

Article 7(3) – 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 7.3

ECT as adopted (17/12/94)
CONF 104 (Text for adoption) (14/09/94)
Article 7.3 - Transit

Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and Products in Transit in no less favourable a manner than its provisions treat such materials and products originating in or destined for its own Area, unless an existing international agreement provides otherwise.

Interim text (25/06/94)
Article 8.3 - Transit

Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and Products in Transit in no less favourable a manner than its provisions treat such materials and products originating in or destined for its own Area, **except of otherwise provided for in** unless an existing international agreement provides otherwise.

Interim text (20/06/94)
Compromise text [CONF 98] (22/04/94)
Article 8.3 - Transit

Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and Products in Transit in no less favourable a manner than its provisions treat such materials and products originating in or destined for its own Area, except if otherwise provided for in an existing international agreement.

ECT 7 [CONF 96] (17/03/94)
[Article 8].3 - Transit

Each Contracting Party undertakes that its provisions relating to [transport]² of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and Products in Transit in no less favourable a manner than its provisions treat such materials and products originating in or destined for its own Area, except if otherwise provided for in an existing international agreement.

² **Australia** contingency reserve. Removal of reserve depends on Australia concerns about coverage of transport in the Treaty being met through adoption of a legally binding GATT reference approach. **Canada** scrutiny reserve.

ECT 6 [CONF 82] (20/12/93)
ECT 5 [CONF 72] (11/10/93)
ECT 4 [CONF 64] (07/07/93)
[Article 8].3 - Transit

Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and Products in Transit in no less favourable a manner than its provisions treat such materials and products originating in or destined for its own Area, except if otherwise provided for in an existing international agreement.³

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

[Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and Products in Transit in no less favourable a manner than its provisions treat such materials and products originating in or destined for its own Domain, except if otherwise provided for in an existing international agreement.]³

ECT 2 [CONF 56] (01/05/93)
[Article 8].3 - Transport and Transit

[Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products [and the use of harbour facilities,]⁴ high pressure gas transmission pipelines, high-voltage electricity transmission grids, crude oil transmission pipelines and coal slurry pipelines shall treat Energy Materials and Products originating [in another Domain and destined for a third Domain so long as either the other Domain or the third Domain is that of a Contracting Party]⁵ in no less favourable a manner than its provisions treat such materials and products originating in or destined for its own Domain, except if otherwise provided for in an existing international agreement.]^{6,7}

CONF 50 – ECT 1 (15/03/93)
[Article 8].3 - Transport and Transit

Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products and the use of harbour facilities, high pressure gas transmission pipelines, high-voltage electricity transmission grids, crude oil transmission pipelines and coal slurry pipelines shall treat Energy Materials and Products wholly or partly originating in or destined for the Domain of another

³ **Australia** contingency reserve. Removal of reserve depends on Australia concerns about coverage of transport in the Agreement being met through adoption of a legally binding GATT reference approach.

Canada scrutiny reserve.

⁴ **USA** reserve. USA will present a proposal on how to handle its concerns, preferably by drafting a text for the Ministerial Declaration stating that this paragraph does not apply to the means of transportation. The proposal will be forwarded to the Secretariat in good time before the May Plenary Session.

⁵ Similar wording for paragraphs (4) and (9) will be proposed by WG 11 Chairman.

⁶ **Australia** contingency reserve (removal of reserve depends on Australia concerns about coverage of transport in the Agreement being met through adoption of a legally binding GATT reference approach).

⁷ General scrutiny reserve.

Contracting Party, in no less favourable a manner than its provisions treat such materials and products wholly or partly originating in or destined for its own Domain, except if otherwise provided for in an existing international agreement.

BA-37 (01/03/93)
[Article 11].3 - Transport and Transit

Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products [and the use of harbor facilities]⁸, high pressure gas transmission pipelines or high-voltage electricity transmission grids or crude oil transmission pipelines [or coal slurry pipelines]⁹ shall treat Energy Materials and Products wholly or partly originating in or destined for the Domain¹⁰ of another Contracting Party, in no less favourable a manner than its provisions treat such materials and products wholly or partly originating in or destined for its own Domain**Error! Bookmark not defined.**, except if otherwise provided for in an existing international agreement.

BA-35 (09/02/93)
[Article 11].3 - Transport and Transit

¹¹Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products [and the use of harbour facilities]¹², [high-pressure]¹³ transmission pipelines or high-voltage transmission grids shall treat Energy Materials and Products wholly or partly originating in or destined for the Domain of another Contracting Party, in no less favourable a manner than its provisions treat such materials and products wholly or partly originating in or destined for its own Domain, except if otherwise provided for in an existing international agreement.

BA-31 (21/12/92)
BA-26 (25/11/92)
BA-22 (21/10/92)
[Article 11].3 - Transport and Transit

^{14,11}Each Contracting Party undertakes that its provisions relating to [transport of Energy Materials and Products and the use of harbour facilities]¹⁵, high-pressure transmission pipelines or high-voltage transmission grids shall treat Energy Materials and Products wholly or partly originating in or destined for the Domain of another Contracting Party, in no less favourable a manner than its

⁸ USA scrutiny reserve.

⁹ General scrutiny reserve.

¹⁰ **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 the Law of the Sea of 1982. The Basic Agreement should not interfere with this regime already established in international law.

¹¹ EC may prepare additional language reducing any possible doubt that this provision does not require third party access.

¹² USA scrutiny reserve.

¹³ **Canada** proposes deletion.

¹⁴ **Greece** reserve.

¹⁵ USA reserve pending further instructions from capital.

provisions treat such materials and products wholly or partly originating in or destined for its own Domain, except if otherwise provided for in an existing international [agreement]¹⁶.

BA-15 (12/08/92)
[Article 11].3 - Transport and Transit

¹⁴ ¹¹ Each Contracting Party undertakes that its provisions relating to [transport of [Energy Materials and Products] and the use of harbour facilities]¹⁵, high-pressure transmission pipelines or high-voltage transmission grids shall treat [Energy Materials and Products] wholly or partly originating in or destined for the Domain of another Contracting Party, in no less favourable a manner than its provisions treat such materials and products wholly or partly originating in or destined for its own Domain, except if otherwise provided for in an existing international [agreement]¹⁶.

BA-14 (24/06/92)
BA 13 (19/06/92)
[Article 11].3 - Transport and Transit

¹⁴ ¹¹ Each Contracting Party undertakes that its provisions relating to [transport of [Energy Materials and Products] and the use of harbour facilities]¹⁵, high-pressure transmission pipelines or high-voltage transmission grids shall treat [Energy Materials and Products] wholly or partly originating in or destined for the [Territory] of another Contracting Party, in no less favourable a manner than its provisions treat such materials and products wholly or partly originating in or destined for its own [Territory], except if otherwise provided for in an existing international [agreement]¹⁶.

BA 12 (09/04/92)
[Article 11].3 - Transport and Transit

Each Contracting Party [undertakes]¹⁷ that its provisions relating to transport of [Energy Materials and Products] by rail, [road]^{18,19}, [harbour facilities]²⁰ and to the use of high-pressure pipelines or high-voltage transmission grids shall, if capacity is available, not be less favourable than those which would have been accorded to such materials and products wholly or partly originating in or destined for its own Territory or the Territory of another Contracting Party, except if otherwise provided for in an existing international agreement.

BA 6 (21/01/92)
Article 11.3 to 11.5 - Transport and Transit

(3) Each Contracting Party undertakes that its provisions relative to transport of [Energy Materials and Products] by rail, inland waterway or sea, shall not be less favourable in their direct or indirect effect on carriers of other states as compared with carriers who are nationals of another Contracting Party or as compared with carriers who are nationals of that state or less favourable for [Energy Materials or Products] originating in or destined for the Territory of another Contracting

¹⁶ **Australia** asks for substituting with “law”.

¹⁷ **Japan** asks for substituting with “shall”.

¹⁸ **Austria** considers road transport undesirable.

¹⁹ **Australia** requests for inserting : “inland waterways”.

²⁰ **USA** reserve.

Party compared with such [Energy Materials and Products] originating in or destined for its own Territory.

(4) In the case of transport within its Territory each Contracting Party shall prohibit discrimination which takes the form of carriers or other providers of transportation services or harbor facilities charging discriminatory rates and imposing different conditions in respect of the same [Energy Materials and Products] over the same transport links on grounds of the country of origin or of destination of the goods in question.

(5) Each Contracting Party undertakes that its provisions relative to the construction and use of pipelines or high voltage transmission lines shall not be less favourable in their direct or indirect effect on builders and operators of pipelines or transmission lines of other states as compared with those who are nationals of another Contracting Party or as compared with those who are nationals of that state or less favourable for [Energy Materials and Products] wholly or partly originating in or destined for the Territory of another Contracting Party compared with such [Energy Materials and Products] wholly originating in or destined for its own Territory.

<p style="text-align: center;">BA 4 (31/10/91) Article 11.1b - Freedom of Movement</p>

- (1) Each Contracting Party undertakes:
- (a) To limit the amount of any fees and charges (other than import and export duties and internal taxes) imposed in connection with the importation or exportation of [Energy Materials and Products] including the use of facilities necessary for such purposes to the approximate cost of services rendered, including a reasonable commercial rate of return, [and to avoid indirect protection of domestic products or taxation of imports or exports for fiscal purposes]²¹;

<p style="text-align: center;">BP 2 (11/09/91) Article 11.b to c - Freedom of Movement</p>

Each Contracting Party undertakes:

- (b) to limit the amount of any fees and charges imposed in connection with the importation or exportation of Energy Materials and Products (other than import and export duties and internal taxes) to the approximate cost of services rendered, including a reasonable commercial rate of return, and to avoid indirect protection of domestic products or taxation of imports or exports for fiscal purposes;
- (c) not to institute or maintain any form of prohibitions or restrictions (other than duties, taxes or other charges) or measures having equivalent effect on the importation of Energy materials and Products from any other Contracting Party or on the exportation or sale for export of any such Materials and Products destined for the Territory of any other Contracting Party;

<p style="text-align: center;">Basic Protocol (20/08/91) Article 9.b to c - Freedom of Movement</p>
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²¹ **New Zealand**: supported by **Sweden**, reserved its position on the need for this wording in subpara (b).

Each Contracting Party undertakes:

- (a) To limit the amount of any fees and charges imposed in connection with the importation or exportation of Energy Materials and Products (other than import and export duties and internal taxes) to the approximate cost of services rendered, and to avoid indirect protection of domestic products or taxation of imports or exports for fiscal purposes;
- (b) Not to institute or maintain any form of prohibitions or restrictions (other than duties, taxes or other charges) or measures having equivalent effect on the importation of Energy Materials and Products from any other Contracting Party or on the exportation or sale for export of any such Materials and Products destined for the Territory of any other Contracting Party.