interim text (20/06/94) Compromise [CONF 98] (22/04/94) Article 8.5 - Transit

A Contracting Party through whose Area Energy Materials and Products may transit shall not be obliged to

- (a) permit the construction or modification of Energy Transport Facilities; or
- (b) permit new or additional Transit through existing Energy Transport Facilities,

which it demonstrates to the other Contracting Parties concerned would endanger the security or efficiency of its energy systems, including the security of supply.

Subject to paragraphs (6) and (7), Contracting Parties shall secure established flows of Energy Materials and Products to, from or between the Area of other Contracting Parties.

ECT 7 [CONF 96] (17/03/94) [Article 8].5- Transit

[A Contracting Party through whose Area Energy Materials and Products may transit shall not be obliged to

- (a) permit the construction or modification of Energy Transport Facilities; or
- (b) permit new or additional Transit through existing Energy Transport Facilities,

which it demonstrates to the other Contracting Parties concerned would endanger [the security or efficiency of its energy systems, including the security of supply.]²

Subject to paragraphs (6) and (7), Contracting Parties shall secure established flows of Energy Materials and Products to, from or between the Area of other Contracting Parties.]^{3,4}

<p style="text-align: center;">ECT 6 [CONF 82] (20/12/93) ECT 5 [CONF 72] (11/10/93) ECT 4 [CONF 64] (07/07/93) [Article 8].5 - Transit</p>
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[A Contracting Party through whose Area Energy Materials and Products may transit shall not be obliged to

- (a) permit the construction or modification of Energy Transport Facilities, or
- (b) permit new or additional Transit through existing Energy Transport Facilities,

which it [demonstrates]⁵ to the other Contracting Parties concerned would endanger [the security or efficiency of its energy systems, including the security of supply.]²

Subject to paragraphs (6) and (7), Contracting Parties shall secure established flows of Energy Materials and Products to, from or between the Area of other Contracting Parties.]^{3,4}

<p style="text-align: center;">ECT 3 [CONF 60] (01/06/93) [Article 8].5 - Transit</p>
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[A Contracting Party through whose Domain Energy Materials and Products may Transit shall not be obliged to

- (a) permit the construction of Energy Transport Facilities, or
- (b) permit terms and conditions governing Transit and use of such facilities,

which it demonstrates to the other Contracting Parties concerned would endanger the security of supply of its customers, the quality of service of supplies of Energy Materials and Products and the most efficient development and operation of all parts of its electricity and gas systems.

Subject to paragraphs (6) and (7), Contracting Parties shall permit the Transit of established flows of Energy Materials and Products to, from or between the Domain of other Contracting Parties.]⁶

² **Ukraine** proposes replacement with: “the security or efficiency, including reliability of supplies, of its energy systems or the systems of other Contracting Parties.”

³ **Russian Federation** scrutiny reserve.

⁴ **Switzerland** contingency reserve pending Article 27, and clarification of relationship between paragraphs (5)(a) and (4).

⁵ Chairman asked translators to ensure that Russian language text correctly reflects that there is a distinction between “demonstrate to” and “convince”.

⁶ **Russian Federation, Ukraine and Belarus** reserve. They propose the following wording for this paragraph: “Subject to paragraphs (6) and (7) the Contracting Party through whose Domain Energy Materials and Products may Transit shall not be obliged to endanger existing flows of Energy Materials and Products destined for consumers of

ECT 2 [CONF 56] (01/05/93)
[Article 8].5 - Transport and Transit

[The provisions of paragraphs (1) to (4) above shall not require a Contracting Party through whose Domain Energy Materials and Products transit to take action which it demonstrates to the other Contracting Parties concerned would endanger existing flows of Energy Materials and Products destined for consumers of such products in its Domain or for the Domain of another State.]⁷

(Compromise text) ECT 1 [CONF 50] (15/03/93)
Article 8.5 - Transport and Transit

The provisions of paragraphs (1) to (4) above shall not require a Contracting Party to take action which it demonstrates to the other Contracting Parties concerned would endanger its security of energy supply, quality of service or the most efficient development and operation of all parts of its electricity and gas systems.

BA-37 (01/03/93)
BA-35 (09/02/93)
[Article 11].5 - Transport and Transit

[The provisions of paragraphs (1) to (4) above shall not require a Contracting Party to take action which it demonstrates to the other Contracting Parties concerned would endanger its [security of energy supply,]⁸ quality of service and the most efficient development and operation of all parts of its electricity and gas systems.]⁹

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].6 - Transport and Transit

¹⁰The provisions of this Article shall not require a Contracting Party to take action [– other than the protection of existing flows – which it demonstrates to the other Contracting Parties concerned would

such products in its Domain or for the Domain of another Contracting Party, or the security of its energy systems and the optimal regimes of their operation, if it so proves to other interested Contracting Parties.”

⁷ WG II Chairman proposes following compromise text for paragraph (5):

“The provisions of paragraphs (1) to (4) shall not be construed so as to oblige a Contracting Party through whose Domain Energy Materials and Products may transit to

- (a) permit the construction of 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, or
- (b) permit terms and conditions governing the transit and use of such facilities, which would endanger the security of supply and quality of service of supplies of Energy Materials and Products other than those covered by the transit arrangement, destined for consumers in its Domain or in the Domain of another State.”

⁸ **Russian Federation** and **Australia** reserve.

⁹ **EC** and **Russian Federation** reserve.

¹⁰ **Greece** reserve.

endanger its]¹¹ [security of]¹² energy supply, quality of service and the most efficient development and operation of all parts of its electricity and gas systems.¹³

BA 12 (09/04/92)
[Article 11].6 - Transport and Transit

The provisions of this Article shall not require a Contracting Party to take action which endangers its [security of energy supply]¹⁴, quality of service and the most efficient development and operation of all parts of its electricity and gas systems.

BA-6 (21/01/92)
Article 11.8 - Transport and Transit

The provisions of this Article shall not require a Contracting Party to take action which substantially reduces its security of energy supply or impedes the optimisation of local electricity grids and gas pipelines.

BA-4 (31/10/91)
Article 11.2¹⁵ - Freedom of Movement

The provisions of this Article shall not require a Contracting Party to take action which reduces substantially its security of energy supply.

BP 2 (11/09/91)
Article 11d - Freedom of Movement

The provisions of this Article shall not require a Contracting Party to take action which reduces substantially its security of energy supply.

¹¹ **Austria** suggests replacing with: “which - apart from existing supply flows and contractual relations to be maintained - proves to endanger its own”.

¹² **Russian Federation** and **Australia** reserve.

¹³ **Russian Federation** suggests adding the following text:

“, subject to the requirement, that the relevant policies, measures and practices in the fields covered by this Article are not applied in a manner which causes disturbances to the principles of the present Agreement, would constitute a means of discrimination between the Contracting Parties or its investors, or cause serious damage to existing contractual relations in the fields covered by this Agreement or to the trade flows, and that such relevant policies, measures and practices shall be discontinued as soon as the conditions giving rise to them have ceased to exist”.

¹⁴ **Australia** suggests deletion.

¹⁵ **Japan**: provisions of paragraph (2) have wider implications than this Article, and would be better covered elsewhere.