

Article 7(8) – 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(8)

ECT as adopted (17/12/94) CONF 104 (Text for adoption) (14/09/94) Article 7.8 - Transit	Interim text (25/06/94) Interim text (20/06/94) Article 8.8 - Transit
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Nothing in this Article shall derogate from a Contracting Party's rights and obligations under international law including customary international law, existing bilateral or multilateral agreements, including rules concerning submarine cables and pipelines.

Compromise text [CONF 98] (22/04/94) Article 8.8 - Transit
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[This Article shall not derogate from a Contracting Party's rights and obligations under existing bilateral or multilateral agreements or under Article 35.]²

ECT 7 [CONF 96] (17/03/94) [Article 8].8 - Transit
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[This Article shall not derogate from a Contracting Party's rights and obligations under existing bilateral or multilateral agreements including Articles 4 and 35 of this Treaty.]³

ECT 6 [CONF 82] (20/12/93) ECT 5 [CONF 72] (11/10/93) ECT 4 [CONF 64] (07/07/93) [Article 8].8 - Transit
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[This Article shall not derogate from a Contracting Party's rights and obligations under existing bilateral or multilateral agreements [including Articles 4 and 35 of this Agreement.]⁴⁵

ECT 3 [CONF 60] (01/06/93) [Article 8].8 - Transit
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[This Article shall not derogate from a Contracting Party's rights and obligations under existing bilateral or multilateral agreements.]⁶

ECT 2 [CONF 56] (01/05/93) [Article 8].8 – Transport and Transit
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⁷[This Article shall not derogate from a Contracting Party's obligations under article V of the GATT as applied by Articles 4 and 35 of this Agreement]⁸ nor its rights and obligations under Article 4 of

² Following the Legal Sub-Group redraft of Article 4, a reference to the latter was dropped.

³ Advice from Legal Sub-Group requested. In the meantime **EC** and **Canada** scrutiny reserves.

⁴ **Canada** scrutiny reserve.

⁵ Subject to advice from Legal Sub-Group on implications. **EC** scrutiny reserve.

⁶ **EC** scrutiny reserve. Legal Sub-Group to advice further on derogation issues.

⁷ **EC** disagree with the underlined text of para (8) with respect to both Conventions.

the Convention on the Continental Shelf of 1958 or Article 79 of the United Nations Convention on the Law of the sea of 1982, [nor its rights and obligations in existing bilateral or multilateral agreements insofar as the exercise of those rights and obligations does not detract from the rights of Contracting Parties who are not party to such agreements or of the Investors of such Contracting Parties].⁹

(Compromise text) ECT 1 [CONF 50] (15/03/93)
Article 8.9 - Transport and Transit

This Article shall not derogate from a Contracting Party's obligations under article 5 of the GATT as applied by Articles 4 and 35 of this Agreement nor its rights and obligations under Article 4 of the Convention on the Continental Shelf of 1958 or Article 79 of the United Nations Convention on the Law of the Sea of 1982, nor its rights and obligations in existing bilateral or multilateral agreements insofar as the exercise of those rights and obligations does not detract from the rights of Contracting Parties who are not party to such agreements or of the Investors of such Contracting Parties.

BA-37 (01/03/93)
[Article 11].1 - Transport and Transit

[This paragraph shall not derogate from the obligations of Contracting Parties under article 5 of the GATT as applied by Articles 5 and 41 BIS of this Agreement nor a Contracting Party's rights and obligations in existing bilateral or multilateral agreements insofar as the exercise of those rights and obligations does not detract from the rights of Contracting Parties who are not party to such agreements or of the Investors of such Contracting Parties.]¹⁰

BA-35 (09/02/93)
[Article 11].1 - Transport and Transit

[This paragraph shall not derogate from the obligations of Contracting Parties under article 5 of the GATT as applied by Articles 5 and 41 BIS of this Agreement nor, a Contracting Party's rights and obligations in existing bilateral or multilateral agreements insofar as the exercise of those rights and obligations does not detract from the rights of Contracting Parties who are not party to such agreements or of the Investors of such Contracting Parties.]⁸⁶

⁸ Legal Sub-Group was asked to examine the wording of this part of paragraph (8) and to assure that it fulfills the wish of WG II that this should not derogate from article V of GATT.

⁹ Legal Sub-Group was asked to examine whether, in the light of the Vienna Convention, such language is necessary, or could have harmful effects. The Sub-Group was asked to consider the wording and in the process to give separate consideration to the need for the words “or of the Investors of such Contracting Parties”.

¹⁰ Chairman’s proposal derived from earlier Hungarian proposal. General scrutiny reserve.