

# ARTICLE 24

## EXCEPTIONS<sup>1</sup>

### Contributions by Costantino Grasso and Gloria Alvarez

- 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,
    - C. 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.

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<sup>1</sup> See Final Act of the European Energy Charter Conference, Understandings, n. 15. with respect to Art 24, p. 28 and note 44, p. 77.

- 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.
  - d. Such measure shall not constitute a disguised restriction on Transit.
- 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;<sup>2</sup> or
  - b. which is accorded by a bilateral or multilateral agreement concerning economic co-operation 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.

## COMMENTARY

**Costantino Grasso**

**24.01** Article 24 of the Energy Charter Treaty (ECT) includes a series of exceptions, which found their inspiration<sup>3</sup> in the exceptions from trade rules that are contained in the General Agreement on Tariffs and Trade framework (GATT) of 1994, which give the Contracting Parties the possibility of derogating from treaty rules for various reasons. Specifically, Article 24(2)(i) aims at safeguarding inhabitants' health and the natural environment. It specifies that the rules of the ECT shall not preclude any Contracting Party from adopting or enforcing any measure '**necessary to protect human, animal or plant life or health**'. This provision echoes the only environment-related provision present in the GATT, which is represented by Article XX that allows the use of

2 See Decisions with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference), n. 5. with respect to Arts 24(4)(a) and 25, p. 137 and note 6, p. 42.

3 See Craig S. Bamberger, Jan Linehan, Thomas Wälde, 'Energy Charter Treating 2000: In a New Phase,' (2000) 18(4) *Journal of Energy & Natural Resources Law* 336.

measures otherwise contrary to the GATT if necessary for the protection of human, animal or plant life or health.<sup>4</sup>

Taking into consideration the strategic importance of energy resources, Article 24(2) 24.02  
 (ii) allows Contracting Parties to derogate from the ECT rules where such a violation is **‘essential to the acquisition or distribution of energy materials and products in conditions of short supply arising from [exceptional] causes’**. In other words, a Contracting Party is allowed to adopt measures which are essential to the acquisition or distribution of energy-related products in conditions of short supply arising from causes outside its control.<sup>5</sup> This rule is tempered by two provisions. The first one, considering that a situation of limited supplies can affect simultaneously several Contracting Parties, establishes that **‘all other Contracting Parties are entitled to an equitable share of the international supply of such energy materials and products’**. The second one provides that, in any case, the measure that is inconsistent with the ECT rules has to be **‘discontinued as soon as the conditions giving rise to it have ceased to exist’**.

Article 24(2)(iii) provides for an exception where the conducts that do not comply 24.03  
 with the ECT rules are **‘designed to benefit Investors who are aboriginal people or socially or economically disadvantaged individuals’**. However, the same article specifies that such measures must not have a **significant impact on that Contracting Party’s economy** and **‘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’**. In that regard, some concerns arise from the vagueness of the term **‘significant’** and the way in which it could be adequately assessed in the case of settlement procedure. Moreover, if the purpose of the exception is to safeguard indigenous people or economically disadvantaged individuals it seems that a better option was to establish an objective economic threshold more than a relative and vague criterion related to the economy of the Contracting Party interested by the measure. Such a choice can end up betraying the very aim the exception is supposed to serve. As a matter of fact, the use of the chosen criterion can produce different results depending on the size and wealth of the interested country as well as the amount of indigenous or economically disadvantaged people that live in it. For instance, a poor country with a relatively high amount of economically disadvantaged persons would reasonably seek to make more use of this exception from both a quantitative and qualitative perspective; at the same time, the derogating measure would easily exert a significant impact on its economy, exposing it to liability for violation of

4 See Lorna Brazell, ‘Draft Energy Charter Treaty: Trade, Competition, Investment and Environment,’ (1994) 12(3) *Journal of Energy & Natural Resources Law* 339.

5 See Anna Papaionnou, ‘Security of Energy Supply: the Approach in the European Union and the Contribution of the Energy Charter Treaty,’ (1995) 2(1) *Maastricht Journal of European and Comparative Law* 41.

the Treaty. Similarly, the impact on a Contracting Party's economy can become more relevant, and conversely the exception less applicable, in times of economic crisis that is when the adoption of measures for the safeguard of the most vulnerable population groups become of crucial importance. In any case, in order to avoid potential abuses, Article 24(2)(iii) expressly establishes that measures provided in favour of aboriginal people and socially or economically disadvantaged individuals have to be duly motivated and notified to the Secretariat.

**24.04** Article 24(3), instead of providing an exception in a classical and substantive way, introduces a method of interpretation under which the provisions of the ECT cannot be construed to prevent any Contracting Party from taking measures aimed at<sup>6</sup> protecting its essential security interests, implementing national policies related to the non-proliferation of nuclear weapons, and maintaining law and order.<sup>7</sup> These kind of exceptions are not a novelty under international trade law and are included in several international treaties and bilateral trade agreements. For instance, Article XI of the Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, which was signed on 14 November 1991 and entered into force on 20 October 1994, expressly provides that: 'This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.'<sup>8</sup> Such a provision was subject to arbitral review in the decision taken by the International Centre for Settlement of Investment Disputes<sup>9</sup> in the case *Continental Casualty Company v Argentine Republic*.<sup>10</sup> In the decision the tribunal affirmed that:

6 As it emerges from the original draft of the ECT, in the original version of this article (at that time, Art 27(3)(c)) it was also expressly provided that the agreement 'shall not be construed [...] to prevent any Contracting Party from taking any measure in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security'. See European Energy Charter. 'Draft Treaty,' 1 June 1993. <[https://energycharter.org/fileadmin/DocumentsMedia/ECT\\_Drafts/17\\_-\\_ECT\\_3\\_\\_01.06.93\\_.pdf](https://energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/17_-_ECT_3__01.06.93_.pdf)> accessed on 23 February 2018.

7 From the preparatory works, it emerges that in the original draft of the ECT, the exception related to any measure necessary for the maintenance of public order was instead inserted in the classic exceptions currently falling under the provision of Art 24(2) (at that time Art 27(2)(a)). See *ibid*.

8 See Argentina-United States BIT, Art XI, available at <https://www.italaw.com/sites/default/files/laws/italaw6017%284%29.pdf> accessed on 23 February 2018.

9 The International Centre for Settlement of Investment Disputes is the world's leading institution devoted to international investment dispute settlement. It was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which is a multilateral treaty formulated by the Executive Directors of the World Bank. See World Bank Group. *About ICSID*. <<https://icsid.worldbank.org/en/Pages/about/default.aspx>> accessed on 23 February 2018.

10 See *Continental Casualty Company v Argentine Republic*, Argentina-United States BIT, Award on the Merits, ICSID Case No. ARB/03/9, 5 September 2008, p. 31. <<https://www.italaw.com/sites/default/files/case-documents/ita0228.pdf>> accessed on 23 February 2018.

The ordinary meaning of the language used, together with the object and purpose of the provision clearly indicates that either party would not be in breach of its BIT obligations if any measure has been properly taken because it was necessary, as far as relevant here, either ‘for the maintenance of the public order’ or for ‘the protection of essential security interests’ of the party adopting such measures [...] A private investor of the other party could therefore not succeed in its claim for responsibility and damages in such an instance, because the respondent party would not have acted against its BIT obligations since these would not be applicable, provided of course that the conditions for the application of Art. XI are met. In other words, Art. XI restricts or derogates from the substantial obligations undertaken by the parties to the BIT in so far as the conditions of its invocation are met. In fact, Art. XI has been defined as a safeguard clause; it has been said that it recognizes ‘reserved rights,’ or that it contemplates ‘non-precluded’ measures to which a contracting state party can resort.<sup>11</sup>

In any case, Article 24(3) specifies that such measures cannot constitute a disguised **24.05** restriction on ‘**Transit**’.<sup>12</sup> From this provision, it emerges that under the ECT energy transit issues are considered as a matter of special importance. This is emphasized not only by Article 24(3) but also by the negotiations for a Transit Protocol, by Article 7 of the ECT, which has structured a special dispute resolution mechanism assigning particular importance to transit, and by the establishment of a relevant Directorate and Working Group for ‘Trade and Transit’.<sup>13</sup>

Article 24(4)(a) safeguards the Contracting Party’s possibility of establishing or joining **24.06** free-trade areas or customs unions. Specifically, the article provides that the ECT provisions which **accord most-favoured-nation treatment**<sup>14</sup> **shall not oblige any Contracting Party to extend to the Investors of any other Contracting Party any preferential treatment** where it derives from the participation in **free-trade areas or customs unions**. From an analysis of the preparatory works it clearly emerges that the introduction of this exception, which was fostered by the European Communities, was a matter of concern to extra-European countries, who believed such a clause might have generated an unfair advantage for the EC Member States. As a matter of fact, the US and Japan openly opposed the introduction of any exception for Region Economic

11 Ibid, at para 164.

12 Under Art 7 of the ECT, contracting parties are obliged to facilitate transit on a non-discriminatory basis, consistent with the principle of freedom of transit enshrined in the WTO/GATT. These provisions go beyond the WTO insofar as they contain explicit obligations relative to energy transit, including via fixed infrastructure like pipelines and electricity grids. See International Energy Charter. ‘Transit Protocol.’ <<https://energycharter.org/what-we-do/trade-and-transit/transit-protocol>> accessed on 23 February 2018.

13 See Danae Azaria, ‘Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade,’ (2009) 27(4) *Journal of Energy and Natural Resources Law* 587.

14 Under the most-favoured-nation treatment clause any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties. See John H. Jackson, ‘World Trade Rules and Environmental Policies: Congruence or Conflict,’ (1992) 49(4) *Washington and Lee Law Review* 1260.

Integration Organization.<sup>15</sup> A similar concern also arose in relation to the provision included in Article 24(4)(a) of the ECT,<sup>16</sup> which aims at safeguarding the Contracting Party's possibility of establishing or joining free-trade areas or customs unions.

**24.07** The provision of Article 24(4)(a), as well as the one of Article 25, were subject to Decision<sup>17</sup> no. 5 as included in the treaty materials as a result of further consultations after the adoption of the Interim Text.<sup>18</sup> Such a decision allows the extension of treatments commonly reserved to countries that are part of free-trade areas or customs unions to third parties where some specific conditions are satisfied. Specifically, Decision no. 5 provides that:

An Investment of an Investor referred to in Article 1(7)(a)(ii), of a Contracting Party which is not party to an EIA<sup>19</sup> 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.

**24.08** Article 24(4)(b) extends the exception also to bilateral or multilateral agreements **'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'**.

**24.09** A major concern arose in relation to the general exception related to EIAs included in Article 24(4)(a) of the ECT. In particular, the non-EU states expressed concern as to the how such an exception would affect them in the case of adoption of further EU

15 See European Energy Charter. 'Draft Treaty,' 1 June 1993, at p. 60. <[https://energycharter.org/fileadmin/DocumentsMedia/ECT\\_Drafts/17\\_-\\_ECT\\_3\\_\\_01.06.93\\_.pdf](https://energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/17_-_ECT_3__01.06.93_.pdf)> accessed on 23 February 2018.

16 See Saamir Elshihabi, 'The Difficulty behind Securing Spector-Specific Investment Establishment Rights: The Case of the Energy Charter Treaty,' (2001) 35(1) *International Lawyer (ABA)* 154.

17 These decisions were taken to promote conditions for cooperation between Western and Eastern energy organizations, in order to bring about a cycle of economic activity which will act as a catalyst for economic recovery in Eastern Europe and the former Soviet Union. Their aim is the progressive liberalization of international trade and investment, the avoidance of discrimination and the alleviation of market distortions and barriers to competition. See European Commission – Community Research and Development Information Service. 'Council Decision on provisional application of the Energy Charter Treaty by the European Community.' <[https://cordis.europa.eu/news/rcn/4026\\_en.html](https://cordis.europa.eu/news/rcn/4026_en.html)> accessed on 23 February 2018.

18 See European Energy Charter. 'Note from the Conference Chairman,' 14 September 1994, at p. 5. <[https://energycharter.org/fileadmin/DocumentsMedia/ECT\\_Drafts/25\\_-\\_Text\\_for\\_adoption\\_\\_14.09.94\\_.pdf](https://energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/25_-_Text_for_adoption__14.09.94_.pdf)> accessed on 23 February 2018.

19 An economic integration agreement (EIA) may be defined as an agreement that facilitate international trade and cross-border movement of the factors of production. See United Nations Conference on Trade and Development. 'Investment Provisions in Economic Integration Agreements,' (2006) at p. 2. <[http://unctad.org/en/docs/iteit200510\\_en.pdf](http://unctad.org/en/docs/iteit200510_en.pdf)> accessed on 23 February 2018.

laws on investment that, by means of Article 24(4)(a), could be used in a discriminatory way towards them. This concern has been considered by some authors as far-fetched because, on the one hand, a move aimed at guaranteeing more favourable terms for EU Member States could eventually jeopardize their hopes of securing investments in non-EU states and, on the other, non-EU countries may respond adopting a reciprocity exception on access to energy investments.<sup>20</sup>

Article 24(1) established that the above-mentioned exceptions are applicable in relation to the entire Treaty but for Articles 12, 13 and 29. Specifically, the reference to Article 12 of the ECT excludes the possibility of using the exceptions to affect another Contracting Party's right to compensation for losses in case of war, other armed conflict, state of national emergency, and civil disturbance. Similarly, no exception can be used to affect another Contracting Party's right to compensation for losses in case of requisitioning or destruction of its investment by the forces or authorities of the state that would like to invoke the exception. 24.10

The reference to Article 13 excludes the possibility of invoking the exceptions in case of nationalization or expropriation of another Contracting Party's investments. This unless the expropriation is applied for a purpose which is in the public interest, in a way that is not discriminatory and under due process of law, and is accompanied by the payment of prompt, adequate and effective compensation. 24.11

Finally, Article 29 excludes the possibility of invoking the exceptions in relation to the case of trade in energy materials and products<sup>21</sup> and energy-related equipment.<sup>22</sup> 24.12

By means of Understanding No. 15, it has been clarified that irrespective of the clauses included in Article 24, the exceptions contained in the GATT and its related instruments apply between particular Contracting Parties which are parties to that agreement. This legal effect is a direct application of the non-derogation from WTO Agreement clause provided by Article 4 of the ECT, which establishes that: 'Nothing in this Treaty shall derogate, as between particular Contracting Parties which are members of the WTO, from the provisions of the WTO Agreement as they are applied between those Contracting Parties.' 24.13

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20 See Elshihabi, *supra* note 116.

21 A list of energy materials and products is included in Annex EM I107 to the ECT. Such a list includes: nuclear energy, coal, natural gas, petroleum and petroleum products, electrical energy, and other energy sources like Fuel wood and Wood charcoal.

22 A list of energy-related equipment is included in Annex EQ1 to the ECT.

## COMMENTARY

Gloria Alvarez

- 24.14 Article 24 ECT provides for exceptions in the protection of the treaty regime. Similarly, to Article 21 ECT, the provisions of the article create exceptions to the exceptions (claw-backs), namely – exclusion in the protections of: compensation for loss,<sup>23</sup> expropriation<sup>24</sup> and provisions on trade-related matters.<sup>25</sup> It has been pointed out that the general exceptions provided for in Article 24 ECT find their inspiration in Articles XX and XXI of the General Agreement on Tariffs and Trade (GATT) but are adapted to the investment and other non-trade rights under the ECT which are essentially different than those in the GATT.<sup>26</sup>
- 24.15 The first set of three general exceptions are in paragraph 2 and relates to measures (i) **necessary to protect life and health** (according to ECT Article 24(2)(b), this exception does not apply to Part III ECT), (ii) addressing **short supply** Energy Materials and Products caused by reasons outside of the Contracting Party's control (provided that such measures (A) do not infringe the **equitable share** of the international supply of all other Contracting Parties; and (B) is **discontinued as soon as the conditions giving rise to it have ceased to exist**) and (iii) **designed to benefit aboriginal or socially or economically disadvantaged individuals or groups, notified to the Secretariat** as such (provided that such measures (A) do not significantly **impact the Contracting Party's economy**; or (B) **discriminate between Investors**). The text further provides that the measures purported to be justified under Article 24(2) shall be duly motivated, shall not constitute (i) **a disguised restriction on Economic Activity**; (ii) **arbitrary or unjustifiable discrimination**; shall not nullify any benefit a Contracting Party may reasonably expect.
- 24.16 The next set of exceptions are set out in paragraph 3 and relate to measures which the respective Contracting Party considers necessary (i) **for the protection of its essential security interests**, including those relating to the supply of Energy Materials and Products to military establishments, or **taken in time of war** or **international conflict**; (ii) **non-proliferation of nuclear weapons**; and (iii) for the protection of **public order**. According to the last sentence of the paragraph, the above-mentioned measures **shall not constitute a disguised restriction on transit**. The most important question regarding the practical application of the exception under ECT Article 24(3) ECT is

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23 See Commentary ECT Art 12.

24 See Commentary ECT Art 13.

25 See Commentary ECT Art 29.

26 Craig S. Bamberger, 'An Overview of the Energy Charter Treaty' in Thomas W. Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International, 1996), 22.

whether they are self-judging, as argued by commentators.<sup>27</sup> As already emphasized, the wording of the provision, namely that it concerns measures which are considered by the Contracting Party necessary, leads to the conclusion that these exceptions are indeed designed to be self-judging. This begs the question why the publicly available practice regarding reliance on the exceptions under Article 24 ECT is virtually non-existent. Lastly, paragraph 4 sets out exceptions to the MFN protection under ECT which apply to preferential treatment arising out of (i) **membership in free-trade area or customs union**<sup>28</sup> or (ii) a **bilateral or multilateral agreement concerning economic cooperation between states that were constituent parts of the former Union of Soviet Socialist Republics**.<sup>29</sup>

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27 Ibid.

28 Decision with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference) <<https://www.italaw.com/sites/default/files/laws/italaw6101%2812%29.pdf>> accessed on 23 February 2018.

29 Energy Charter Conference, 'Final Act', (Lisbon 16–17 December 1994), Understanding 15 AF/EECH/en 13:

UNDERSTANDING with respect to Article 24 Exceptions contained in the GATT and Related Instruments 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.