

Article 7(7) – 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(7)

<p style="text-align: center;">ECT as adopted (17/12/94) CONF 104 (Text for adoption) (14/09/94) Article 7.7 - Transit</p>
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The following provisions shall apply to a dispute described in paragraph (6), but only following the exhaustion of all relevant contractual or other dispute resolution remedies previously agreed between the Contracting Parties party to the dispute or between any entity referred to in paragraph (6) and an entity of another Contracting Party party to the dispute:

- (a) A Contracting Party party to the dispute may refer it to the Secretary-General by a notification summarizing the matters in dispute. The Secretary-General shall notify all Contracting Parties of any such referral.
- (b) Within 30 days of receipt of such a notification, the Secretary-General, in consultation with the parties to the dispute and the other Contracting Parties concerned, shall appoint a conciliator. Such a conciliator shall have experience in the matters subject to dispute and shall not be a national or citizen of or permanently resident in a party to the dispute or one of the other Contracting Parties concerned.
- (c) The conciliator shall seek the agreement of the parties to the dispute to a resolution thereof or upon a procedure to achieve such resolution. If within 90 days of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the interim tariffs and other terms and conditions to be observed for Transit from a date which he shall specify until the dispute is resolved.
- (d) The Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim decision under subparagraph (c) on tariffs, terms and conditions for 12 months following the conciliator's decision or until resolution of the dispute, whichever is earlier.
- (e) Notwithstanding subparagraph (b) the Secretary-General may elect not to appoint a conciliator if in his judgement the dispute concerns Transit that is or has been the subject of the dispute resolution procedures set out in subparagraphs (a) to (d) and those proceedings have not resulted in a resolution of the dispute.
- (f) The Charter Conference shall adopt standard provisions concerning the conduct of conciliation and the compensation of conciliators.

Interim text (25/06/94)

Article 8.7 - Transit

- (a) The parties to a dispute relating to described in paragraph (6) shall exhaust any contractual or other dispute resolution remedies they have previously agreed.
- (b) If this fails to resolve the dispute, a party to the dispute may refer it to the Secretary General with by a note notification summarizing the matters in dispute. The Secretary General shall notify all Contracting Parties of any such referral.
- (c) Within 30 days of receipt of such a note notification, the Secretary General, in consultation with the parties to the dispute and the other Contracting Parties concerned, shall appoint a conciliator. Such a conciliator shall have experience in the matters subject to dispute and shall not be a national or citizen of or permanently resident in a party to the dispute the Areas through which the Transit occurs, from which the Energy Materials and Products being transported originate or to which the Energy Materials and Products are being supplied or the other Contracting Parties concerned.
- (d) The conciliator shall conciliate between seek the agreement of the parties to the and seek their agreement to a resolution to the dispute thereof or upon a procedure to achieve such resolution. If within 90 days of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the interim tariffs and other terms and conditions to be observed for Transit from a date which he shall specify until such resolution the dispute is resolved.
- (e) The Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim decision under paragraph (7)(d) on tariffs, terms and conditions for 12 months following the conciliator 's decision or until resolution of the dispute, whichever is earlier.
- (f) No dispute concerning a Transit which has already been the subject of the conciliation procedures set out in this Article may be referred to the Secretary General under paragraph (7)(b) unless the previous dispute has been resolved.
- (g) The Charter Conference shall adopt standard provisions on conciliator's expenses, location, etc shall be decided by the Charter Conference concerning the conduct of conciliation and the compensation of conciliators.

Interim text (20/06/94) Compromise text [CONF 98] (22/04/94) Article 8.7 - Transit	ECT 7 [CONF 96] (17/03/94) ECT 6 [CONF 82] (20/12/93) ECT 5 [CONF 72] (11/10/93)* ECT 4 [CONF 64] (07/07/93) [Article 8].7 - Transit
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- (a) The parties to a dispute relating to paragraph (6) shall exhaust any contractual or other dispute resolution remedies they have previously agreed.
- (b) If this fails to resolve the dispute, a party to the dispute may refer it to the Secretary General with a note summarizing the matters in dispute. The Secretary General shall notify all Contracting Parties of any such referral.
- (c) Within 30 days of receipt of such a note, the Secretary General, in consultation with the parties to the dispute and the Contracting Parties concerned, shall appoint a conciliator. Such a conciliator shall have experience in the matters subject to dispute and shall not be a national or citizen of or resident in the Areas through which the Transit occurs, from which the Energy Materials and Products being transported originate or to which the Energy Materials and Products are being supplied.
- (d) The conciliator shall conciliate between the parties to the dispute and seek their agreement to a resolution to the dispute or upon a procedure to achieve such resolution. If within 90 days of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the interim tariffs and other terms and conditions to be observed for Transit from a date which he shall specify until such resolution.
- (e) The Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim decision under paragraph (7)(d) on tariffs, terms and conditions for 12 months following the conciliator's decision or until resolution of the dispute, whichever is earlier.
- (f) No dispute concerning a Transit which has already been the subject of the conciliation procedures set out in this Article may be referred to the Secretary General under paragraph (7)(b) above unless the previous dispute has been resolved.
- (g) Standard provisions on conciliator's expenses, location, etc shall be decided by the Charter Conference.

* *Ed. note:* in these version article 8.7b states that "... a party to the dispute may refer it to the Secretary General referred to in Article 40 ... " (emphasis added)

ECT 3 [CONF 60] (01/06/93)
[Article 8].7 - Transit

ECT 2 [CONF 56] (01/05/93)
[Article 8].7 - Transport and Transit

- (a) The parties to a dispute relating to paragraph (6) shall exhaust any contractual or other dispute resolution remedies they have previously agreed.
- (b) If this fails to resolve the dispute, a party to the dispute may refer it to the Secretary General referred to in Article 40 with a note summarising the matters in dispute. The Secretary General shall notify all Contracting Parties of any such referral;
- (c) Within 30 days of receipt of such a note, the Secretary General, in consultation with the parties to the dispute and the Contracting Parties concerned, shall appoint a conciliator. Such a conciliator shall have experience in the matters subject to dispute and shall not be a national or citizen of or resident in the Domains through which the Transit occurs, from which the Energy Materials and Products being transported originate or to which the Energy Materials and Products are being supplied;
- (d) The conciliator shall conciliate between the parties and seek their agreement to a resolution to the dispute or upon a procedure to achieve such resolution. If within 90 days of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the interim tariffs and other terms and conditions to be observed for Transit from a date which he shall specify until such resolution;
- (e) The Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim decision under paragraph (7)(d) on tariffs, terms and conditions for 12 months following the conciliator's decision or until resolution of the dispute, whichever is earlier;
- (f) No dispute concerning a Transit which has already been the subject of the conciliation procedures set out in this Article may be referred to the Secretary General under paragraph (7)(b) above unless the previous dispute has been resolved;
- (g) Standard provisions on conciliator's expenses, location, etc shall be decided by the Charter Conference.

(Compromise text) ECT 1 [CONF 50] (15/03/93)
Article 8.7 - Transport and Transit

- (a) The parties to a a dispute relating to paragraph (6) shall exhaust any contractual or other dispute resolution remedies they have previously agreed.
- (b) If this fails to resolve the dispute, a party to the dispute may refer it to the Secretary General referred to in Article 40 with a note summarising the matters in dispute. The Secretary General shall notify all Contracting Parties of any such referral;
- (c) Within 30 days of receipt of such a note, the secretary General, in consultation with the parties to the dispute and the Contracting Parties concerned, shall appoint a conciliator,

such a conciliator shall have experience in the matters subject to dispute and shall not be a national or citizen of or resident in the Domains through which the transit occurs, from which the Energy Materials and Products being transported originate or to which the Energy Materials and Products are being supplied;

- (d) The conciliator shall conciliate between the parties and seek their agreement to a resolution to the dispute or upon a procedure to achieve such resolution. If within 90 days of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the interim tariffs and other terms and conditions to be observed for transit from a date which he shall specify until such resolution;

[DL]

- (e) The Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim decision under paragraph (7)(d) on tariffs, terms and conditions for 12 months following the conciliator's decision or until resolution of the dispute, whichever is earlier;
- (f) No dispute concerning a transit which has already been the subject of the conciliation procedures set out in this Article may be referred to the Secretary General under paragraph (7)(b) above unless the previous dispute has been resolved;
- (g) Standard provisions on conciliator's expenses, location, etc shall be decided by the Charter Conference.

BA-37 (01/03/93)

[Article 11].7 - Transport and Transit

- (a) [The parties to the dispute shall exhaust any contractual or other dispute resolution remedies they have previously agreed;
- (b) If this fails to resolve the dispute, a party to the dispute may refer it to the Secretary General referred to in Article 31 with a note summarising the matters in dispute. The Secretary General shall notify all Contracting Parties of any such referral;
- (c) Within 30 days of receipt of such a note, the Secretary General, in consultation with the parties to the dispute and the Contracting Parties concerned, shall appoint a conciliator.² Such a conciliator shall have experience in the matters subject to dispute and shall not be a national or citizen of or resident in the Domains³ through which the transit occurs, from

² Norway is not satisfied with leaving the choice of a conciliator to the Secretary General as proposed, in view of the strong legal and contractual involvement by the Contracting Parties and Investors and the conciliator's powers as proposed.

³ Norway reserve. According to N the territorial scope of application of Article 11 should be limited to land territory, internal waters and territorial sea. Submarine cables and pipelines on the continental shelf are covered in Article 4 of the Convention on the Continental Shelf of 1958 and in Article 79 of the United Nations Convention on

- which the Energy Materials and Products being transported originate or to which the Energy Materials and Products are being supplied;
- (d) The conciliator shall conciliate between the parties and seek their agreement to a resolution to the dispute or upon a procedure to achieve such resolution. If within 90 days of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the [interim tariffs and other terms and]⁴ conditions to be observed for transit from a date which he shall specify until such resolution;
 - (e) [If the parties to the dispute then fail to agree a resolution to the dispute or upon a procedure to achieve such resolution within a further 60 days the Secretary General may seek the consent of the Charter Conference referred to in Article 29 to further conciliation measures;]⁵
 - (f) The Contracting Parties undertake to observe and ensure that the entities under their control or Jurisdiction observe any interim decision under paragraph (d) on tariffs, terms and conditions for 12 months following the conciliator's decision or until resolution of the dispute, whichever is earlier;⁶
 - (g) No dispute concerning a transit which has already been the subject of the conciliation procedures set out in this Article may be referred to the Secretary General under paragraph (b) above unless the previous dispute has been resolved;
 - (h) [Standard provisions on conciliator's expenses, location, etc.]⁷⁸

the Law of the Sea of 1982. The Basic Agreement should not interfere with this regime already established in international law.

⁴ **Norway** reserve.

⁵ Scepticism was expressed by many delegations on this subparagraph and especially on the possible role of the Charter Conference.

⁶ The Legal Sub-Group is invited to check this subparagraph on its consistency with paragraph (6) in view of the word "require" in the latter paragraph.

⁷ If time allows a draft will be made for such provisions; if not, it will be referred to the Charter Conference.

⁸ **Russian Federation, USA, Austria** and **EC** scrutiny reserve on para (6) and (7).