

**The Energy Charter Treaty**

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CHAPTER

10. Part IV: Miscellaneous Provisions

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Abstract

This chapter studies Part IV of the Energy Charter Treaty, which is entitled 'Miscellaneous Provisions'. Article 18, dealing with sovereignty over natural resources, is the first article in Part IV of the ECT. This is significant, because the placement of Article 18 outside of Part III of the ECT means that the provisions in Article 18 cannot be made the subject of the dispute settlement mechanism in Article 26 of the ECT, which requires that there be an alleged breach of an obligation under Part III of the ECT. Meanwhile, Article 19 deals with environmental aspects and Article 20 with transparency. Article 21, concerning taxation, has a complex structure such that interpretation based on the Vienna Convention may be required. Article 22 deals with a Contracting Party's obligations in relation to the conduct of state enterprises (paragraphs 1 and 2); the conduct of entities which it has entrusted with governmental authority (paragraph 3); and the conduct of entities which have been granted exclusive or special privileges (paragraph 4). Article 23 addresses the responsibility of Contracting Parties for acts of all organs of government, be they at the national, regional, or local level. Article 24 sets forth a number of general exceptions to the obligations set out in the ECT. Lastly, Article 25 sets forth a separate exception related to most-favoured-nation treatment for members of an economic integration agreement (EIA).

Keywords: [ECT \(Energy Charter Treaty\)](#), [Transparency](#), [International environmental law](#), [Sovereignty](#), [Reservations and exceptions](#)

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G. Article 24: Exceptions

- 1) This Article shall not apply to Articles 12, 13 and 29.
- 2) The provisions of this Treaty other than
 - (a) those referred to in paragraph (1); and
 - (b) with respect to subparagraph (i), Part III of the Treaty shall not preclude any Contracting Party from adopting or enforcing any measure
 - (i) necessary to protect human, animal or plant life or health;
 - (ii) essential to the acquisition or distribution of Energy Materials and Products in conditions of short supply arising from causes outside the control of that Contracting Party, provided that any such measure shall be consistent with the principles that
 - (A) all other Contracting Parties are entitled to an equitable share of the international supply of such Energy Materials and Products; and
 - (B) any such measure that is inconsistent with this Treaty shall be discontinued as soon as the conditions giving rise to it have ceased to exist; or
 - (iii) designed to benefit Investors who are aboriginal people or socially or economically disadvantaged individuals or groups or their Investments and notified to the Secretariat as such, provided that such measure
 - (A) has no significant impact on that Contracting Party's economy; and
 - (B) does not discriminate between Investors of any other Contracting Party and Investors of that Contracting Party not included among those for whom the measure is intended, provided that no such measure shall constitute a disguised restriction on Economic Activity in the Energy Sector, or arbitrary or unjustifiable discrimination between Contracting Parties or between Investors or other interested persons of Contracting Parties. Such measures shall be duly motivated and shall not nullify or impair any benefit one or more other Contracting Parties may reasonably expect under this Treaty to an extent greater than is strictly necessary to the stated end.
- 3) The provisions of this Treaty other than those referred to in paragraph (1) shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary:
 - (a) for the protection of its essential security interests including those
 - (i) relating to the supply of Energy Materials and Products to a military establishment; or
 - (ii) taken in time of war, armed conflict or other emergency in international relations;
 - (b) relating to the implementation of national policies respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or needed to fulfil its

obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines, and other international nuclear non-proliferation obligations or understandings; or (c) for the maintenance of public order.

(c) Such measure shall not constitute a disguised restriction on Transit.

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4) ↳ The provisions of this Treaty which accord most favoured nation treatment shall not oblige any Contracting Party to extend to the Investors of any other Contracting Party any preferential treatment:

(a) resulting from its membership of a free-trade area or customs union; or

(b) which is accorded by a bilateral or multilateral agreement concerning economic cooperation between states that were constituent parts of the former Union of Soviet Socialist Republics pending the establishment of their mutual economic relations on a definitive basis.

Article 24 sets forth a number of general exceptions to the obligations set out in the ECT. The exceptions listed in the article have to a large extent been inspired by Articles XX and XXI of the 1994 GATT. If a Contracting Party has adopted or enforced a measure which falls under Article 24, no violation of ECT obligations has occurred.²²⁰

It is noteworthy, that no ECT tribunal has so far been called upon to rule on Article 24.²²¹

One of the Contracting Parties (Croatia) seems to have relied on Article 24(2) with respect to transit by road of oil bound for Slovenia, another Contracting Party. The issue was raised at a Charter Conference meeting, but was apparently not taken further.²²²

The *travaux préparatoires* suggest that some delegations were of the view that the exceptions in the ECT should be kept at a minimum.²²³

The Contracting Parties agreed on the following Understanding with respect to Article 24.

Exceptions contained in the GATT and Related Investments apply between particular Contracting Parties which are parties to the GATT, as recognized by Article 4. With respect to Trade in Energy Materials and Products governed by Article 29, that Article specifies the provisions relevant to the subjects covered by Article 24.²²⁴

The exceptions in Article 24 thus do not apply to Contracting Parties which are parties to the GATT in so far as trade in Energy Materials and Products is concerned. Nor do they apply to Articles 12, 13, and 29 of the ECT as stipulated in Paragraph (1) of Article 24. It follows from Paragraph (2)(b) that the exceptions also shall not apply to Part III of the ECT in so far as the protection of humans, animals or plant life or health is concerned. Other aspects of Part III are, however, covered by the exceptions.

Article 24(2)(b)(iii) allows measures which are necessary (i) to protect human, animal or plant life or health; (ii) in emergency energy shortage situations; and (iii) to benefit investors who are indigenous or socially or economically disadvantaged persons.

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Such measures must not constitute a disguised restriction on economic activity in the energy sector, nor an arbitrary or unjustifiable discrimination. In addition, the measures must be duly motivated and must not impair benefits reasonably expected ↳ under the ECT to an extent greater than what is strictly necessary to achieve the stated objective.

Article 24(3) covers measures related to security interests, the non-proliferation of nuclear weapons and the maintenance of political order. Any such measure must not constitute a disguised restriction on Transit.²²⁵ Article 7 of the ECT dealing with transit is not exempted from Article 24, which means, as a matter of principle, that a Contracting Party can stop the transit of energy products for the protection of its essential security interests, provided that the measure does not constitute a disguised restriction on the transit.

Article 24(4) establishes an exception related to most-favoured-nation treatment for members of a free trade or customs union, and for parties to an economic co-operation agreement between CIS countries, pending the definitive establishment of their mutual economic relations.

With respect to Article 24(4)(a) the following Decision was taken at the conference adopting the text of the ECT.

An Investment of an Investor referred to in Article 1(7)(a)(ii), of a Contracting Party which is not party to an EIA or a member of a free-trade area or a customs union, shall be entitled to treatment accorded under such EIA, free-trade area or customs union, provided that the Investment:

- (a) has its registered office, central administration or principal place of business in the Area of a party to that EIA or member of that free-trade area or customs union; or
- (b) in case it only has its registered office in that Area, has an effective and continuous link with the economy of one of the parties to that EIA or member of that free-trade area or customs union.²²⁶

In this context mention must be made of the ILC Articles on State Responsibility, which are generally accepted to be an authoritative codification of customary international law concerning state responsibility.

Chapter V of the ILC Articles deals with circumstances precluding wrongfulness under international law. From a practical point of view Article 23 (*force majeure*), Article 24 (Distress), and Article 25 (Necessity) are the most relevant provisions with respect to the protection of foreign investments.

Article 23 reads:

Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
2. Paragraph 1 does not apply if:
 - (a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - (b) the State has assumed the risk of that situation occurring.

p. 392 Wrongfulness is avoided based on *force majeure* when the act in question is due to an unforeseen event or an irreversible force which is beyond the control of the State and which makes it materially impossible for the State to perform the obligation. A State seeking to rely on *force majeure* must thus satisfy three conditions: (i) the act in question must be due to an unforeseen event, or an irresistible force; (ii) the event or the force must be beyond the control of the State; and (iii) the event, or the force, must make it materially impossible for State to perform the obligation in question.

Force majeure under Article 24 of the ILC Articles is to be distinguished from *force majeure* under national and international commercial law.²²⁷ In this context *force majeure* is usually governed by the municipal law of a State. When public international law is the governing law, Article 23 may be applicable.

Article 24 of the ILC Articles deals with distress. It reads:

Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.
2. Paragraph 1 does not apply if:
 - (a). The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - (b). The act in question is likely to create a comparable or greater peril.

Just like the provision on *force majeure*, the concept of distress is exceptional in character in the system of public international law in general, and with respect to investment protection treaties in particular. The concept could become relevant only in very rare situations.

The principle of necessity could be more relevant—than distress—in the context of investment protection treaties. Necessity is addressed in Article 25 of the ILC Articles. It reads:

Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - (a). Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
 - (b). Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - (a). The international obligation in question excludes the possibility of invoking necessity; or
 - (b). The State has contributed to the situation of necessity.

Like *force majeure* and distress, the plea of necessity is exceptional in character. It is generally accepted that the principle must be interpreted narrowly. In the *Gabčíkovo–Nagymaros* case, the ICJ noted that 'the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the state concerned is not the sole judge of whether those have been met'.²²⁸

The conditions referred to by the ICJ are the four conditions identified in Article 25, i.e. 1.(a). (b) and 2.(a). (b). all four of them must be satisfied for Article 25 to be applicable.