

Chapter 21

The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development

Preface

*Graham Coop**

Energy and energy security are at the top of today's global agenda. The energy sector, taken almost for granted when functioning smoothly under stable conditions, assumes worldwide prominence when discontinuity and unpredictability intervene. The last two years have seen world oil prices rise and fall three-fold. At the time of this writing, European Union countries regularly face the threat of not receiving stable supplies of Russian gas. 'Security' has never been more relevant to the international energy industry.

But 'energy security' conveys different aspirations for different countries: security of supply for net energy importers such as the US and most European Union (EU) States; security of demand for net energy exporters such as Norway, Russia, and the members of the Organization of Petroleum-Exporting Countries (OPEC); and the security of receiving a reasonable return on investment for transit countries such as Belarus, Ukraine, and Turkey. In many international fora, these

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desiderata are debated as if they are mutually exclusive – or in other words, as if an increase in security for some can only come at the price of a decrease in security for others, as part of a global zero-sum game.

The Energy Charter Treaty (ECT), an international treaty with fifty-one member states, and the process of ongoing discussion that the ECT fosters, are based on a radically different approach. As Ms Sussman's chapter convincingly argues, a fundamental assumption underlying the ECT is that an increase in security for any energy market participant contributes to energy security at the global level. In no respect is this more evident than in connection with the issue of global warming, which, if not adequately addressed, has the potential to affect every aspect of the energy chain from production to use. In other words, the continuing sustainability of the entire energy cycle depends on finding effective solutions to the issue of global warming.

These solutions can include supply-side management (encouraging change from carbon-intensive sources such as coal and oil to less carbon-intensive sources such as gas, nuclear, geothermal, hydro, or other renewables), demand-side management (discouraging extravagant or unnecessary uses of energy), and improving energy efficiency (acting to maintain the same unit of output of a good or service without reducing the quality or performance of the output, while reducing the amount of energy required to produce that output).

The ECT, mainly – though not exclusively – through its investment protection provisions, enhances all of these aspects of sustainable development and thereby offers solutions to global warming. As Ms Sussman demonstrates, these solutions are entirely consistent with the continuing viability and relevance of the international energy industry. By encouraging energy market participants – producers, transporters and distributors, traders, and consumers – to pursue sustainable development in a way that adequately responds to the global warming challenge, the ECT can make a significant contribution to securing the future of the energy sector at a global level.

Chapter 21

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*Edna Sussman**

1. INTRODUCTION

Current global trends in energy supply and consumption are patently unsustainable – environmentally, economically, and socially. Securing energy supplies and speeding up transition to a low-carbon energy system both call for radical action by governments – at national and local levels and through participation in coordinated international mechanisms.¹

Pressing issues concerning energy confront all nations, which must be addressed through the promotion of optimal energy solutions. An examination is required of whether and how accession to investment treaties can facilitate the creation of energy development responses that maximize the achievement of energy security for all nations, promote economic growth, and minimize harm to the environment. The means for achieving these multiple goals are compatible. As the G8 Energy Ministers stated at the G8 2008 Summit, ‘[a]ddressing energy security,

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1. International Energy Agency, World Energy Outlook 2008 at 4, November 2008, online: <www.worldenergyoutlook.org/docs/weo2008/WEO2008_es_english.pdf>.

climate change and economic growth can be achieved in a mutually conducive manner.²

There have been numerous calls for an investment framework that creates stable multilateral rules for investment in the energy sector. The Energy Charter Treaty (ECT), to which fifty-one nations are now signatories, is the only multi-lateral treaty that addresses energy matters and was negotiated to meet such a need. This chapter examines the role the ECT (or a similar multi-lateral energy investment treaty) can play in advancing the goals of all countries to optimize climate change responses, promote sustainable development, and achieve energy security.

2. ENERGY CHARTER TREATY BACKGROUND

The ECT had its genesis in the ending of the Cold War, which offered an opportunity for mutually beneficial cooperation between Russia and its many neighbours, who needed major investments in their energy rich resources, and the States of Western Europe, which had a strategic interest in diversifying their sources of energy. As stated in Article 2, the ECT ‘establishes a legal framework in order to promote long term cooperation in the energy field;’³ by so doing, it increases confidence by investors and the financial community and promotes investment and trade flow among Members.

The ECT was signed in 1994 and entered into force in 1998. It has been signed or acceded to by fifty-one States, mainly countries in Europe and the former Soviet Union, as well as the European Union, Japan, and Australia (Contracting Parties). The ECT has many States with observer status, including the United States, China, Saudi Arabia, Iran, Venezuela, Tunisia, the United Arab Emirates, and many other Persian Gulf States, as well as international organizations such as the World Bank and the Association of Southeast Asian Nations.⁴ However, while the former Soviet Union was a signatory to the ECT, in July of 2009 Russia rejected participation in the ECT by terminating provisional application of the ECT and stating its intention not to become an ECT contracting party.

The ECT provisions include:

- (a) investment protections intended to create a ‘level playing field’ and reduce the non-commercial risks associated with energy sector investments;
- (b) trade provisions consistent with WTO rules and practice;

2. ‘Joint Statement by Energy Ministers of G8, the People’s Republic of China, India and the Republic of Korea’, online: Canada’s G8 website, <www.canadainternational.gc.ca/g8/ministerials-ministerielles/2008/energy_ministers-ministres_energie_080608.aspx?lang=eng>.

3. *Energy Charter Treaty*, opened for signature 17 Dec. 1994, 34 I.L.M. 360, 385 [ECT]. For comprehensive information about the ECT and the activities of the Energy Charter Treaty Secretariat see <www.encharter.org>.

4. Energy Charter Secretariat, online: Members & Observers, <www.encharter.org/index.php?id=61>.

- (c) obligations to facilitate transit of energy on a non-discriminatory basis consistent with the principle of free transit;
- (d) energy efficiency and environmental provisions that require States to formulate a clear policy for improving energy efficiency and reducing the energy cycle's negative impacts on the environment; and
- (e) dispute resolution mechanisms for investment related disputes between an investor and a Contracting Party or Contracting Parties in regard to the application or interpretation of the ECT.

The focus of this chapter will be on the investment protection and dispute resolution provisions of the ECT. With the increasing globalization of the world's economy, the interdependence of the energy sector, and the long-term and highly capital-intensive nature of energy projects, multilateral rules for international cooperation are needed. The ECT was negotiated to meet that need. As the arbitral tribunal stated in *Plama Consortium Limited v. Republic of Bulgaria*, the ECT is the 'first multilateral treaty to provide as a general rule the settlement of investor-State disputes by international arbitration' and provides 'a covered investor an almost unprecedented remedy for its claims against a host state'.⁵

3. ECT INVESTMENT PROTECTIONS

The ECT provides for a variety of protections for foreign investments, including the following:

General protections: Under Article 10, Contracting Parties must accord 'fair and equitable treatment,' 'constant protection and security' and 'shall in no way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of an investment;' in no case shall 'treatment be less favourable than that required by international law'.

Discrimination: Under Article 10, Contracting Parties must accord investors treatment no less favourable than that accorded to its own investors or to investors of any other State.

Expropriation: Under Article 13, investments shall not be expropriated, nationalized or subjected to measures that have an effect equivalent to expropriation or nationalization unless certain limited exceptions are met and then only if a prompt, adequate, and effective compensation payment equivalent to fair market value is made.

Fund Transfers: Under Article 14, Contracting Parties guarantee freedom to transfer funds in and out of the country without delay and in a freely convertible currency.

5. *Plama Consortium Limited v. Republic of Bulgaria* (Decision on Jurisdiction, 8 Feb. 2005), at 739, 742 online: <www.encharter.org/index.php?id=213&L=0#Plama> [*Plama*, Decision on Jurisdiction].

Interplay with Other Treaties: Under Article 16, if two or more Contracting Parties enter into a prior or subsequent international agreement, the provision more favourable to the investor shall govern where there are disparities.

4. DISPUTE RESOLUTION PROVISIONS

Resorting to arbitration rather than domestic courts in the settlement of international disputes has generally been viewed as preferable because of concerns about neutrality, competence, process, efficiency, and respect for rule of law in local courts. Equally important is the question of enforceability of any decision rendered. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards [New York Convention] is the most successful international Treaty to date, with over 140 countries as signatories.⁶ Pursuant to the New York Convention, signatory countries have committed to enforcing arbitration awards; the grounds for refusing to enforce arbitration awards are extremely limited.⁷ There is no parallel international treaty that has been broadly adopted for recognition of foreign court decisions. While the new Hague Convention on Choice of Court Agreements⁸ may change that, it is years away from widespread adoption and it is not yet clear how widely it will be accepted. Thus, the ECT's provisions governing dispute resolution and creating arbitration rights are of great importance to the protection of investors in the energy sector.

The ECT enables an investor to make claims against a Contracting Party in case of a breach of an obligation relating to investment protection. It mandates conciliation as a first step, but if that fails the investor can choose the forum for dispute resolution: either a domestic court or international arbitration. The ECT creates 'arbitration without privity,' so the host country need not be a party to the investment contract to be subject to the claim. Under Article 26 of the ECT, the Contracting Party gives its 'unconditional consent to the submission of a dispute to international arbitration'. This commitment is viewed as an 'offer' that can be 'accepted' by the investor.

Arbitration under the ECT is to be submitted to either the International Centre for Settlement of Investment Disputes (ICSID) if one or both parties are party to the ICSID Convention, to a sole or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or to an arbitral proceeding before the Arbitration Institute of the Stockholm Chamber of Commerce.

6. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 Jun. 1958, 21 U.S.T. 2517 [*New York Convention*].

7. *Ibid.*

8. See generally *Hague Convention on Choice of Court Agreements*, 30 Jun. 2005, 44 I.L.M. 1294, online: <www.hcch.net/index_en.php?act=conventions.text&cid=98>.

5. APPLICATIONS OF THE ECT

As the ECT is a relatively new Treaty, there have been few cases decided under it to date, but claims are emerging. As tribunals analyse the application of the ECT, several awards have been rendered on the right to pursue claims under the treaty and on whether the respondent State is bound by its provisions. Several awards on the merits have also been delivered.

Most significantly for this chapter, two decisions under the ECT have dealt with the merits of the question of changes in governmental policy or regulation with respect to energy and environmental matters. In *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, Nykomb Synergetics won a claim against the Republic of Latvia for changing a government policy and amending legislation, which altered an incentive system for environmental investment and deprived the claimant of double tariffs in connection with the construction of a cogeneration power plant.⁹

In the case, Nykomb had built a gas fired co-generation plant (a modern power generation facility designed to emit fewer greenhouse gases) in reliance on incentive legislation enacted to attract private investment into the State-monopoly electricity sector in Latvia. With the end of Russia's occupation, the Republic needed to reduce its dependency on imported power. Latvia had insufficient domestic power generation and had been left with enormous ecological problems caused by dirty fossil fuel usage in local heating plants, creating the need to encourage cleaner power generation. In addition, low import prices had resulted in electricity prices that were too low to attract investors. Accordingly, the Latvian Entrepreneurial Law was enacted in 1995 to 'encourage entrepreneurial activity in this field' of clean energy, which provided for payment twice as high as the average consumer price. Under this new law, Nykomb would receive a double tariff in its first eight years of operation. Subsequent to building the co-generation plant, a new law was passed repealing the Entrepreneurial Law, and Latvia refused to pay the Claimant the double tariff. Following local court proceedings, however, the higher tariff was paid to two local generators of less-environmentally advanced facilities. The Tribunal in *Nykomb* found that the Claimant had been the subject of a discriminatory measure in violation of the ECT as there was no legitimate reason to treat the Claimant differently. The Tribunal rejected Latvia's argument that Nykomb's claims should be rejected because Nykomb took a commercial risk knowing of Latvia's claims as to the invalidity of the tariff provisions in the contract as Latvia had asserted such claims in prior court proceedings on similar contracts alleging that the contracts were signed by persons without authority, that the pricing clauses were unclear and therefore unenforceable, and that the purchase price was superseded by subsequent legislation. Finding the agreement upon which the Claimant relied to be valid and binding, the Tribunal concluded that the

9. *Nykomb Synergetics Tech. Holding AB v. The Republic of Latvia* (Award, 16 Dec. 2003) [Nykomb].

claimant's awareness of Latvia's position did not relieve Latvia of its obligation to comply with its treaty obligations and ordered it to pay the double tariff.

In *Plama Consortium Limited v. Republic of Bulgaria*,¹⁰ the dispute giving rise to the arbitration arose out of the purchase by the Claimant of a recently privatized refinery. Although the Claimant had hoped to rehabilitate the struggling business, the facility only operated for a short time before falling into bankruptcy and liquidation. Multiple allegations were asserted against Bulgaria, including claims relating to environmental liability, actions of bankruptcy trustees, taxation of entities exiting from bankruptcy, the privatization of certain Bulgarian entities, and a variety of alleged conduct by Bulgarian authorities and State-owned entities. The Tribunal found that the investor had made misrepresentations about ownership that had induced Bulgaria to enter into the arrangement and dismissed the claims on the basis that the ECT should not be interpreted to afford protection to investments made contrary to law. Although not necessary to its award, the Tribunal addressed the merits of the claims, including a claim that a change in the Bulgarian law was discriminatory and could have obliged Plama to bear the cost of remedying past environmental damage, a claim particularly relevant to the discussion of the utility of the ECT to fostering sustainability. The Tribunal stated that the ECT does not protect against all changes in the law, but 'under the fair and equitable treatment standard the investor is only protected if (at least) reasonable and justifiable expectations were created in that regard'.¹¹ The Tribunal found that Bulgaria had made no representation to freeze its environmental law and that in any case, Bulgarian law as it existed prior to the acquisition could give no assurance to the Claimant that Plama would be exempt from liability for cleaning up past environmental damage. It further found that insufficient evidence was offered to permit a determination that the change in the law was discriminatory and that the Claimant had failed to demonstrate any harm resulting from any such obligation, as it had neither performed an environmental remediation nor shown that it was disabled from obtaining financing by virtue of such an obligation.

Several publicly reported decisions on the merits are also of interest. Petrobart, for example, won a claim against the Kyrgyz Republic for the State's decision to transfer assets out of KGM, a State-owned company, to which Petrobart had delivered gas to their own detriment as KGM's judgment creditor.¹² The Tribunal addressed the applicability of the ECT and found in favour of the Claimant. In *Amtov v. Ukraine*,¹³ the Tribunal rejected various claims, including allegations of a denial of justice in bankruptcy court proceedings and of a failure to provide equitable or favourable treatment by virtue of intimidation, discrimination, and obstruction when making the investment.

Jurisdictional issues concerning the ECT are being resolved one by one as they are raised and addressed by the tribunals. An issue as to whether Russia is subject to

10. *Plama Consortium Limited v. Republic of Bulgaria* (Award, 27 Aug. 2008) [*Plama*, Award].

11. *Ibid.*, at 68.

12. See generally *Petrobart Ltd v. Kyrgyz Republic* (Award, 29 Mar. 2005).

13. *Limited Liability Company Amtov v. Ukraine* (Award, 26 Mar. 2008).

the ECT was raised in an arbitration involving the Yukos Oil Company. The Group Menatep shareholders are seeking United States Dollar (USD) 30 billion or more against Russia, claiming that Russia's actions in connection with the forced auction of Yukos were tantamount to expropriation. The arbitration required the Tribunal to address the question of whether Russia, which had signed but not ratified the ECT, is governed by its provisions. Article 45 of the ECT commits each signatory to apply the treaty 'provisionally pending its entry into force . . . to the extent that such provisional application is not inconsistent with its constitution, laws or regulations'.¹⁴ Furthermore, Article 25 of the Vienna Convention on the Law of Treaties expressly provides for provisional application where the Treaty so provides.¹⁵ Claimants argued that Article 45 of the ECT thus binds Russia. Russia opposed jurisdiction. The Tribunal found that Russia could invoke the limitation clause in the ECT without making a prior declaration to exclude provisional application, but that there was no inconsistency between the provisional application of a treaty and Russian law and therefore Russia was bound by the investor State arbitration provision invoked. The Tribunal concluded that the ECT in its entirety applied provisionally until 2009, when Russia informed the ECT depository that it did not intend to become a contracting party to the ECT, and that the arbitration provisions of the ECT, *inter alia*, remain in force until 2029 for any investments made prior to 2009.¹⁶

The Yukos tribunal relied in part on the award in *Ioannis Kardassapoulos v. Georgia*¹⁷ in which the Tribunal explored, for the first time, the issue of jurisdiction under the ECT pursuant to the 'provisional application' language. Ioannis Kardassapoulos contended that the Republic of Georgia had violated the terms of the ECT by issuing a decree that expropriated a concession for the reconstruction of energy pipelines and infrastructure.¹⁸ In its procedural defences to the proceeding, Georgia challenged the Tribunal's jurisdiction under the ECT because the actions in issue, although they took place after Georgia signed the ECT, occurred before it ratified the ECT and before the ECT took effect upon ratification by thirty States.¹⁹ The arbitral Tribunal rejected this argument, noting that limiting the application of the ECT to after it definitively entered into force would 'exclude from the scope of the ECT' the provisional period before entry into force and that 'such a result would strike at the heart of the clearly intended provisional language'²⁰ of the Treaty. In *Nykomb*, the Tribunal determined that Latvia was subject

14. Article 45 of the ECT, *supra* n. 3.

15. Article 25 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 Jan. 1980) [*Vienna Convention*].

16. Yukos Universal Limited (Isle of Man) and The Russian Federation, Decision on Jurisdiction, 30 Nov. 2009 at 146, online: <www.encharter.org/fileadmin/user_upload/document/Yukos_interim_award.pdf>.

17. *Ioannis Kardassapoulos v. Georgia* (Decision on Jurisdiction, 6 Jul. 2007).

18. *Ibid.*, at 1.

19. *Ibid.*, at 6.

20. *Ibid.*, at 59.

to the ECT for action with respect to a contract entered into before the ECT came into force but subsequent to Latvia's signature and ratification of the Treaty.

Another issue that tribunals have dealt with is the question of who is entitled to bring claims under the ECT. In *Libananco Holdings Co. Limited v. Turkey*,²¹ the Claimant, a Cypriot company affiliated with Turkish interests, made a USD 10 billion claim for the cancellation of several large-scale electric power concessions that Libananco asserted was politically motivated. The case raised the question as to what extent companies from within the ECT area are protected by the Treaty's arbitration and investment protection provisions, even if some of their major shareholders are from the respondent country. In the *Plama* decision on jurisdiction,²² the Tribunal found in favour of a narrow interpretation of the most favoured nation clause and restricted the scope of application for the 'denial of benefits' to 'mailbox' companies.²³

Many practitioners recommend that in structuring deals for multi-national companies with a principal domicile in a country that is not a signatory to the ECT (such as the United States), a review should be conducted of which countries will be involved in the project and what investment treaties are in effect that may be applicable with respect to those countries.²⁴ Many energy projects span several countries, last for decades, and require enormous capital investments, making investor protection particularly significant. While tax treaty considerations are generally considered to be of greater importance in structuring the deal, the investment protection aspects should not be ignored. In fact, investment treaty protection is becoming a more significant factor in the corporate structuring of foreign investment transactions.

The *Nykomb* and *Plama* awards serve to confirm the utility of the ECT to shield investors with respect to promises made, and to protect them against changes in laws upon which they had relied in making investments in the energy sector. The growing body of decisions that interpret the ECT²⁵ are creating greater certainty as to the meaning, scope, and application of its provisions.²⁶ The ECT presents a unique opportunity for immediate implementation of a multi-lateral energy investment protection regime for the energy sector. It also has the advantage of already being acceded to by over fifty countries. Often many years

21. *Libananco Holdings Co. Limited v. Turkey* (Decision on Preliminary Issues, 23 Jun. 2008).

22. *Plama*, Decision on Jurisdiction, *supra* n. 5.

23. *Ibid.*

24. If seeking coverage under the ECT, the selection of the corporate domicile of the contracting entity should include a review of s. 17 of the ECT. This section provides that a Contracting Party reserves the right to deny the benefits of the ECT to a legal entity if citizens or nationals of a third State own or control that entity, and that entity has no substantial business activities in the area of the Contracting Party.

25. For a complete list of publicly known cases under the ECT, see the Energy Charter Treaty website online: <www.encharter.org/index.php?id=213&L=0>.

26. For excellent discussions of many issues under the ECT see Thomas Wälde, 'Investment Arbitration under the Energy Charter Treaty: An Overview of Key Issues', *Transnat'l Dispute Mgmt.* I, no. 2 (2004); Graham Coop and Clarisse Ribeiro (ed.), *Investment Protection and the Energy Charter Treaty* (New York: Juris Publishing Inc., 2008).

pass between the signing of an international treaty and its coming into legal force, as a requisite number of countries must ratify it through their domestic procedures. The Kyoto Protocol, for example, was adopted in 1997 but did not enter into force until 2005. Because the ECT is already in force it can serve to promote the multiple goals related to energy of all nations.

6. ECT POTENTIAL TO FOSTER INTERNATIONAL INVESTMENT IN EMERGING ECONOMIES TO ADDRESS GLOBAL WARMING AND FOSTER SUSTAINABLE DEVELOPMENT

Investment in energy has been recognized repeatedly as necessary both to foster sustainable development and to address climate change. For example, increased access to energy has long been recognized as essential to the goals underlying the United Nations Millennium Declaration of achieving human dignity, equality, and equity across the globe.²⁷ Although energy is not explicitly mentioned in the Declaration, the World Bank has noted that the Millennium Declaration Goals (MDGs) cannot be met without increased access to energy, as 'Most economic activity is not possible without energy, and no country in modern times has substantially reduced poverty without massively increasing its use of energy'.²⁸ As the World Bank elaborated:

Without access to modern energy services, the poor are deprived of opportunities for economic development and improved living standards. Modern energy services provide lighting, cooking, heating, refrigeration, transportation, motive power and electronic communications that are indispensable to increasing productivity, creating enterprises, employment and incomes, and accessing safe water and sanitation, as well as health and education.²⁹

Continued growth in energy demand and energy investment was explicitly acknowledged in the progress report issued in 2008 on the achievement of the MDGs. According to the report, 'large investments in energy projects are expected over the coming years' in developing countries as a response to the growing demand for energy worldwide.³⁰

27. *United Nations Millennium Declaration*, G.A. Res. 55/2, U.N. GAOR, 55th Sess., Supp. No. 49, at 4, U.N. Doc. A/55/49 (2000) [the Declaration].

28. The World Bank, 'Energy Poverty Issues and G8 Actions' (Discussion Paper presented in Moscow, February 2006), online: <http://siteresources.worldbank.org/INTRUSSIANFEDERATION/Resources/Energy_Poverty_Issues_Paper_Russia_G8_eng_summary.pdf>.

29. *Ibid.*

30. UNESA, *The Millennium Development Goals Report 2008* (New York: United Nations, 2008) at 37, online: <www.un.org/millenniumgoals/pdf/The%20Millennium%20Development%20Goals%20Report%202008.pdf>.

Further, the recent scientific reports issued by the International Panel on Climate Change (IPCC)³¹ forcefully confirm that Earth is warming principally as a result of greenhouse gas (GHG) emissions generated by human use of fossil fuels. The reports vividly describe the dire consequences of continued release of GHGs at the projected rates and identify many developing countries as those vulnerable to the most severely destructive impacts. In the wake of these reports, all avenues to address the problem must be studied.

The importance of international investment in the energy sectors of developing countries as a primary means by which to arrest the growth of GHGs has been a theme of discussions on climate change for many years. Developing countries have steadfastly refused to be bound by GHG emissions caps. Having rejected that emissions caps be binding on them, it then behoves those developing countries to combat climate change by fostering foreign investment to mitigate their GHG emissions. Accession to the ECT would contribute significantly to the attractiveness of investment in developing countries and would serve to reduce the cost of such investments, thus making more investment possible.

Building on the 1992 United Nations Framework Convention on Climate Change (UNFCCC)³² under the Kyoto Protocol³³ (which over 183 nations have ratified), all major industrialized countries, with the exception of the United States, have committed to reducing their GHG emissions by 2012 and have set binding emission reduction goals to meet this goal. However, the developing countries that are parties to the Kyoto Protocol have no GHG limits and have taken the position that to similarly bind them to reducing their emissions would preclude them from developing their economies and bettering the lives of their populations, as energy generation and usage is crucial to modern life and the growth of modern economies. They argue that imposing an emissions cap on developing nations would not be equitable since the industrialized countries have grown and developed by polluting the world for decades as the principal emitters of GHGs, and that industrialized nations should accordingly bear the bulk of the current burden and allow the developing countries' economies to catch up. As this indicates, developing countries have consistently refused to be bound by GHG emission caps.

Any solution to climate change must deal with the reality that developing countries' contribution to global GHG emissions is significant and continuing to increase exponentially. It was reported that in 2007, while the United States remained the largest emitter of GHG on a per capita basis, China exceeded the United States in total GHG emissions. Further, the growth of GHG emissions in

31. Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report* (Approved by the IPCC Plenary XXVII in Valencia, Spain, 12–17 Nov. 2007), online: <www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf>. The International Panel on Climate Change (IPCC) reports are also available online: <www.ipcc.ch/ipccreports/>.

32. *United Nations Framework Convention on Climate Change*, 9 May 1992, 31 I.L.M. 849.

33. For a general discussion of the Kyoto Protocol, see <http://unfccc.int/kyoto_protocol/items/2830.php>; and Edna Sussman, 'New York Addresses Climate Change with the First Mandatory US Greenhouse Gas Program', *NYSBA J.* 78 (2006): 43, online: <www.sussmanadr.com/docs/rggi_nys_%20bar_journal0506.pdf>.

developing countries is expected to burgeon in coming years if no action is taken. The International Energy Association (IEA) reported that on a business-as-usual-basis, the world's energy demand would be well over 45% higher in 2030 than today, that China and India alone account for over 50% of this increase in demand, and that non-OECD countries as a group account over 87% of the increase.³⁴ In this business-as-usual scenario, the IEA projected a 'shocking' 45% jump in energy related global CO₂ emissions by 2030,³⁵ rather than the 80% reduction by 2050 that the IPCC warns is needed to avoid the worst consequences of climate change.³⁶ Three-quarters of this emissions increase is projected to come from China, India, and the Middle East, and 97% from the non-OECD countries as a whole.³⁷

There is a general consensus that the path to mitigating GHG emissions lies in moving towards sustainable development and that developing countries are looking to industrialized nations to assist them in accomplishing that goal. Transfers of technology, technical assistance, and investment in sustainable development projects in developing nations have been accepted by all as a crucial, albeit only partial, element to the solution to climate change. Indeed, the Kyoto Protocol expressly allows credit against emission caps under the Clean Development Mechanism (CDM)³⁸ for sustainable development emission reduction projects in developing countries. At the December 2007 United Nations conference under the UNFCCC and the Kyoto Protocol on climate change, vigorous negotiations were held over the respective obligations of developing and developed countries. The 'Bali Roadmap,' which sets out a framework for negotiations, included an acceptance by all countries of a proposal from India that the developing countries would agree to take 'measurable, reportable and verifiable' mitigation actions but their actions would be supported by 'technology, finance and capacity-building' from developed countries.³⁹ Thus the stage was set diplomatically to negotiate binding measures consistent with these guidelines: measures that would seem to include significant investment-related commitments by all parties. Some additional progress was made at the December 2009 United Nations conference under the UNFCCC and the Kyoto Protocol with the Chair of the conference taking note of the Copenhagen Accord pursuant to which developing countries agree to report on the implementation of their mitigation actions and the developed countries

34. International Energy Agency, *World Energy Outlook 2008, Executive Summary*, online: <www.worldenergyoutlook.org/docs/weo2008/WEO2008_es_english.pdf> [IEA Report]. This reference scenario was reduced by IEA from the 50% growth predicted in 2007 due to higher energy prices and slower economic growth.

35. Energy related CO₂ accounts for 61% of global GHG emissions today.

36. See *supra* n. 31.

37. *Ibid.*, at 45–46 and *supra* n. 35. The IEA Report notes that on a per-capita basis non-OECD emissions remain far lower on average than those in the OECD countries.

38. For a background discussion of the international climate change regime, see Sussman, *supra* n. 33.

39. *Bali Action Plan*, UNFCCC, adopted at the Conference of the Parties on its 13th Sess., Decision 1/CP.13, FCC/CP/2007/6/Add.1 (14 Mar. 2008), at 1(b)(i)–(ii).

commit to scaling up funding and investment, both public and private, for the developing countries.⁴⁰

Progress on such investments is essential and must be fostered and supported. Immense investments in GHG mitigation projects in developing countries will be necessary to keep GHG emissions to a minimum as their economies grow. The ECT can serve an important role in making such investments more attractive. The need for equitable, stable and effective legal regimes to promote investment in the energy sector has been recognized repeatedly at gatherings of nations. At the G8 Summit in 2006, the Energy Security Declaration⁴¹ explicitly ‘support[ed] the principles of the Energy Charter and the efforts of participating countries to improve international energy cooperation,’ and committed to a set of principles that included:

open, transparent, efficient and competitive markets for energy production, supply, use, transmission and transit services as a key to global energy security; [and] transparent, equitable, stable and effective legal and regulatory frameworks, including the obligation to uphold contracts, to generate sufficient, sustainable international investments upstream and downstream.⁴²

The 2007 G8 Summit Declaration⁴³ noted the importance of ‘improving [the] investment climate in the energy sector,’ supported the principles of the Energy Charter and invited China, Brazil, India, Mexico, and South Africa and other emerging economies to adopt the Global Energy Security Principles established at the G8.⁴⁴

In 2008, the Members party to the G8 Summit Leaders Declaration reconfirmed their commitments under the St. Petersburg Principles and Plan of Action and invited other countries to embrace those principles. The Declaration explicitly

40. Copenhagen Accord, UNFCCC, Conference of the Parties on its 15th Sess. Draft Decision -/CP.15, FCCC/CP/2009/L.7 (18 Dec. 2009).

41. G8/2006 Russia, *Global Energy Security* (16 Jul. 2006), online: <www.globalbioenergy.org/uploads/media/0607_G8_Russia_-_Global_Energy_Security_2006.pdf>.

42. *Ibid.*

43. G8 Summit 2007 Heiligendamm, *Growth and Responsibility in the World Economy* (7 Jun. 2007), online: <www.g-8.de/Content/EN/Artikel/_g8-summit/anlagen/2007-06-07-gipfeldokument-wirtschaft-eng,templateId=raw,property=publicationFile.pdf/2007-06-07-gipfeldokument-wirtschaft-eng>.

44. *Ibid.*, at 14. Other regional organizations have issued similar pronouncements. The ASEAN nations, for example, recognize the importance of creating an investment friendly environment for energy as stated in The 25th ASEAN Ministers on Energy Meeting (AMEM) (Singapore: Energy Policy and Planning Office, 23 Aug. 2007), online: <www.eppo.go.th/inter/asean/AMEM25/20844.htm>:

The Ministers encouraged Member Countries to create suitable conditions that facilitate energy infrastructure investments, in particular, in energy production, to secure adequate and stable supply of energy. The Ministers expressed hope that through energy infrastructure investments and cross-border trade, ASEAN economies can better access the energy resources and technologies to meet the region’s energy needs.

recognized the importance of protections that investment treaties provide in calling all countries to take steps to implement such investor protections:

Open trade and investment policies strengthen economies. All countries should take steps to develop, maintain and promote regimes that welcome foreign investment, guarantee non-discriminatory treatment for foreign investment, and ensure freedom to transfer capital and returns from investment. Any foreign investment restrictions should be very limited, focusing primarily on national security concerns, and should adhere to the principles of transparency and predictability, proportionality, and accountability. Furthermore, we note the importance of high standards of investment protection in international agreements including fair and equitable treatment, prompt, adequate and effective compensation in the event of expropriation, and access to international arbitration to resolve disputes. We are equally committed to high liberalization standards, such as national treatment and most favored nation treatment in bi-lateral agreements in relation to trade.⁴⁵

Accession to the ECT by emerging nations would improve the investment climate in the energy sector by: (1) creating a more secure investment environment; and (2) lowering the cost of investments. The marketplace reacts favorably to investment protection treaties. There is increasing sensitivity in investment decision-making as to whether the protection of an investment treaty is available. A recent survey conducted by *The Economist* in conjunction with the Columbia Program on International Investment reported that 67% of respondents were greatly or somewhat influenced by the existence of an international investment treaty in deciding in which markets to invest.⁴⁶ This is particularly true in the energy sector.⁴⁷ Recent incidents of direct or masked expropriations in various countries

The OPEC nations too have recognized the importance of facilitating investment in The Riyadh Declaration of the Third Summit of Heads of State and Government of OPEC Member Countries. In November 2007, OPEC members resolved to:

Work with other governments, international organizations and the international business community to facilitate investment in, and the transfer of technology to, our Member Countries, in order to diversify our economies and achieve social progress and sustainable development,

Riyadh Declaration, The Third Summit of Heads of State and Government of OPEC Member Countries, 17 Nov. 2007.

45. G8 Hokkaido Summit Leaders Declaration: *World Economy*, July 2008, online: <www.g8summit.go.jp/eng/doc/doc080714_en.html>.
46. Laza Kekic & Karl P. Sauvant, *World Investment Prospects to 2011, Foreign Direct Investment and the Challenge of Political Risk* (London: Economists Intelligence Unit, 2007), at 96. Nineteen per cent responded that they were influenced to a very great extent and 48% responded that they were influenced to a limited extent. Only 23% responded that they were not influenced at all and 9% responded that they did not know.
47. For an interesting analysis linking political risk to lower asset valuation of petroleum reserves that provides an apt analogy for consideration, see Reid Click & Robert Weiner, 'Resource Nationalism Meets the Market: Political Risk and the Value of Petroleum Reserves' (July 2009), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=971147>.

have raised concerns about investments in this sector that may spill beyond the borders of the countries involved. Moreover, the economics of many sustainable clean energy projects are grounded in part on local governmental subsidies and incentives and require that those be maintained in the form presented at the time the investment is commenced in order for it to be profitable. There is also considerable concern in the investment community about the stability of the relevant rules and regulations in many developing countries.

As demonstrated by the decision in *Nykomb* and affirmed in the dicta of the *Plama* award, the ECT, if binding on the host country, would create rights for investors against a host government for changing incentives and subsidies that it has committed to a foreign investor or amending other laws or regulations in violation of the ECT investor protection provisions. The increased certainty afforded by investment treaty protection should serve to significantly increase the availability of funds for investment in GHG mitigation projects in developing countries.⁴⁸ In essence, membership in the ECT enables a host State to make a credible and internationally enforceable promise about investment incentives and guarantees with respect to energy investment.

With the reduced investment risk resulting from the investor protections afforded by the ECT, the cost of investment should decrease, allowing a greater number of investments to be made. Risk is a factor in determining the rate of return necessary to make an investment attractive. Reduced risk should lead to lower expected rates of return, making more projects financially attractive. Moreover, where prudence would dictate the purchase of political risk insurance, the existence of an investment treaty may, in many cases, obviate the need for expensive political risk insurance, or at least drive down the cost of such insurance.⁴⁹ Again, this would decrease the cost of the investment and make a greater number of sustainable energy investments attractive.

There are numerous and extensive international negotiations ongoing under the UNFCCC and the Kyoto Protocol to develop an international treaty regime that addresses climate change. Theoretically these negotiations could also encompass investor protections to achieve the goals discussed. However, there are incredibly complex tasks already before negotiators, including whether emissions caps should be binding and on which nations; at what level the emissions caps should be set over what period of time; what trading mechanisms should be in place and how to create linkages among them to create the most robust trading market; what nations without emission caps should be obligated to do and what support for them from developed countries will be required; what kinds of projects in what nations should count as offsets and how to make sure that they are additional, verifiable,

48. For a collection of studies, see Karl Sauvant & Lisa Sachs, *The Effect of Treaties on Foreign Direct Investment* (Oxford: Oxford University Press, 2009).

49. See generally Noah D. Rubins & N. Stephan Kinsella, *International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide* (New York: Oxford University Press, 2005); and Paul E. Comeaux & N. Stephan Kinsella, 'Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance', *N.Y.L. Sch. J. Int'l & Comp. L.* 15 (1994): 1, 5.

permanent, and enforceable; how to prevent further deforestation; how to address the critical issue of adaptation; what sectoral agreements should be developed and much more. A suggestion that these negotiators also address the issue of how to craft an acceptable multi-lateral investment treaty is simply not practical. The ECT presents a ready-made investment protection treaty already ratified by over fifty nations. It is this treaty that all nations should be urged to adopt: developing nations as an important contribution on their part to arresting climate change in the absence of binding GHG emission reduction caps and developed nations as the requisite parallel commitment to fostering sustainability goals.

The application of the ECT to climate change solutions is well grounded in its original intention and in its provisions. The ECT specifically recalls the United Nations Framework Convention on Climate Change in its Preamble. As set forth in Article 31 of the Vienna Convention on the Law of Treaties,⁵⁰ this Preamble reference is relevant to the interpretation of the ECT. Article 1, paragraph 6 of the ECT defines 'Investments' as investment associated with an 'Economic Activity in the Energy Sector', which is defined in paragraph 5 as an 'economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing or sale of Energy Materials (or) Products'.⁵¹ These activities are defined in paragraph 4 as including the items listed in Annex EM,⁵² which covers nuclear energy, coal, natural gas, petroleum and petroleum products, and 'electrical energy'.⁵³

The above-mentioned provisions are broad enough to cover many, if not all, of the currently known GHG mitigation measures, including nuclear energy, coal gasification and carbon sequestration. 'Electrical energy' includes all newer technologies, including solar, wind, biomass, tidal, wave, hydropower, and even plug-in hybrid cars. Indeed, because the term 'electrical energy' is 'economic activity concerning' energy items listed in Annex EM, it must be read to also include energy efficiency, green building and other such measures as geothermal or combined heat and power that serve to reduce the demand for energy. The ECT should also be read broadly to include technological improvements relating to energy in the industrial sector that reduce GHG emissions, such as improvements in cement production (a major emitter of GHGs) or aluminum product manufacture (a highly energy intensive process), as they reduce 'trade' and 'sale' through energy efficiency and thus would constitute 'economic activity concerning' products specified in Annex EM. In addition, the ECT specifically provides in Article 1 that 'Investment' also refers to investments that have been designated by a Contracting Party in its area as a 'Charter efficiency project'.⁵⁴ Any uncertainty as to the scope of coverage of the ECT to include climate change mitigation measures that are now

50. See *Vienna Convention*, *supra* n. 15.

51. *ECT*, *supra* n. 3, at Art. 1.

52. *Ibid.*

53. *Ibid.*, Annex EM.

54. *ECT*, *supra* n. 3, at Art. 1, s. 6.

known and those as yet unknown can be resolved by adopting an amendment, understanding, or declaration to the ECT.

7. UNITED STATES ACCESSION TO THE ENERGY CHARTER TREATY

The US is a major GHG emitter and a crucial source of funding and private capital for the development of energy infrastructure. Its participation in any global energy solution, including a multi-lateral energy investment treaty like the ECT, is essential. The United States is a Member of the G8 that spoke to the need for an effective legal and regulatory framework for international investment but, although it was heavily involved in the development of the Energy Charter, is one of the few industrialized countries that has not signed the ECT. Ria Kemper, then Secretary General of the Energy Charter Secretariat delivered a speech in 2001 stating that she had been informed that the United States had not signed the treaty because:

- (a) The protections of investments in the ECT are not as strong as those contained in US bilateral agreements;
- (b) There is a potential conflict between the ECTs unconditional provisions on most favoured nation treatment and the Jackson-Vanik Amendment to the 1970 US Trade Act; and
- (c) There would be difficulty in ensuring that the ECT provisions are implemented on a sub-federal level.⁵⁵

It has also been noted that the US did not sign the ECT because it did not bind the parties at the pre-investment stage which relates to such issues as access conditions as opposed to the post-investment risks covered by the ECT.⁵⁶

An analysis of these concerns leads one to a conclusion that they should not present roadblocks to US accession to the ECT. The ECT text, while the product of compromise among many nations (and different from the US 2004 model bilateral investment treaty), does provide the customary investment treaty protections. The Jackson-Vanik amendment, which was passed by the US Congress to encourage freedom of emigration in other countries, has served its purpose and is now of extremely limited applicability. Commitments at the sub-federal level are not

55. Dr Ria Kemper, Secretary General, Energy Charter Secretariat, Promoting an East-West Energy Dialogue – Introducing the Energy Charter, Address before the Atlantic Council of the United States (1 Nov. 2001). For a review of the ECT negotiation process and its provisions, see Craig Bamberger, Jan Linehan & Thomas Wälde, 'The Energy Charter Treaty in 2000: In a New Phase', in *Energy Law in Europe*, ed. Martha M. Roggenkamp (Oxford: Oxford University Press, 2000), 171 available online: <<http://iis-db.stanford.edu/evnts/3917/Charter.pdf>>.

56. For a detailed discussion of the United States position in the context of the ECT negotiations, see William Fox, 'The United States and the Energy Charter Treaty: Misgivings and Misperceptions', in *The Energy Charter Treaty: An East West Gateway for Investment & Trade*, ed. Thomas W. Wälde (The Hague: Kluwer Law International, 1996).

unique to the ECT and are similar to those to which the US committed under NAFTA. Moreover, like the US, China, Russia, Brazil and other countries have sub-federal levels of government. A treaty that did not protect against actions taken at the sub-federal level would offer far lesser protections. The US preference for BITs that include pre-investment treaty protections would appear to be impossible to achieve given the particularly strong desire of many nations to be at liberty to decide how and with whom to develop their energy resources. It would seem advantageous for the US to protect investments once made even if pre-investment protections for US investors cannot now be achieved.

The United States may be revisiting many past US decisions. For example, the US did not accede to the Kyoto Protocol and make commitments to a GHG emission cap. However, the United States presidential election campaigns in 2008 confirmed the significance of energy related national security issues⁵⁷ and of climate change concerns with both candidates promising to take concerted action to address the problems posed. Solutions focus largely on the energy sector which generates over 60% of global CO₂ emissions. President Obama has proposed numerous measures that would serve to foster energy efficiency, demand reduction and renewable energy, and reduce greenhouse gas emissions⁵⁸ and is acting on his campaign commitment to 'support implementation of an economy-wide cap-and-trade system to reduce carbon emissions by the amount scientists say is necessary: 80% below 1990 levels by 2050'.⁵⁹ The drive towards energy independence and security are constant themes of the current Administration.

Concerns about new developments since the ECT was negotiated, including pressing matters of national security and global warming, compel a re-examination of the US decision on accession to the ECT and call for the US to participate in a thorough review of how the ECT or a similar multi-lateral investment treaty can be utilized to foster optimal development of energy around the world. There is space for the US to play a leading role in this global effort.

8. CONCLUSION

The number of investor–State arbitrations based on international investment agreements is growing; of the over 2000 known investor–State arbitrations to date,

57. National security is of significance not only because of the drive towards energy independence but also because of the national security concerns presented by climate change impacts. See Dr Thomas Fingar, Deputy Director of National Intelligence for Analysis and Chairman of the National Intelligence Council before the House Intelligence Committee, Statement for the Record, *National Intelligence Assessment on the National Security Implications of Global Climate Change to 2030*, 25 Jun. 2008, available online: <www.dni.gov/testimonies/20080625_testimony.pdf>.

58. White House Briefing Room Energy and Environment, available online: <www.whitehouse.gov/issues/energy_and_environment/>.

59. Barack Obama & Joe Biden: New Energy for America, available online: <www.barackobama.com/pdf/factsheet_energy_speech_080308.pdf>.

two-thirds have commenced since the beginning of 2002. Several of these have been brought under the ECT and more will likely follow. The ECT is a young treaty and the Energy Charter Secretariat is working on raising awareness of the treaty, developing areas of consensus among Member States and observers on key issues such as energy security, transit issues and energy efficiency, and attracting additional Contracting Parties.

It is time to act on the G8's annual affirmation of the need for a stable investment framework for the energy sector. With today's focus on climate change, sustainable development and energy security, it is essential that there be a thorough review of how the ECT can be utilized to shape decisions on the optimal development of energy around the world. Utilizing the ECT as the tool to move forward would lead to savings of many years which would otherwise be spent on negotiating a new multi-lateral treaty and awaiting ratification by the requisite number of nations pursuant to their national laws, a process that would likely take several additional years.

The recent financial crisis makes the call for a widely adopted multi-lateral energy investment treaty all the more urgent as investors are notably risk averse and are likely to remain more cautious with their investments even as the global economy recovers. Indeed, the global financial crisis may make it easier to achieve consensus on the need for a multi-lateral energy investment treaty as nations look for foreign direct investment and investors look for stability and certainty in host countries. It must be recognized that investment treaty analysis and climate change concerns have developed since the drafting of the ECT and political changes and realignments have occurred which may require some fine tuning or adjustments in the ECT provisions; modifications necessary to gain broad scale global acceptance should also be considered.⁶⁰ Indeed, Russia's recent termination of the provisional application of the ECT, rejection of the ECT and call for a new multi-lateral energy investment treaty⁶¹ may require serious consideration as to whether the ECT can operate effectively without this energy giant and whether accordingly a new multi-lateral energy investment treaty must regrettably be crafted. But collaborative efforts are essential to facilitate the development of a workable global energy investment environment that promotes sustainable energy projects that serve to mitigate GHG emissions, promote sustainable development and foster global energy security.

60. For example, a clarification of the treatment under the investment treaty protections of environmental limits established to respond to climate change may be advisable to achieve the twin goals of environmental protection and regulatory predictability.

61. Dmitry Medvedev, President, Russ., Conceptual Approach to the New Legal Framework for Energy Cooperation (Goals and Principles) (21 Apr. 2009), online: <www.kremlin.ru/eng/text/docs/2009/04/215305.shtml>; see also Russia's Medvedev Offers to Rewrite Energy Rules, *EU BUSINESS*, 27 May 27, 2009, <www.eubusiness.com/news-eu/1240237042.93/> (explaining the background and basics of Russia's proposal).