44 Int'l Law. 939

International Lawyer
Fall 2010

Article

A MULTILATERAL ENERGY SECTOR INVESTMENT TREATY: IS IT TIME FOR A CALL FOR ADOPTION BY ALL NATIONS?

Edna Sussman [a1]

Energy is at the forefront of the global agenda. It is central to the issues of development, global security, environmental protection, and achieving the MDGs [Millennium Development Goals]. Profound changes are beginning to transform the way we supply, transform, deliver, and use energy services--a trend that a revitalized global energy dialogue can reinforce, leading to a sustainable future for all with multiple co-benefits for development, human health, environment and climate change. [1]

Pressing issues confront the nations of the world concerning energy security, climate change, and sustainable development, all problems that should be faced through the promotion of optimal energy solutions. An examination of whether and how the rule of law, through accession to investment treaties, can facilitate the development of energy development responses that maximize the achievement of energy security for all nations, promote economic growth, and minimize harm to the environment is required. The means for achieving these multiple goals are compatible. As the G8 Energy Ministers stated at the G8 Summit in 2008, "addressing energy security, 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. [3] This paper examines the role a multilateral ***940** investment treaty can play in advancing the goals of all countries to achieve energy security, sustainable development, and climate change solutions. Section I reviews the projected investments required for energy development and the potential impacts on national and global security if the requisite investments are not made. Section II reviews briefly the development of bilateral investment treaties and discusses the Energy Charter Treaty, a multilateral investment treaty for the energy sector that is now in force. Section III considers the obstacles and the feasibility of successfully corralling nations to accede to a multilateral investment treaty for the energy sector.

I. Energy Sector Imperatives

Human use of energy has always been central to life dating back as far as the caveman's discovery of fire. As civilization developed and entered into the current period of industrialization, which utilizes vast quantities of fossil fuels for production, and as increased urbanization of populations around the world lead to reliance on energy for multiple uses, access to energy has become increasingly critical to the conduct of business and the function of everyday life.

The importance of energy and concern about the steady availability of reliable sources of energy has been a focus of governments for many years. The oil embargo imposed in the 1970s on the United States and the natural gas transmission interruption in Europe in 2006 are two examples of events that crystallized the issue. [4] But the current realities bring concerns about the quantity and quality of energy to a new level. The rapid and continuing economic growth of several developing countries with their massive calls on energy sources, the need for the development and implementation of clean energy technologies to combat climate change, and the commitment of nations to the Millennium Development Goals to raise people around the world from poverty lead to a radically new paradigm and dictate tremendous additional investments in energy. In recognition

of the potentially dire security implications of these new imperatives, governments are adding energy security considerations into their national security planning. [5]

A. Increased Demand Requires Massive Energy Investment

The capital required to meet projected energy demand through to 2030 . . . is huge. [6]

The International Energy Agency (IEA) has projected that on a business-as-usual basis, the world's energy needs will grow by forty percent between 2007 and 2030, at an average annual rate of 1.5% per year. [7] "World electricity demand is projected to grow at an annual rate of 2.5% to 2030. Over 80% of the growth takes place in non-OECD countries." [8]

***941** Projections by U.S. agencies reveal similar numbers. The U.S. Energy Information Administration (U.S. EIA) predicts a worldwide energy consumption increase, based on the continuation of current laws and policies, of forty-nine percent from 2007 to 2035. [9] This projection reflects a projected increase in energy demand in the non-OECD Asian countries of 118% between 2007 and 2035. [10] In 2007, non-OECD consumption exceeded OECD consumption for the first time. [11] China and India's share of global energy consumption is expected to increase to thirty percent in 2035 from twenty percent in 2007, as their combined energy use more than doubles by 2035. [12] The energy demand in the Middle East is expected to grow by eighty-two percent, while Africa and Central and South America will increase by sixty-three percent. [13] The United States will decrease as a percentage of world global demand from twenty-one percent in 2007 to about sixteen percent by 2035. [14]

The IEA projects that approximately $26 trillion (in 2007 dollars) of investment in energy supply infrastructure between 2007 and 2030 or $1.1 trillion per year (1.4% of global GDP per year on average) is needed to meet projected global energy demand. [15] Over half of the energy investment is needed in developing countries. [16] Investment is necessary not only to meet increased demand, but also to maintain current levels of capacity because much of the current energy infrastructure will need to be replaced by 2030. [17]

B. Climate Change Challenges Require Significant Energy Investment

In the context of meaningful mitigation actions and transparency on implementation, developed countries commit to a goal of mobilizing jointly USD $100 billion a year by 2020 to address the needs of developing countries. This funding will come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources of finance. [18]

The Intergovernmental Panel on Climate Change (IPCC), the leading international scientific group composed of hundreds of scientists from nations from all over the world, issued a series of influential reports in 2007 reviewing the causes and impacts of climate change identifying solutions and emphasizing the need for greenhouse gas mitigation and adaptation to climate change. [19] The critical findings of the IPCC included a finding that the "warming of the climate system is unequivocal" and that there was a "very high confidence" (ninety percent probability) that human activity, principally greenhouse gas ***942** (GHG) emissions, is causing warming. [20] These conclusions of the international scientific body were echoed by the scientists working at the U.S. National Academies, who concluded that "reducing greenhouse gas emissions will require strong national and international commitments, technological innovation and human willpower." [21]

Strong action is indeed necessary to curb CO_2 emissions. In its business-as-usual scenario, the International Energy Agency projects a forty-five percent jump in global GHG emissions by 2030. [22] "Three-quarters of the projected increase in energy-related CO_2 emissions in the Reference Scenario arises from China, India and the Middle East, and 97 [percent] in non-OECD countries as a whole." [23] The U.S. Energy Information Administration similarly projected a fifty percent increase in global carbon dioxide emissions from 2005 to 2030 and noted that in 2005, non-OECD emissions of CO_2 exceeded OECD emissions by seven percent while non-OECD emissions are projected to exceed those from OECD countries by seventy-two

percent by 2030.[24] The non-OECD annual increase in CO_2 emissions is projected to be five times that projected for the OECD countries.[25] While their per capita emissions are very low compared to the developed countries and are likely to remain so for many years, China and India are projected to account for thirty-four percent of the world's total emissions in 2030.[26]

In 2008, the G8 agreed to a goal of a "50% reduction [in] global emissions by 2050."[27] This commitment was reaffirmed at the 2009 and 2010 G8 meetings.[28] The path to mitigating GHG emissions lies not only in the reduction of emissions in the industrialized nations, but, as the IEA and U.S. EIA projections vividly show, also in the curbing of the growth of emissions in the developing countries.[29]

Who will act and how has been the subject of ongoing multinational consultations? At the December 2007 conference in Bali under the United Nations Framework Convention on Climate Change (UNFCC) and the Kyoto Protocol on climate change, vigorous negotiations were held over the respective obligations of developing and developed countries.[30] The developing countries have no GHG limits and have long taken the position that to ***943** bind them to reduce 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.[31] They argued that imposing an emissions cap on developing nations would not be equitable, as the industrialized countries have grown and developed by polluting the world for decades as the principal emitters of GHGs, and that the industrialized nations should accordingly bear the bulk of the current burden and allow the developing countries' economies to catch up.[32] The developing countries have accordingly consistently refused to be bound by GHG emission caps and the fundamental principle guiding the negotiations since the signing of the UNFCC has been that parties should act to protect the climate system "on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities."[33]

The "Bali Roadmap" achieved in the UNFCC/Kyoto Protocol negotiations in December of 2007 set out a framework for negotiations for the following two years.[34] The Roadmap included an acceptance by all countries of a significant new concession offered by India that the developing countries would agree to take "measurable, reportable and verifiable" mitigation actions, but their actions would be supported by "technology, financ[e] and capacity-building" from the developed countries.[35] Thus, the stage was set diplomatically to negotiate binding measures consistent with these guidelines, measures which would seem to include significant investment-related commitments by all parties.

Binding measures to follow the Kyoto Protocol commitments have yet to be achieved. At the December 2009 U.N. climate change summit conference under the UNFCCC and the Kyoto Protocol, following a difficult week of negotiation, objection by several countries blocked formal adoption of any document.[36] But the Chair of the conference "took note" of the Copenhagen Accord.[37] The Copenhagen Accord, while not binding, did provide a path for moving forward. It recognizes: (a) "the scientific view that the increase in global temperature should be below 2 degrees Celsius;" (b) Annex I parties, the developed countries as identified at the Rio Earth Summit in 1992, are to submit their GHG reduction goals for 2020 in a document titled Annex I to be measured, reported, and verified in accordance with existing and further guidelines; (c) Non-Annex I parties are to submit their mitigation and communicate their implementation of those measures which are to be subject to measurement, reporting, and verification pursuant to guidelines to be developed with "international consultations and analysis which will ensure that national sovereignty is respected."[38] Pursuant to the Copenhagen Accord, over 120 countries have ***944** now submitted their Annex I and Annex II commitments.[39] The next U.N. summit in Cancun, Mexico is scheduled to commence in November 2010 and will determine how international commitments on climate change progress.[40]

The Copenhagen Accord also committed developed countries to invest $30 billion for the period 2010-2012 for adaptation and mitigation measures in the developing countries, and "in the context of meaningful mitigation actions and transparency on implementation" the developed countries also committed to a goal of "mobilizing jointly $100 billion dollars a year by 2020

to address the needs of developing countries." [41] This funding is identified as coming from a wide variety of sources both "public and private." [42]

While this soft commitment by the developing countries to fund mitigation and adaptation measures in the developing countries was a positive step forward, the amount pledged is a small fraction of what is required. Massive investment is needed to meet the target reduction in emissions. According to the International Energy Agency's submission to the parties in preparation for the Copenhagen summit, implementing measures to reduce emissions to stabilize the concentration of greenhouse gases at 450 ppm by 2030 (a target now viewed as perhaps being inadequate) would require an increase in cumulative energy related investment over the period 2010-2020 of 2.4 trillion dollars and over the period 2020-2030 of 8.1 trillion dollars for an incremental investment cost of 0.5% of GDP in 2020, rising to 1.1% of GDP in 2030. [43] In an earlier report, McKinsey & Company projected that the total annual cost to society would be 500 to 1,100 billion euros by 2030 or 0.6-1 .4% of that year's global projected GDP, a number consistent with cost projections developed by the IPCC. [44] To put this figure in perspective, McKinsey adds that "if one were to view this spending as a form of insurance against potential damage due to climate change, it could be compared to global spending on insurance (excluding life insurance), ***945** which was 3.3% of GDP in 2005." [45] The World Bank has concluded that studies "emphasize that the financial contribution of the private sector is essential for achieving progress in making economies worldwide more climate-friendly, particularly in view of the huge public fiscal deficits worldwide." [46] Much of that investment will be in the energy sector, which can make the greatest contribution to the reduction of greenhouse gas emissions. [47]

C. Achievement of the U.N. Millennium Goals Requires Meaningful Energy Investment

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. [48]

The increase in energy demand in the developing world projected by the IEA and the U.S. EIA discussed above is consistent with and necessary to the development of those nations. 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. [49] Although energy is not explicitly mentioned in the Millennium Declaration, the World Bank has noted that the Millennium Declaration Goals 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." [50] 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. [51]

***946** The U.N. Advisory Group on Energy and Climate has recommended that energy be an integral part of the Millennium Development Goals review process. [52]

Today, 1.4 billion people, twenty percent of the global population, lack access to electricity, and 2.7 billion people, forty percent of the global population, rely on traditional biomass for cooking. [53] The continued need for and growth in energy demand and energy investment was explicitly acknowledged in the progress report issued in 2008 on the achievement of the Millennium Declaration Goals: "large investments in energy projects are expected over the coming years" in developing countries in response to the growing demand for energy worldwide. [54]

In recognition of the need for energy development in order to achieve the Millennium Development Goals, this year the International Energy Agency and two United Nations organizations cooperated to assess the magnitude of the investment required. [55] In order to provide the needed reliable electricity to the global population lacking such access would require an investment of $33 billion each year, or a total of $700 billion through 2030. [56] An additional $2.6 billion, or a total of $56 billion through 2030, is required to achieve universal access to clean cooking facilities. [57]

Private international capital flow, particularly foreign direct investment, was identified as "vital" in the Monterrey Consensus for developing economies. [58] In order "to attract and enhance inflows of capital" countries were called upon by the Monterrey Consensus to continue their efforts to achieve a "transparent, stable and predictable investment climate, with proper contract enforcement and respect for property rights." [59] In the Doha conference's recent review of progress in implementation of the Monterrey Consensus, it was concluded that the experience showed that providing "an enabling domestic and international investment climate is fundamental to fostering domestic and foreign private investment" and that "[b]ilateral investment treaties may promote private flows by increasing legal stability and predictability to investors." [60]

*947 D. Energy Implications for National Security

The geopolitics of energy insecurity will be a key theme of the 21st Century. [61]

Energy security in the 21st century revolves around the adequacy of and access to supply and responses to climate change. [62] "Although they produce distinct types of challenges, climate change, energy security and economic stability are inextricably linked." [63] Many of the measures necessary to ensure supply, such as energy efficiency improvements, the development of new energy generation technologies and energy technologies that are less water intensive, serve also to reduce GHG emissions or adapt to the consequences of climate change--both climate change imperatives. [64] The shortages that will result from a failure to assure adequate energy supply will cause energy prices to rise and stunt economic growth and poverty reduction, especially in developing countries. [65] Energy is the driver of virtually every facet of life now from manufacture to lighting, heat, and food. [66]

As the predicted increase in demand for energy develops, competition for energy sources will increase. There is a clear risk that investment will be inadequate to offer global supplies sufficient to meet market demands of all nations. [67] Absent such investment, the rising risk of energy shortages will increase the potential for disputes and conflict. [68] It has been recognized that competition for energy sources "is one of the biggest potential drivers of the breakdown of the rules-based international system and the re-emergence of major inter-state conflict, as well as regional tensions and instability." [69]

Numerous reports and vigorous debates about "peak oil," i.e. when oil production reaches a peak leaving only diminishing stocks for the future, have been issued. [70] Some, accepting the view that peak oil is near, predict dire consequences to follow when supplies begin to diminish. [71] Oil is indisputably central to the functioning of modern societies and *948 oil has been the driver of many geopolitical actions taken by nations. The subject of energy security however is broader and must include all energy sources as well as reliable infrastructure for its wide scale delivery. Notwithstanding the obvious and significant security implications of the adequacy of a more broadly based examination of energy supply and access, government reports and scholarly research on the intersection of this broader view of energy and security are scarcer. [72] But the impact of the newer challenge, climate change, on national security has drawn wide attention.

In April 2007, the United Nations Security Council launched the discussion of climate change and its impact on global security. [73] Since then, numerous analyses of the connection between climate change and national security have been published. [74] All have recognized the national security dangers posed by climate change and have noted the inextricable link between the approaches to minimize climate change impacts and the approaches to assure reliable, affordable energy, also

crucial to national security.[75] As concluded in a study conducted by the Royal United Services Institute for Defense and Security Studies:

> In the next decade climate change will drive as significant a change in the strategic security environment as the end of the Cold War. If uncontrolled, climate change will have security implications of similar magnitude to the World Wars, but which will last for centuries . . .[t]here will be no agreement on climate security without guaranteeing all nations energy security.[76]

The European Council commissioned a study of the impacts of climate change on national security.[77] The report to the European Council concluded that climate change is a "threat multiplier which exacerbates existing trends, tensions and instability" and "threatens to overburden states and regions which are already fragile and conflict prone."[78] It was concluded that these risks pose "political and security risks that directly affect European ***949** interests."[79] The report identified conflicts arising from climate change over water and food resources, increased flooding and drought, sea level rise risk to coastal areas, loss of territory and border disputes, environmentally induced migration of many millions of people, instability in weak or failing states, tension over energy supplies, many of which are in regions vulnerable to climate change, and the fueling of tensions in the international community between those most responsible for climate change and those most affected.[80] The recent flooding in Pakistan, which may not have been a consequence of global warming, but which flooded twenty percent of the country and affected more than twenty million people, is a harbinger of what can be expected as extreme weather events increase in number and ferocity.[81]

An analysis of the issue in the United States identified similar concerns. As required by Congress, a report was prepared by the U.S. National Intelligence Council, reflecting a consensus of all sixteen U.S. intelligence agencies; while the report itself is classified, Thomas Fingar Deputy Director of National Intelligence for Analysis and Chairman of the National Intelligence Council testified before the House Intelligence Committee in June 2008.[82] The report leads with the statement that "global climate change will have wide-ranging implications for U.S. national security interests over the next 20 years" and could have "significant geopolitical consequences."[83] At the hearing in Congress, Mr. Fingar added that "[t]he conditions exacerbated by the effects of climate change could increase the pool of potential recruits into terrorist activity."[84]

The Council on Foreign Relations, in concluding that "climate change presents a serious threat to the security and prosperity of the United States and other countries," explained that national security extends beyond protecting against armed attack by other states and includes phenomena like pandemic disease and natural disasters so climate change, despite lack of "human intentionality," can threaten national security and endanger large numbers of people.[85] The Council's report provides examples of impacts both in the United States and abroad to illustrate its position.[86]

A Military Advisory Board, composed of a blue-ribbon panel of eleven of the most senior retired U.S. admirals and generals, found that climate change, national security, and energy dependence are a related set of global challenges that will add to tensions even ***950** in stable regions of the world.[87] In a report issued in 2007, the Military Advisory Board found that: "Projected climate change poses a serious threat to America's national security" by adding "new hostile and stressing factors."[88] The Report describes climate change as a "threat multiplier for instability in some of the most volatile regions of the world" that "will seriously exacerbate already marginal living standards in many Asian, African, and Middle Eastern nations, causing widespread political instability and the likelihood of failed states."[89] On the question of the impact on terrorism, the Military Advisory Board concluded that these conditions, which will magnify the disparity between nations, can create conditions for terrorism.[90] Responding to those who question the need to act based on their perception of lack of certainty in science, the Military Advisory Board stated that "as military leaders we know we cannot wait for certainty. Failing to act because a warning isn't precise enough is unacceptable."[91]

Investment, including massive investment by the private sector in energy development and implementation, is the key to avoiding these security risks.

II. Investment Treaties and Energy

A. Investment Treaties Overview

"Bilateral investment treaties ("BITs") are legally binding treaties that provide significant legal protections for investors and investments in BIT partner countries." [92] They are thought by many, and intended, to encourage investment in the host country. [93] While BITs vary one from another as each is individually negotiated, BITs generally grant protections by guaranteeing investors fair and equitable treatment, the better of national or most favored nation treatment, protection from direct or indirect expropriation and the right to commence an arbitration. [94] By the end of 2009, 2750 BITs had been signed by various nations. [95]

The growth in the number of BITs among nations starting in the 1990s and continuing in the years of this millennium has been exponential. [96] In 2009 alone, eighty-two new BITs were concluded. [97] Whereas historically BITs had been between developed countries ***951** and developing countries, so-called North-South BITs, increasingly, BITs are being concluded between developing countries, so-called South-South BITs. [98]

The United States, which has concluded approximately forty BITs, is continuing to negotiate additional BITs. [99] Illustrative of these efforts by the United States are pronouncements with respect to U.S. BIT negotiation activity. In June 2008, the United States announced an initiative to develop a BIT with China, which is expected to "level the playing field for U.S. companies" and enable U.S. companies to have the benefit already afforded to "many of the European and Asian competitors of U.S. companies . . . [pursuant to] protections . . . under BITs that their governments have already signed with China." [100] A U.S.-China BIT is expected to "strengthen the rule of law . . . [and] require China to abide by clear, certain and agreed rules of investor protection and transparency of investment-related laws and regulations." [101] In April 2008, the United States and Russia "agreed to advance efforts on a new Bilateral Investment Treaty that will promote a stable and predictable framework for investment, to the benefit of the business communities in both countries." [102] In January 2008, the United States and India announced high-level talks to forge an India-U.S. BIT. [103] In April 2008, the United States affirmed its support for the negotiation of a BIT with Brazil. [104] In October 2008, discussions by the United States on a BIT with Japan were reported to be continuing in an effort to "promote foreign direct investment," especially in light of the current economic downturn. [105] The United States is actively engaged in the negotiation of the Trans-Pacific Strategic Economic Partnership Agreement. [106]

But none of these BITs have been concluded--progress on completing BIT negotiations is undoubtedly delayed by the current ongoing review of the 2004 U.S. Model BIT, the template document from which the United States starts the process of negotiating its ***952** BITs. [107] Pursuant to his campaign pledge to reform U.S. foreign investment law, President Barack Obama announced that his administration would commence a review of the 2004 Model BIT. [108] The Obama Administration instructed the Investment Subcommittee of the State Department's Advisory Committee on International Economic Policy (ACIEP) to review the 2004 Model BIT and recommend changes to the document. [109] The review was to cover certain areas of the 2004 Model BIT, including: investor-state dispute resolution, the definitions of expropriation and investment, the impact of likely global financial regulatory overhaul, and the need for enforceable investor responsibilities with respect to workers' rights and the environment. [110] The report of the Subcommittee was issued in September 2009 and the final version of the new U.S. Model BIT is expected shortly. [111]

Many countries have completed the negotiations of many more BITs with nations other than the United States. [112] For example, China is now only second behind Germany's 135 BITs with over 120 of its own BITs in force. [113] The United Kingdom and

France each have about a hundred BITs in place. [114] Russia has successfully negotiated sixty-five BITs. [115] These BITs are intended to afford protection to investors of those nations for investments made in their BIT counterparty nations and encourage investment in both countries. [116]

It must be recognized that there is a great deal at stake here. Foreign direct investment (FDI), which the BITs are intended to foster, represents enormous investment sums with $1,114 billion in FDI inflows reported for 2009. [117] The so-called BRIC countries (Brazil, Russia, India, and China) have become increasingly significant players in making such investments and accounted in 2008 for "almost 9 per cent of world outflows, compared to less than 1 per cent ten years ago." [118]

With the proliferation of BITs and the increasing number of claims against host countries by investors, there has been considerable debate in recent years as to whether investment ***953** treaties really do serve to attract increased FDI. [119] These studies were recently analyzed by the United Nations Conference on Trade and Development (UNCTAD), which found that there are many factors that dictate whether investments will be made in particular countries: including "(a) the general policy framework for foreign investment, including economic, political and social stability. . . (b) economic determinants, such as the market size, cost of resources and other inputs (e.g. costs of labour) or the availability of natural resources; and (c) business facilitation, such as . . . investment incentives." [120] But the UNCTAD report concluded that BITs (and even more so treaties with broader economic cooperation that include an investment chapter) "do have some influence on FDI inflows from developed countries into developing countries." [121] This conclusion was based not only on the more recent studies of the subject credited by UNCTAD, but also on an investor survey that confirmed that seventy percent of the surveyed transnational corporations reported that international investment agreements "played a role in making an investment decision." [122] Furthermore, another investor survey conducted by UNCTAD itself showed investors ranking BITs as a very important factor in decision making on investments. [123] The report further noted that political risk insurance, a vehicle used to protect against risk in a host developing country, may be more expensive or even unavailable in countries without BITs in place. [124]

The U.S. business community, a strong supporter of investment treaties, wrote a letter vigorously urging the Obama administration to "embrace a strengthened U.S. Model BIT" and to reenergize the BIT program. [125] The disadvantage suffered by U.S. investors compared to key competitors from other countries that already have strong BIT programs was emphasized along with the need to ensure that core obligations are preserved in the U.S. Model BIT and that neutral arbitration for dispute resolution is available. [126] The letter pointed out that U.S. investment abroad supports higher paying U.S. jobs, increased productivity, a higher standard of living, and economic growth in the United States. [127]

*954 B. The Energy Charter Treaty

Any discussion of a multilateral investment treaty for the energy sector must start with the Energy Charter Treaty (ECT), the existing multilateral treaty for the energy sector. [128] The ECT is an extensive, but young, multinational agreement. [129] The negotiation of the ECT followed the dissolution of the Soviet Union, which led to a cosmic change in world politics and a desire for cooperation in energy matters. It was believed that an intergovernmental framework was necessary to provide the stability needed for the investment that would foster the requisite large investments from the West. [130] The breakup of the Soviet Union also threatened energy transit systems and provided opportunities for the European Union countries to strengthen their long term energy security. [131] As stated in Article 2, the ECT "establishes a legal framework in order to promote long term cooperation in the energy field." [132] The ECT promotes investment liberalization by establishing an international legal order which ensures a level playing field and respect for the rule of law. [133] By providing a dispute resolution mechanism before international tribunals the ECT increases confidence by investors and the financial community and ensures the investment and trade flows which lead to economic growth. [134] The ECT was designed to meet the need for multilateral rules for international cooperation on investment protection, which is required by 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. [135]

The ECT, which was signed in 1994 and entered into force with the ratification by the requisite number of states in 1998, has been acceded to by fifty-one states, as well as by the European Community and the European Atomic Energy Community (EUROTOM). [136] The signatories are mainly countries in Europe as well as Japan and Australia [Contracting Parties]. [137] The ECT also provides for observer status, and twenty four states participate on that basis including the United States, China, Saudi Arabia, Iran, Venezuela, Tunisia, United Arab Emirates, many other Persian Gulf states, and international organizations like the World Bank and the Association of Southeast Asian Nations. [138] The ECT provisions include:

a) Investment protections intended to create a "level playing field" and reduce to a minimum the non-commercial risks associated with energy sector investments;

b) trade provisions consistent with WTO rules and practice;

c) obligations to facilitate transit of energy on a non-discriminatory basis consistent with the principle of free transit;

***955** d) energy efficiency and environmental provisions which 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 between one state and another as to the application or interpretation of the ECT. [139]

The ECT also creates a number of foreign investment protections. While the precise language varies from BIT to BIT, the ECT includes the standard traditional BIT investor protection provisions:

General protections: Under Article 10, Contracting Parties must commit "to accord . . . fair and equitable treatment," "constant protection and security," and shall not "in any way impair by unreasonable or discriminatory measures [the] management, maintenance, use, enjoyment or disposal" of an investment. [140] Also, "[i]n no case shall such Investments be accorded treatment less favourable than that required by international law. . . ." [141]

Discrimination: Under Article 10, Contracting Parties must accord investors "treatment . . . no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state. . . ." [142]

Expropriation: Under Article 13, "Investments . . . shall not be nationalized, expropriated or subjected to . . . measures," which have an effect "equivalent to nationalization or expropriation" unless certain limited exceptions are met and even then only if a "prompt, adequate and effective compensation" payment equivalent to "fair market value" is made. [143]

War and Civil Disturbance: Under Article 12, in the event of loss to an Investor due to war or civil disturbance, the Contracting State shall accord "restitution, indemnification, compensation or other settlement, treatment which is the most favourable of that which the Contracting Party affords to any other Investor." [144]

Fund Transfers: Under Article 14, Contracting Parties must guarantee "freedom of transfer" of funds in and out of the country "without delay and . . . in a Freely Convertible Currency. [145]

Key personnel: Under Article 11, Contracting Parties commit to permit Investors to employ key personnel of the Investors' choice. [146]

Interplay with Other Treaties: Under Article 16, in the event "two or more Contracting Parties [enter] into a prior [or subsequent] international agreement" and disparities exist, the provision shall be construed in favor of the Investor. [147]

The right to arbitrate under the ECT is established as the host state as the Contracting Party "gives its unconditional consent to the submission of a dispute to international arbitration. ***956** . . ." [148] This commitment is viewed as an "offer" which can

be "accepted" by the investor and the ECT creates "arbitration without privity." [149] This right is of signal importance as it removes the investor from resort to local courts which may fail to be neutral or subject to influence from the government. [150] The enforceability of an arbitration award as opposed to a court judgment is also of great significance. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), a treaty signed by over 140 nations, commits those nations to enforce arbitration awards and provides for only very limited exceptions. [151]

The ECT dispute resolution provisions provide the "teeth" that can serve to assure investors that their investments will be protected with respect to the measures specified in the ECT. [152] In the event of loss caused by an event in breach of the ECT, they will be able to recover from the host state in a neutral decision making forum that can render an award that will be recognized and enforced around the world. [153] There have been several publicly known arbitrations brought by investors against host countries claiming rights afforded by the ECT. [154]

C. Repeated Calls for a Multilateral Investment Framework for the Energy Sector

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. [155]

G8 Summit Leaders Declaration, July 2008.

The need for equitable, stable, and effective legal regimes to promote investment in the energy sector has been recognized repeatedly by developed countries. At the G8 Summit in 2006, the St. Petersburg Global Energy Security Principles were issued and committed to: "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." [156] The St. Petersburg Plan of Action Global Energy Security explicitly "support[ed] the principles of the Energy Charter and the efforts of participating countries to improve international energy cooperation" and stated the understanding that,

***957** [G]overnments' environmental and energy policies are critical for investment decisions. In producing, consuming, and transit states, therefore, we will promote predictable regulatory regimes, including stable, market-based legal frameworks for investments, medium and long-term forecasts of energy demand, clear and consistent tax regulation, removal of unjustified administrative barriers, timely and effective contract enforcement and access to effective dispute settlement procedures. [157]

The 2007 G8 Summit Declaration noted the importance of "improving [the] investment climate in the energy sector," supported the principles of the Energy Charter, and "invite[d] China, Brazil, India, Mexico and South Africa and other major emerging economies to adopt these Global Energy Security Principles" established at the G8. [158]

The G8 Summit Leaders Declaration in 2008 again reconfirmed the commitment of the St. Petersburg Principles Plan of Action and "invite[d] other countries to embrace these [p]rinciples." [159] The Declaration explicitly 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 investment. [160]

A review of progress on the St. Petersburg Plan of Action conducted in 2009 by the International Energy Agency notes the adoption by all G8 countries of the Energy Charter and recognizes the various ongoing international regional negotiations but reports no progress on the conclusion of any of these efforts. [161]

***958** In recognition of the changing geopolitics of the world in recent years, in 2009 the G-20 was agreed to be "the premier forum for . . . international economic cooperation." [162] The G-20 is a joint effort of the leading industrial and emerging-market countries from all over the world. Together, countries that constitute the G-20 represent approximately ninety percent of global gross national product, eighty percent of world trade (including E.U. intra-trade) and two-thirds of the world's population. [163] At the G-20 Summit in Pittsburgh in 2009, the G-20 in its Leaders Statement concluded that "[a]ccess to diverse, reliable, affordable and clean energy is critical for sustainable growth" and "[n]oting the St. Petersburg Principles on Global Energy Security, which recognize the shared interest of energy producing, consuming and transiting countries in promoting global energy security" various commitments were made by the G-20 members. [164]

While the G-20 did not speak in its Leaders Statement to the need for assuring stable investment regimes, given the crucial nature of the energy sector and the capital-intensive long-term nature of the investments required, it is time to consider whether the time has come to pursue the St. Peter's principles on investment protection in the energy sector and take concrete steps to develop a legal regime that will make them a reality and binding on nations. If the large private investments required are to be forthcoming, investors will have to choose to make investments in energy measures over competing investment opportunities. [165] Investor protection by means of a multilateral energy investment treaty can serve as part of the menu of mechanisms developed to foster the necessary investment.

The predictability of regulation and host government action is of particular importance in the energy sector as the viability of the economics of many energy projects depend on incentives and subsidies granted by governments to encourage such investment. [166] Energy project development is very capital-intensive and requires the investment of huge sums for projects that are very long-term in nature. [167] This is not a business comprised of many short-term, low-cost investment opportunities. Energy is a critical natural resource that nations often regard as uniquely their own and has a history of expropriations which makes an assurance of investment protection all the more important. [168]

The right to recovery under the ECT against a host government for changing incentives has been confirmed in awards rendered under the ECT. For example, in Nykomb Synergetics v. Republic of Latvia, the investor-claimant prevailed on a claim against the Republic of Latvia for changing a government policy and amending legislation, which had the effect of altering an incentive system for environmental investment and depriving the claimant of double tariffs in connection with the construction of a cogeneration power ***959** plant. [169] This right to recovery was affirmed in dicta in the tribunal's award in Plama Consortium v. Republic of Bulgaria, in which the Tribunal posited that while the ECT does not protect against all changes in the law "[u]nder the fair and equitable treatment standard the investor is . . . protected if (at least) reasonable and justifiable expectations were created." [170] Thus investment treaty protection can serve to assure the continuity of incentives promised and which formed the basis of investment decisions.

III. The Realities and Practicalities

The seminal question even a sympathetic reader must be asking is whether a widely adopted multilateral treaty for the energy sector is even remotely possible. We address that question with our own series of questions.

A. Haven't prior attempts at multilateral investment treaties failed?

There have in fact been several attempts at a broad based multilateral investment treaty; however, they have not been successful. [171] For example in the 1990s "the OECD states attempted to negotiate a [multilateral] agreement on investments (MAI)." [172] Given the growing consensus at the time as to international investment policy, it was believed that such a multilateral agreement might be possible. [173] The thought was to develop the text among the OECD states and then open it up for signature by other states. [174] But even the OECD states themselves could not agree on the terms of such a treaty. [175] Another example is the original Doha round of trade negotiations in 2001 under the auspices of the World Trade Organization, which included investment as part of the agenda for negotiations. [176] Investment was removed from the agenda in 2004 in order to focus the issues and promote progress on the trade issues. [177]

The fact that some prior efforts at negotiating a multilateral, multi-sector investment treaty regime failed should not preclude an attempt at arriving at such a regime for the all important energy sector. As discussed above, recent years have seen the successful completion of and accession to hundreds of additional BITs and investment agreements as chapters of trade agreements. Countries have been "voting with their feet" and entering into investment protection commitments. As also discussed above, the historic pattern of ***960** "north-south" BITs has morphed into a growing body of "south-south" BITs. So notwithstanding the vigorous current debate over whether BITs, as now typically framed, are a benefit for host countries, in light of the world's current energy needs and the demonstrated increased willingness of many nations to enter into investment protection treaties, the time may be ripe to renew the effort to achieve a truly multilateral widely accepted investment treaty limited to the energy sector. This is a new age with a new set of imperatives.

B. Hasn't there been serious criticism of the entire traditional BIT regime by developing countries and NGOs?

Indeed, an entire book on the subject was recently published. [178] In recent years, there has been a vigorous effort on the part of a number of non-governmental organizations (NGOs), scholars, and activists to advance consideration of the problems with investment treaties. [179] NGOs and scholars have raised four general concerns about investment treaties:

1) Investment treaties have the potential "to undermine legitimate laws and regulations protecting health, safety, the environment" labor laws and human rights; [180]

2) Investment treaties "discriminate[ ] against local investors by affording foreign investors greater rights and a preferential competitive advantage;" [181]

3) The arbitration process established in investment treaties lacks transparency. [182] Unlike commercial arbitration, investment arbitration adjudicates issues of both commercial and public nature. Consequently, according to critics, these disputes should not be decided behind closed doors; [183] and

4) The legitimacy of the decision-makers is questionable because they are not elected judges, but "practicing commercial lawyers whose independence is not guaranteed," and who are not accountable to the public. [184]

***961** In addition, governments have started reviewing their BIT and FTA practice. [185] Their principal concern is that investment arbitration infringes upon their sovereignty by "favor[ing] the interests of investors over the host state's competing interests," and by removing disputes of a public nature from the province of their domestic courts. [186]

With the experience garnered in the past few years with the growth of the number of investor state claims, governments have also voiced concerns over investment arbitration. [187] The notion that international investment law and arbitration is a one-sided system that works all in favor of investors has gained traction among governments. [188] Whether justified or not, the perception that the dispute resolution mechanism is unfair toward states endangers the viability and effectiveness of investment arbitration--because in order for a dispute resolution mechanism to function, it must not only be fair, but be perceived as fair by the parties to

the process. [189] If this concern is not addressed, the risk that governments actively involved in investment arbitration disputes opt out of the system is real, as recent developments, in both the developing and developed worlds, illustrate. [190] In the southern hemisphere, Latin American governments are leading a new wave of discontent with investment arbitration and the institution that personifies it; ICSID and two States, Bolivia and Ecuador, have already denounced ICSID, while others have been very critical of it. [191]

Concerns about state autonomy to regulate are not limited to developing countries. In the United States, similar concerns have drawn wide political support. [192] The concern in the United States was precipitated by the Methanex case brought before an arbitral tribunal by a Canadian investor under the North American Fair Trade Agreement, which has *962 an investment chapter, against the United States for the issuance by California of regulations banning the use of MTBE, a product found to pollute the water. [193] The outcry over the prospect of damages to be awarded in such circumstances by arbitrators answerable to no one in a private setting enraged many and made it a campaign issue in the 2008 presidential elections. [194] It led the presidential candidates in the 2008 election to promise to reexamine NAFTA, and to President Obama's direction of the current review of the U.S. Model BIT. [195]

The debate currently taking place in the United States about the contours of a new Model BIT exemplifies the difficulty of reaching consensus on the issues. [196] The Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty makes precious few and very limited recommendations. [197] It is rather a document that sets forth the positions of the parties. One might conclude that the failure to reach agreement even in this uni-national setting demonstrates that no consensus could ever be reached on investment treaty language in a multilateral setting. Perhaps, but the Advisory Committee had a very limited period of time within which to do its work and its focus was on investment treaty policy development rather than a focus on the specter of energy crises if accommodations are not made among nations and consensus reached. [198] Recognizing that the energy sector is one in which state concerns about autonomy might be the most pressing, perhaps there is a way in the face of the great global dangers to bridge the divide.

C. Can a meaningful treaty be developed if it does not provide for protection of access to foreign investment in the energy sector?

The question of whether an investment treaty should afford pre-investment protections has been a question of moment in prior multilateral investment treaty discussions. It is likely that states will continue to seek to preserve the ability to decide what investments they will permit in their own natural resources. The ECT negotiators were unable to achieve a consensus to include such a protection and the ECT does not currently afford any pre-investment protection. [199] It is submitted that even a treaty that does not afford such a protection would be useful in promoting investments, as investors will know that their investments once made will be afforded all treaty protections. [200]

*963 D. What role, if any, can the ECT play?

As noted above, the ECT already has over fifty contracting parties and over twenty observers and continues to attract interest and participation of states. [201] In addition, the Economic Community of West African States (ECOWAS), a regional group of fifteen countries, founded in 1975 to promote economic integration in all fields of economic activity including energy [202] has established an Energy Protocol. [203] The Protocol deliberately copied the essential provisions of the ECT. As the ECOWAS parties explained, they used much of the language of the ECT because it "represent[s] the leading internationally accepted basis for the promotion, cooperation, integration and development of energy investment projects and energy trade among sovereign nations[.]" [204] The Protocol was intended to establish "a legal framework . . . to achieving increased investment in the energy sector, and increased energy trade in the West Africa region." [205]

Not only are many nations already involved in and familiar with the ECT, but the ECT has an accomplished and expert secretariat, which has done extraordinary work in working with signatory states and the many observers on a variety of energy issues. With this foundation, the ECT would be an attractive vehicle to serve as a springboard for further negotiations. Of course, if the ECT were to be used as the basis for the negotiations, it will require the introduction of such amendments or clarifications as may be required to meet finally negotiated demands.

In discussing the utilization of the ECT for further negotiations, a first look at current prospects for renegotiation of the ECT by these nations most active in the development of the ECT is appropriate. Thus, we consider Europe and Russia as well as the United States, which was an active negotiator but ultimately not a signatory. [206] There have been significant relevant changes since the early 1990s.

1. The European Union

The Treaty of Lisbon, which was ratified in December 2009 in the European Union, altered the previous allocation of authority within the European Union for making investment treaty commitments. [207] Pursuant to the new Treaty on the Functioning of the European Union, which is the former Treaty of Rome in the form amended by the Treaty of Lisbon, foreign "direct investment" is stated to be an exclusive competence of the European Union. [208] The exact contours of how this will be interpreted remains to be seen. A ***964** Proposal for how the transition should be handled has been submitted and a Communication outlining the Commission's approach to future investment policy has been issued. [209]
Thus while E.U. member states had individually acceded to the ECT, it would seem that future negotiations and alterations will be pursuant to a process that is in a state of evolution. [210] The impact on the ECT cannot be predicted with certainty at this time. Questions include issues with respect to the status of existing BITs, overlap issues with respect to new BIT's with non-E.U. countries party to a pre-existing BIT, and issues relating to dispute settlement since the European Union is not a member of ICSID, and as a supranational organization cannot join under current ICSID rules. [211]

However, it should be recalled that the countries of Europe have been strong advocates of the ECT and had repeatedly urged Russia to ratify it. [212] It would seem likely that the European Union, with a continuing strong interest in assuring its supplies of energy, would be willing to participate in negotiations to make the ECT more attractive to a larger group of nations, but may prove to be unwilling to concede a great deal of its existing protections under the existing ECT regime.

2. Russia

In April 2009 Russia suggested the development of a new multilateral treaty for energy cooperation. [213] The new treaty, it was suggested, would include some features, such as rules for nuclear energy, pre-investment protections, and transit protections that have been proposed, in some cases negotiated, but never finalized and added to the ECT. [214] It was urged at the time by a Russian former Deputy Secretary General of the ECT Secretariat that Russia take the lead on reforming the ECT and work on building these improvements into the ECT's architecture. [215]

However, subsequent to that suggestion of a new treaty, on August 6, 2009, Prime Minister Vladimir Putin signed an order rejecting Russia's participation in the ECT and terminating the "provisional application of the ECT, based on Article 45 (3-a) (by stating Russia's intention not to become an ECT contracting party)." [216] Russia's termination of the application of the ECT may have been influenced by the massive claims against it ***965** arising out of the Yukos matter, in which Yukos shareholders are pursuing a $30 billion claim asserting that Russia's actions in connection with the forced auction of Yukos amounted to virtual expropriation in violation of Russia's obligations under the ECT. [217] If that claim was a motivator, it is no longer a factor. Since Russia's termination of the ECT's provisional application, the Yukos tribunal issued an award finding that Russia is bound by the ECT based on the provisional application clause of the ECT and that the arbitration provisions of the ECT,

inter alia, remain in force until 2029 for any investments made prior to 2009. [218] Thus while Russia's actions with respect to investment made prior to 2009 are covered by the ECT, future investments are not. [219]

Because Russia is a major source of energy for the world and possesses one of the largest energy reserves, a question must be raised as to whether without Russia the ECT can be a vehicle for a meaningful future multilateral treaty. One must further ask, given the withdrawal from the ECT, whether it will be possible to prevail upon Russia to rejoin the family of nations that are party to the ECT as part of negotiations to consider and alter the ECT to address Russia's concerns? At least one Russian ECT expert has urged that is the best path forward for Russia. [220]

3. The United States

The United States was heavily involved in the negotiation of the ECT and signed the European Energy Charter, the precursor to the ECT. [221] But the United States elected not to sign the ECT and participates only as an observer. [222] The U.S. Model BIT has evolved since the early 1990s and continues to evolve. The extent to which the United States actively engages in the ECT, if there were to be another round, would likely depend on the nature and extent of the changes being considered. It is an opportunity that, if presented, should not be lightly disregarded. The Council on Foreign Relations and Baker Institute issued a report on strategic energy policy in 2001 recommending that the United States rethink its position on the ECT, and "[c]onsider using the European Energy Charter as the basis of an energy institution that the United States should want to adopt on a global basis." [223]

In short, consideration should be given to utilizing the ECT as the vehicle for moving forward with a multilateral energy sector investment treaty. If it were politically feasible ***966** to use that treaty as the springboard for negotiation, the benefit is enormous of employing a treaty already in force and a superb professional secretariat with years of experience and an ongoing relationship on energy issues with over seventy countries. Global energy concerns are extremely pressing and any measures that could expedite the process of developing the proposed multilateral investment energy treaty should be pursued. Of course, a first step to considering the utilization of the ECT would be a careful analysis of the treaty itself to determine what kinds of changes can be made and how these can be implemented, a subject beyond the scope of this article.

IV. Conclusion

More than at any point in human history--the interests of nations and peoples are shared. . . . The technology we harness can light the path to peace, or forever darken it. The energy we use can sustain our planet, or destroy it. [224]

The issues that face our world are grave and time is running short. There are urgent global energy issues that must be addressed and solutions can be facilitated by a sound investment framework. Progress should be made to create a framework that will maximize optimal energy investments globally and protect the planet from environmental debacles and security catastrophes. An effort should be made to see if recognizing the threat to all, nations can negotiate a treaty that preserves sufficient protections for investors to foster the required level of investment in the energy sector while at the same time recognizing the need of states to regulate in the public interest. In this era of globalization, and faced with the global calamities that energy shortages and climate change may occasion, we sink or swim together. Finding a way to swim together seems preferable.

In conclusion, we must ask: is the development of a multilateral investment treaty for the energy sector a realistic proposal given the many obstacles? In the words of the great United Nations statesman Dag Hammarskjold, "Never look down to test the ground before taking your next step; only he who keeps his eye fixed on the far horizon will find his right road." [225]

Footnotes

a1 Edna Sussman, of http://www.SussmanADR.com, is a full-time arbitrator and mediator and the Distinguished ADR Practitioner in Residence, Fordham University School of Law, specializing in international and domestic business disputes. She serves on the arbitration and mediation panels of many of the leading dispute resolution institutions and co-chairs the Arbitration Committee of

the American Bar Association's Section of International Law. The author gratefully acknowledges the assistance of Solomon Ebere, L.L.M. (University of Paris-La Sorbonne); Juris Doctor (Georgetown University Law Center).

1 U.N. Secretary-General's Advisory Group on Energy & Climate Change (AGECC), Energy for a Sustainable Future, Summary Report and Recommendations, 3 (Apr. 28, 2010) [hereinafter Energy for a Sustainable Future], available at http://www.un.org/wcm/webdav/site/climatechange/shared/Documents/AGECC%20summary%C20report%C5B1%).pdf.

2 G8, Joint Statement by Energy Ministers of The G8, The People's Republic of China, India, and The Republic of Korea, P 8 (June 8, 2008), http://www.enecho.meti.go.jp/topics/g8/g8_3sta_eng.pdf.

3 See generally ICC Calls on G8 and G20 to Keep Markets Open, Int'l Chamber of Commerce, http://www.iccwbo.org/index.html?id=37587 (last visited Oct. 9, 2010).

4 Richard Shields, Blinded by The (Green) Light: The Rise of Environmentalism and A New Vocabulary-Four Perspectives, 33 Real Est. Issues 76, 76 (Fall 2008); Chloe Bruce, The Successes and Failures of Russia's Gas Policies, 9 Energy & Env't 17, 17 (2008).

5 World Energy Outlook 2009: Executive Summary, Int'l Energy Agency, 6 (2009), http://www.iea.org/Textbase/npsum/weo2009sum.pdf.

6 Id. at 5.

7 Id. at 4.

8 Id.

9 Int'l Energy Outlook 2010, U.S. Energy Info. Admin., 1 (2010), http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2010).pdf.

10 Id. at 10.

11 Id. at 9.

12 Id. at 10.

13 Id.

14 Id.

15 World Energy Outlook 2009: Executive Summary, supra note 5, at 5.

16 Id.

17 World Energy Outlook 2008: Executive Summary, Int'l Energy Agency 39 (2008), http://www.iea.org/Textbase/npsum/weo2008sum.pdf.

18 Copenhagen Accord, Draft Decision -/CP.15, U.N. Doc. GE.09-71523, P 8 (Dec. 18, 2009).

19 Climate Change 2007: Mitigation, Intergovernmental Panel on Climate Change (IPCC), 676-77 (2007), http://www.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4-wg3-chapter11.pdf.

20 Climate Change 2007: Impacts, Adaptation and Vulnerability, IPCC, 3, 5, 27 (2007), http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-ts.pdf.

21 Nat'l Acads., Understanding and Responding to Climate Change: Highlights of Nat'l Acads. Reports 2 (2008), http:// masgc.org/climate/cop/Documents/TNA_CC.pdf.

22 World Energy Outlook 2008: Executive Summary, supra note 17, at 45.

23 Id. at 46.

24 Int'l Energy Outlook 2010, supra note 9, at 7-8, 123.

25 Id.

26 World Energy Outlook 2009: Executive Summary, supra note 5, at 109-10.

27 Chair's Summary, G8 Summit, II (July 9, 2008), http:// www.g8.utoronto.ca/summit/2008hokkaido/2008-summary.html.

28 Final Communique, G8 Summit, P 21 (June 26, 2010), http:// www.g8.utoronto.ca/summit/2010muskoka/communique.html#green; Chair's Summary, G8 Summit, 4 (July 10, 2009), http://www.g8italia2009.it/static/G8_ Allegato/Chair_Summary,1.pdf [hereinafter Chair's Summary 2009].

29 Int'l Energy Outlook 2010, supra note 9, at 123.

30 The Kyoto Protocol has been ratified by 192 nations; the United States is a signatory, but has not ratified. Status of Ratification of the Kyoto Protocol, U.N. Framework Convention on Climate Change, http:// unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php (last visited Oct. 20, 2010); Bali Action Plan, Dec. 15, 2007, 1-2, available at http:// unfccc.int/files/meetings/cop_13/application/pdf/cp_bali_action.pdf; Mr. Rachmat Witoelar, President, U.N. Climate Change Conference, Address to Closing Plenary, Closing of Joint High-Level Segment (Dec. 15, 2007); Bali Action Plan, Decision -/CP.13, at 1-2, available at http://unfccc.int/files/meetings/cop_ 13/application/pdf/cp_bali_action.pdf; see generally Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 12, U.N. Doc FCCC/CP/1997/7/Add.1 (Dec. 11, 1997), available at http:// unfccc.int/resource/docs/convkp/kpeng.pdf.

31 Bali Action Plan, supra note 30.

32 Id.

33 United Nations Framework Convention on Climate Change, U.N. Doc. GE.05-62220, art. 3 P 1, (1992), available at http:// unfccc.int/resource/docs/convkp/conveng.pdf.

34 Andrew C. Revkin & John M. Broder, U.N. Climate Talks 'Take Note' of Accord Backed by U.S., N.Y. Times, Dec. 19, 2009, http:// www.nytimes.com/2009/12/20/science/earth/20climate.html.

35 The United Nations Climate Change Conference in Bali, U.N. Framework Convention on Climate Change, http://unfccc.int/meetings/cop_13/items/4049.php (last visited Oct. 20, 2010).

36 Revkin & Broder, supra note 34.

37 Id.

38 Copenhagen Accord, supra note 18, art.1, P 4-5.

39 Appendix I-Quantified Economy-Wide Emissions Targets for 2020, U.N. Framework Convention on Climate Change, http:// unfccc.int/home/items/5264.php (last visited Oct. 9, 2010); Appendix II-Nationally Appropriate Mitigation Actions of Developing Country Parties, U.N. Framework Convention on Climate Change, http://unfccc.int/home/items/5264.php (last visited Oct. 9, 2010); Warwick J. McKibbin, Adele Morris & Peter J. Wilcoxen, Comparing Climate Commitments: A Model-Based Analysis of The Copenhagen Accord, (Harvard Project on Int'l Climate Agreements, Working Paper No. 10-35, June 2010), available at http://belfercenter.ksg.harvard.edu/files/McKibbin-DP-June2010-final.pdf. For a chart of each country's commitments submitted and share of GHG emissions see Who's on Board with the Copenhagen Accord, USCAN Climate Action Network, http:// www.usclimatenetwork.org/policy/copenhagen-accord-commitments (last visited Oct. 9, 2010).

40 United Nations Climate Change Conference in Cancun, 29 November-10 December 2010, U.N. Framework Convention on Climate Change, http:// unfccc.int/meetings/cop_16/items/5571.php (last visited Oct. 23, 2010).

41 Copenhagen Accord, supra note 18.

42 Id.

43 How The Energy Sector Can Deliver on a Climate Agreement in Copenhagen, Int'l Energy Agency, 9, 19 (Oct. 2009), http:// www.worldenergyoutlook.org/docs/weo2009/climate_change_excerpt.pdf [hereinafter How The Energy Sector Can Deliver].

44 Carbon Productivity Challenge: Curbing Climate Change and Sustaining Economic Growth, McKinsey Global Inst., 15-16, (June 2008), http:// www.mckinsey.com/mgi/reports/pdfs/Carbon_Productivity/MGI_carbon_productivity_ full_report.pdf; see Barker, et al., Climate Change 2008: Mitigation. Contribution of Working Group III to The Fourth Assessment Report of The Intergovernmental Panel on Climate Change, IPCC, 12 (2007) http:// www.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4-wg3-spm.pdf.

45 Carbon Productivity Challenge, supra note 44, at 16. This report states that many of the needed infrastructure and capital investments will generate enormous savings in energy costs and will actually be a negative cost to society, and moreover, the actual cost may prove to be much lower than that projected as was the case with chlorofluorocarbons and SO2 as technological innovations motivated by new regulations reduced the cost of abatement to a fraction of the original projection. Id. at 15, 18-19.

46 World Investment Report 2010: Investing in a Low-Carbon Economy, U.N. Conference on Trade & Dev. (UNCTAD), xxvii (2010), http:// www.unctad.org/en/docs/wir2010_en.pdf [hereinafter World Investment Report 2010].

47 How The Energy Sector Can Deliver, supra note 43, at 17.

48 Energy Poverty Issues and G8 Actions, World Bank, 1, (Feb. 2, 2006), http://siteresources.worldbank.org/ INTRUSSIANFEDERATION/Resources/Energy_ Poverty_Issues_Paper_Russia_G8_eng_summary.pdf.

49 The Millennium Declaration adopted by world leaders committed nations to a global partnership to eradicate extreme poverty and set eight goals that have become known as the Millennium Development Goals. See generally U.N. Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 8, 2000), available at http:// www.un.org/millennium/declaration/ares552e.htm.

50 Energy Poverty Issues and G8 Actions, supra note 48.

51 Id.

52 Energy For a Sustainable Future, supra note 1, at 10.

53 It is estimated that air pollution from biomass cooking leads to 1.5 million premature deaths annually, more than malaria tuberculosis or HIV/AIDS. Energy Poverty, How to Make Modern Energy Access Universal, Int'l Energy Agency, 9, (2010) [hereinafter Energy Poverty], http:// www.worldenergyoutlook.org/docs/weo2010/weo2010_poverty.pdf.

54 The Millennium Development Goals Report 2008, Dept. of Econ. & Soc. Affairs of U.N. Secretariat, 37, (2008), http:// www.un.org/ millenniumgoals/pdf/The%20Millennium%C20Development%C20Goals%C20Report% 202008.pdf.

55 Energy Poverty, supra note 53.

56 Id. at 17.

57 Id.

58 Monterrey Consensus of the International Conference on Financing for Development, Int'l Conference on Fin. For Dev., P 20 (2003), http:// www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf.

59 Id. P 21.

60 Follow-Up Int'l Conference on Fin. for Dev. to Review the Implementation of the Monterrey Consensus, Nov. 29-Dec. 2, 2008, Doha Declaration on Financing for Development: Outcome Document of the Follow-up International Conference on Financing for Development To Review the Implementation of the Monterrey Consensus, P 25, U.N. Doc. A/ CONF.212/L.1/Rev.1 (Dec. 9, 2008),

available at http:// www.un.org/esa/ffd/doha (follow link to “Doha Declaration on Financing for Development,” then select desired language); see also Johannesburg Plan of Implementation, U.N. Dept. of Econ. and Soc. Affairs, Div. for Sustainable Dev., P 4 (Dec. 15, 2004), http://www.un.org/esa/sustdev/documents/WSSD_POI_ PD/English/POIChapter1.htm (stating that “an enabling environment for investment [is] the basis for sustainable development”).

61 Malcolm Wicks, Energy Security: A Nat'l Challenge in a Changing World, Dept. of Energy & Climate Change, 1 (2009), http:// www.decc.gov.uk/en/content/cms/what_we_do/change_energy/int_ energy/security/security.aspx (follow link for “Energy Security: A national challenge in a changing world”).

62 See Quadrennial Defense Review Report, U.S. Dept. of Defense, 7 (2010), http://www.defense.gov/qdr/images/QDR_as_of_12Feb10_1000.pdf.

63 Id. at 84.

64 Id. at 87.

65 Sustainable Energy Security: Strategic Risks and Opportunities For Business, Chatham, House & Lloyd's, 1, 9 (2010), http:// www.chathamhouse.org.uk/files/16720_0610_froggatt_lahn.pdf.

66 See generally id. (explaining the importance of energy to business and the importance of alternative energy sources).

67 Wicks, supra note 61, at 4.

68 See id.

69 National Security Strategy of The United Kingdom: Security in An Independent World, Cabinet Office (U.K.), 19 (Mar. 2008), http:// interactive.cabinetoffice.gov.uk/documents/security/national_security_ strategy.pdf.

70 Understanding Peak Oil, Ass'n Study of Peak Oil & Gas, http:// www.peakoil.net/about-peak-oil (last visited Oct. 20, 2010); see generally Ass'n Study of Peak Oil & Gas, http://www.peakoil.net (last visited Oct. 9, 2010).

71 Those who believe peak oil is not imminent point to the repeated discoveries of new sources of oil such as deep water drilling, the tar sands, and the expectation of drilling in the soon to be accessible Arctic. See Stefan Schultz, Military Study Warns of a Potentially Drastic Oil Crisis, Spiegel, Sept. 1, 2010, http:// www.spiegel.de/international/germany/0,1518,715138,00.html; see Robert L. Hirsch, The Inevitable Peaking of World Oil Production, Atl. Council of the U.S. Vol. XVI, No. 3, Oct. 2005, at 1, available at http:// www.acus.org/docs/051007-Hirsch_World_Oil_Production.pdf; see Leonardo Maugeri, Oil: Never Cry Wolf--Why the Petroleum Age is Far From Over, Sci. & Indus., May 21, 2004, 323-26 (discussing why the “oil doomsters” are claiming an end of the Oil Era too soon).

72 Michael A. Levi, Energy Security: An Agenda for Research (Council on Foreign Relations, Working Paper, June 2010), available at http:// www.cfr.org/publication/22427/energy_security.html (follow link to .pdf file) (accessed by clicking ‘Download the Full Text o the Report Here’) (identifying areas for research on the intersection of energy and security); Sharon Burke, National Security (Center for a New American Society, Working Paper, June 2009), available at http://www.cnas.org/files/documents/publications/CNAS_ Working%20Paper_Natural%20Security_SBurke_June2009_OnlineNEW_0.pdf (indentifies areas for further inquiry on natural resource shortages).

73 Security Council Report: Energy, Security and Climate,. U.N. Sec. Council, (Apr. 12, 2007), http:// www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.2666033/; see also Emyr Jones Parry, The Greatest Threat to Global Security: Climate Change is Not Merely an Environmental Problem, XLIV U.N. Monthly Chron. (2007), http:// www.un.org/wcm/content/site/chronicle/cache/bypass/home/archive/issues2007/pid/4825? ctnscroll_articleContainerList=1_0&ctnlistpagination_articleContainerList=true.

74 See Nick Mabey, Delivering Climate Security: International Security Responses to a Climate Changed World, Third Generation Environmentalism, Apr. 2008, http://www.e3g.org/images/uploads/Delivering_Climate_Security_-_Edited_ Summary.pdf.

75 See id.

76 Id. at 4, 6.

77 Climate Change and Int'l Security: Paper From The High Representative and The European Comm'n to The European Council, E.U., 2 (Mar. 14, 2008) (S113/08), http://www.consilium.europa.eu/uedocs/cms_ data/docs/pressdata/en/reports/99387.pdf.

78 Id. at 2.

79 Id.

80 See id. at 3; see also Renate Schubert, et al., German Advisory Council on Climate Change, Climate Change as a Security Risk 1 (2007), available at http://www.wbgu.de/wbgu_jg2007_engl.pdf.

81 Children in Pakistan: Every Child's Right-Responding to the Floods in Pakistan, UNICEF, 1-2 (Sept. 2010), http:// www.unicefusa.org/assets/pdf/Children_in_Pakistan_-_September_2010.pdf.

82 House Permanent Select Comm. on Intelligence & House Select Comm. on Energy Independence & Global Warming, National Intelligence Assessment on the National Security Implications of Global Climate Change to 2030 (2008) (statement of Dr. Thomas Fingar, Deputy Director of National Intelligence Analysis and Chairman of the National Intelligence Council).

83 Id. at 4, 7.

84 Global Warming Could Increase Terrorism, Official Says, CNN, June 25, 2008, http://edition.cnn.com/2008/POLITICS/06/25/ climate.change.security.

85 Richard N. Haass, Foreword to Joshua W. Busby, Climate Change and National Security: An Agenda For Action v (2007), available at http:// www.cfr.org/publication/14862/climate_change_and_national_security.html; Joshua W. Busby, Climate Change and National Security: An Agenda for Action 5 (2007), available at http://www.cfr.org/publication/14862/ climate_change_and_national_ security.html (accessed by clicking 'Download the Full Text of the Article Here').

86 Id.

87 National Security and The Threat of Climate Change, CNA, 3, 6 (2007), http://securityandclimate.cna.org/report/National %20Security%C20and%C20the%C20Threat%C20of%C20Climate%C#hange.pdf.

88 Id. at 6.

89 Id.

90 Id. at 13.

91 Id. at 7; General Gordon Sullivan is quoted on this point: "We never have 100 percent certainty .... If you wait until you have 100% certainty, something bad is going to happen on the battlefield." Id. at 10.

92 Edna Sussman, The Arbitration Fairness Act: Unintended Consequences Threaten U.S. Business, 18 Am. Rev. Int'l Arb. 455, 488 (2007). For a concise history of BIT development, see Kenneth J. Vandevelde, A Brief History of International Investment Agreements 12 U.C. Davis J. Int'l L. & Pol'y 157 (2005).

93 Mahnaz Malik, Recent Developments In Regional and Bilateral Investment Treaties, Int'l Inst. Sustainable Dev., 1, 1 n.1 (2008), http:// www.iisd.org/pdf/2008/dci_recent_dev_bits.pdf.

94 Howard Mann, International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, International Institute for Sustainable Development 2008, at 4, http://www.iisd.org/pdf/2008/iia_business_human_ rights.pdf.

95 World Investment Report 2010, supra note 46, at 81.

96 UNCTAD Analysis of BITs, UNCTAD, (Aug. 17, 2004), http:// www.unctadxi.org/templates/Page____1007.aspxhttp:// www.unctadxi.org/templates/Page____1007.aspx.

97 World Investment Report 2010, supra note 46, at 81.

98 UNCTAD, South-South Cooperation in International Investment Agreements, 5, U.N. Doc. UNCTAD/ITE/IIT/2005/3 (June 2005), available at http://www.unctad.org/en/docs/iteiit20053_en.pdf.

99 Edna Sussman, The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming And Promote Sustainable Development, 14 J. Int'l & Comp. L. 391, 391-92. For a list of countries that have a BIT with the United States, see Summary of U.S Bilateral Investment Treaties, Office of The U.S. Trade Rep., http:// tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp (last visited Oct. 10, 2010).

100 Trade Facts: United States Launches Negotiations of An Investment Treaty With China, Office of the U.S. Trade Rep., (June 2008), http:// www.ustr.gov/sites/default/files/uploads/factsheets/2008/asset_upload_file993_ 14943.pdf.

101 Id.

102 Fact Sheet U.S.-Russia Strategic Framework Declaration: Bush, Putin Sign New Initiative to Promote Security Between Nations, Office of the Press Secretary, (Apr. 6, 2008), http://moscow.usembassy.gov/sochi-factsheet-040608.html.

103 US, India Eye Bilateral Investment Treaty, Agence France-Presse, (Jan. 10, 2008), http:// www.thaifta.com/thaifta/NewsFTA/tabid/67/ctl/Details/mid/426/ItemID/3732/Default.aspx. To date, this has culminated in the United States-India Framework for Cooperation on Trade and Investment. Framework for Cooperation on Trade and Investment, United States-India Trade Policy Forum (Mar. 17, 2010), http:// www.ustr.gov/webfm_send/1724.

104 Press Release, Office of the Press Secretary, President Bush Meets with U.S.-Brazil CEO Forum (Apr. 28, 2008), available at http://georgewbush-whitehouse.archives.gov/news/releases/2008/04/20080428-2.html.

105 Press Release, Embassy of the United States, Joint-Statement by Co-Chairpersons of Japan-United States Bilateral Investment Working Group (Oct. 29, 2008), available at http://tokyo.usembassy.gov/e/p/tp-20081029-72.html.

106 Trans-Pacific Strategic Partnership Agreement, U.S. Chamber of Comm., http://www.uschamber.com/international/asia/southeastasia/trans-pacific-strategic-partnership-agreement (last visited Oct. 20, 2010).

107 See Damon Vis-Dunbar, United States Reviews Its Model Bilateral Investment Treaty, Inv. Treaty News, June 5, 2009, http://www.investmenttreatynews.org/cms/news/archive/2009/06/05/united-states-reviews-its-model-bilateral-investment-treaty.aspx.

108 Id.

109 Id.

110 See Investment Protections in U.S. Trade and Investment Agreements: Hearing Before The Subcommittee on Trade and The House Committee On Ways and Means, 111th Cong. (2009) (statements of Thae Mei Lee, Policy Director American Federation of Labor and Congress of Industrial Organizations), available at http://waysandmeans.house.gov/media/pdf/111/lee.pdf.

111 Report of The Subcommittee on Investment of The U.S. Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty, U.S. Dep't of State, (Sept. 30, 2009), http:// www.state.gov/e/eeb/rls/othr/2009/131098.htm [hereinafter Model Bilateral Investment Treaty].

112 For a list of BITs by nation: Country Specific BITs, UNCTAD, (June 1, 2009), http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1; for a discussion of recent developments in BITs and the number of BITs entered into by various nations, World Investment Report 2010, supra note 46, at 81-90, 177-81 (discussing recent developments in bilateral investment treaties and of the number of BITs entered into by various nations).

113 World Investment Report 2010, supra note 46, at 177-81.

114 Id. at 178, 181.

115 Id. at 180.

116 Sussman, supra note 99.

117 World Investment Report 2010, supra note 46, at 2.

118 Id. at 7.

119 See Karl Sauvant & Lisa Sachs, The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows (2009) (a collection of studies on the subject).

120 UNCTAD, The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries, xi, UNCTAD/DIAE/IA/2009/5 (Sept. 2009), available at http:// www.unctad.org/en/docs/diaeia20095_en.pdf.

121 Id. at xiii.

122 Id. at 51.

123 Id. at 51-52.

124 Id. at 18-19.

125 Letter from U.S. Business Leaders to President Obama, at 1 (Jan. 19, 2010), available at http://www.uscsi.org/press/01-19-10%20Business%C20Letter%C20to%C20President%C20on%C20Model%B#IT.pdf; see also Letter from the U.S. Chamber of Comm., et al., to the White House President Bush (July 21, 2008), available at http://www.uschina.org/public/documents/2008/07/bit_negotiations_ business_community_letter.pdf (encouraging negotiations of a U.S. BIT with China).

126 Letter from U.S. Business Leaders to President Obama, supra note 125, at 2.

127 Id. at 1-2; see also Matthew Slaughter, How U.S. Multinational Companies Strengthen The U.S. Economy, U.S. Council Found., 1-3 (2009), http:// www.uscib.org/docs/foundation_multinationals.pdf (arguing "that U.S. multinational companies strengthen the American economy through a combination of their domestic activity and their international engagement").

128 Energy Charter Treaty, art. 2, Dec. 17, 1994, 2080 U.N.T.S. 100, 34 I.L.M. 360, 382.

129 See Sussman, supra note 99.

130 Investment Arbitration and the Energy Charter Treaty 4-5 (Clarisse Ribeiro ed., 2006).

131 Id.

132 Energy Charter Treaty, supra note 128.

133 Investment Protection and the Energy Charter Treaty xxviii (Graham Coop & Clarisse Ribeiro eds., 2008).

134 Id.

135 Sussman, supra note 99, at 392.

136 Members and Observers, Energy Charter, http:// www.encharter.org/index.php?id=61 (last visited Oct. 9, 2010).

137 Id.

138 Id.

139 See generally Energy Charter Treaty, supra note 128. Sussman, supra note 99, at 392.

140 Energy Charter Treaty, supra note 128, art. 10 P (1).

141 Id.

142 Id. art. 10 P (3).

143 Id. art. 13 P (1).

144 Id. art. 12 P (1).

145 Id. art. 14 PP (1)-(2).

146 Id. art. 11 PP (1)-(2).

147 Id. art. 16.

148 See Energy Charter Treaty, supra note 128, art. 26 P 3.

149 Sussman, supra note 99, at 394.

150 Id. at 393.

151 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), June 10, 1958, 21 U.S.T. 2517.

152 Energy Charter Treaty, supra note 128, art. 26 P 7.

153 Id. (The ECT, of course, does not protect against business reverses; its protections are limited to the measures specified in the treaty, which largely turn on government action).

154 See Investor-State Dispute Settlement Cases, Energy Charter, http://www.encharter.org/index.php?id=213 (last visited Oct. 9, 2010) (listing public ECT arbitrations).

155 Press Release, Office of the Press Secretary, G8 Toyako Declaration on World Economy (July 8, 2008), available at http:// www.america.gov/st/texttrans-english/2008/July/20080708102050bpuh0.9821131.html.

156 St. Petersburg Plan of Action: Global Energy Security, G8 Summit, (July, 16 2006), http://en.g8russia.ru/docs/11.html; Sussman, supra note 99, at 400.

157 St. Petersburg Plan of Action, supra note 156.

158 Id.; Growth and Responsibility in the World Economy, G8 Summit, P 44 (June 7, 2007), http://www.unglobalcompact.org/docs/ about_the_ gc/government_support/G8_Summit_2007_Heiligendamm_Declaration.pdf. See 25th ASEAN Ministers on Energy Meeting, Energy Policy & Planning Office (Sing.), (Aug. 23, 2007), http://www.eppo.go.th/inter/asean/AMEM25/20844.htm. Riyadh Declaration: The Third Summit of Heads of State and Government of OPEC Member Countries, OPEC, (Nov. 17, 2007), http://www.opec.org/aboutus/III%20OPEC%C20Summit%D#eclaration.pdf. Sussman, supra note 99, at 401 n.31.

159 G8 Hokkaido Toyako Summit Leaders Declaration World Economy, G8 Summit, P 11 (July 8, 2008), http:// www.mofa.go.jp/ policy/economy/summit/2008/doc/doc080714__en.html.

160 Id. P 6.

161 St. Petersburg Plan of Action: Global Energy Security, IEA Evaluation of G8 Countries', and The European Commission's Progress on The 7 Key Action Areas, Int'l Energy Agency, 10, 14 (2009), http:// www.g8italia2009.it/static/G8_Allegato/ StPETERSBURG,0.pdf.

162 Leaders' Statement: The Pittsburgh Summit, September 24-25, 2009, P19, http://www.pittsburghsummit.gov/ mediacenter/129639.htm [hereinafter Leaders' Statement].

163 See What is the G-20, http://www.g20.org/about_what_is_g20.aspx (last visited Nov. 3, 2010) (also listing the members of the G-20).

164 Leaders' Statement, supra note 162, P 28.

165 See Kyoto Protocol to the U.N. Framework Convention on Climate Change, art. 12, U.N. Doc FCCC/CP/1997/7/Add.1 (Dec. 11, 1997); Sussman, supra note 99, at 400. "[T]he Kyoto Protocol expressly allows credit against emission caps under the 'Clean Development Mechanism' (CDM) for sustainable development emission reduction projects in developing countries." Sussman, supra note 99, at 400.

166 See Sussman, supra note 99, at 401-02.

167 Id. at 397.

168 See generally Daniel Yergin, The Prize: The Epic Quest For Oil, Money, and Power (1993) (for a history of the oil industry).

169 Nykomb Synergetics Tech. Holding AB v. Republic of Latvia, Case No. 118/2001, at 31-3234 (Arb. Inst. of Stockholm Chamber of Comm. 2003), available at http://www.encharter.org/fileadmin/user_ upload/document/Nykomb.pdf.

170 Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, at 68 (Int. Ctr. for Settlement of Inv. Disputes 2008), available at http://www.encharter.org/fileadmin/user_upload/document/Plama_Bulgaria_ Award.pdf.

171 Riyaz Dattu, A Journey From Havana to Paris: The Fifty-Year Quest For The Elusive Multilateral Agreement on Investment, 24 Fordham Int'l L.J. 275 (2000) (discussing the history and challenges of establishing multilateral investment treaties).

172 Kenneth J. Vandevelde, Bilateral Investment Treaties 69 (2010).

173 Kenneth J. Vandevelde, A Brief History of International Investment Agreements 12 U.C. Davis J. Int'l L. & Pol'y 157, 191 (Fall 2005).

174 Id.

175 Vandevelde, supra note 172.

176 Id. at 70.

177 Id.

178 The Backlash Against Investment Arbitration: Perceptions and Reality (Michael Waibel et al. eds., 2010).

179 See generally, e.g., Foreign Investment for SD, IISD, http:// www.iisd.org/investment (last visited Oct. 15, 2010) (creating "[a] global agenda for change in international investment law, policy and institutions"); Trade and Sustainable Dev., Ctr. Int'l Envtl. L., http:// www.ciel.org/Tae/programtae.html (last visited Oct. 15, 2010) ("seek[ing] to reform the global framework of economic law, policy and institutions in order to create a more balanced global economy that is environmentally sustainable and beneficial to all people in a more equitable way"); Forum on Democracy & Trade, http://www.forumdemocracy.net (last visited Oct. 15, 2010) ("work[ing] to ensure that trade agreements support local decision-making and economic innovation").

180 Synthesis of Major Concerns, Ctr. Int'l Envtl. L., (Nov. 24, 2003), http://www.ciel.org/Tae/FTAA_Synthesis_24Nov03.html (synthesizing major concerns).

181 Id.

182 Id.

183 Luke Eric Peterson, Bilateral Investment Treaties--Implications for Sustainable Development and Options For Regulation, Dialogue on Globalization: Conference Report, Feb. 2007, at 2; see Barnali Choudhury, Recapturing Public Power: Is Investment Arbitration's

Engagement of the Public Interest Contributing to the Democratic Deficit?, 41 Vand. J. Transnat'l L. 775, 809-18 (2008) (discussing a number of arguments in support of greater transparency).

184 Synthesis of Major Concerns, supra note 180. “The fact that investment disputes are decided not by a standing and impartial court, but by practicing commercial lawyers whose independence is not guaranteed, undermines the legitimacy of the proceedings and decisions.” Id.; Choudhury, supra note 183, at 818-21 (discussing the various reasons why investment arbitrators may be viewed by the public as illegitimate).

185 Model Bilateral Investment Treaty, supra note 111 (illustrating the division between members on the question of whether the various contradictory collective and individual statements by the subcommittee members reflect very clearly that the subcommittee was divided on the question of whether BITs are good for the U.S. economy); see Guido Santiago Tawil, Strengthening International Arbitration's Presence in The Americas, Arb. Rev. of the Am., 2010, http:// www.globalarbitrationreview.com/reviews/21/sections/77/chapters/810/strengthening-international-arbitrations-presence-americas/ (noting the increasing number of Latin American governments criticizing and sometimes denouncing the investment arbitration process).

186 Charles Brower & Stephan W. Schill, Is Arbitration a Threat or a Boon to The Legitimacy of International Investment Law?, 9 Chi. Int'l L. 471, 474 (2009).

187 Id. at 474-75.

188 See id. at 474 (arguing that many states consider that treaty-based arbitration “protects property, investment, and foreign investors without sufficient regard to other non-investment related interests of host states”).

189 Tom R. Tyler, Why People Obey The Law 107-08 (1990) (reporting research demonstrating that people who are confident that decision-making procedures are fair are more likely to obey the law); see Susan Franck, Development and Outcomes of Investment Treaty Arbitration, 50 Harv. Int'l L.J. 435, 453 (2009) (concluding that empirical research casts doubt on the argument that the developing world is treated unfairly in investment treaty arbitration); see also Latest Developments in Investor-State Dispute Settlement 2, U.N. Doc. UNCTAD/WEB/DIAE/IA/2009/6/Rev1 (2009) (casting doubt on the assertion that investment treaty arbitration favors investors over states by noting that respondent States and investors split decisions about 50/50).

190 Investment Treaty News, Int'l Inst. for Sustainable Dev., (May 9, 2007), http://www.iisd.org/pdf/2007/itn_may9_2007.pdf (“Bolivia notifies World Bank of withdrawal from ICSID”).

191 See id.; Timothy G. Nelson & Marco E. Schnabl, Ecuador Moves to Denounce and Leave The ICSID Convention, Attempts to Curtail Investor-State Arbitration Rights, Latin Am. L. & Bus. Rep., June 30, 2009, at 18; Christoph Schreuer, A Decade of Increasing Awareness of Investment Arbitration and Intensive Activity: An Assessment, OCED, 8 (Dec. 12, 2005), http:// www.iisd.org/pdf/2007/itn_may9_2007.pdf (“Bolivia notifies World Bank of withdrawal from ICSID”).www.oecd.org/dataoecd/5/54/36055388.pdf.

192 See Paul Magnusson, States' Rights vs. Free Trade, Bus. Week, Mar. 7, 2005, http://www.businessweek.com/magazine/content/05_10/b3923130.htm.

193 Methanex Corp. v. United States (Can. v. U.S.), NAFTA/UNCITRAL Trib., 294 (2005), available at http:// www.state.gov/documents/organization/51052.pdf (the Methanex Tribunal rejected the claim finding that the claimant was well aware that California regulated hazardous substances and could not reasonable expect that its product would be immune from regulation).

194 Obama Doesn't Plan to Reopen Nafta Talks, N.Y Times, Apr. 20, 2009, http://www.nytimes.com/2009/04/21/business/21nafta.html.

195 See, e.g., Brian Mooney, Democrats Compete to Outbash NAFTA, Boston Globe, Feb. 29, 2008, http:// www.boston.com/news/nation/articles/2008/02/29/democrats_compete_to_outbash_ nafta.

196 See Model Bilateral Investment Treaty, supra note 111.

197 See id.

198 See id. at 1-13.

199 Members and Observers, supra note 136.

200 Id.

201 Id.

202 See generally, ECOWAS in Brief, ECOWAS, http:// www.comm.ecowas.int/sec/index.php?id=about_a&lang=en. The fifteen members of ECOWAS are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. ECOWAS Member States, ECOWAS, http://www.ecowas.int/?lang=en.

203 ECOWAS ENERGY PROTOCOL A/P4/1/03, http:// www.comm.ecowas.int/sec/en/protocoles/WA_EC_Protocol_English-_DEFINITIF.pdf. Chapter III contains the "promotion, protection and treatment of investments" provisions. Id.

204 Id. at pmbl.

205 Id. at Article 2.

206 Investment Protection and the Energy Charter Treaty, supra note 133, at xxxix.

207 See Treaty of Lisbon Amending the Treaty of the European Union and the Treaty Establishing the European Community, Dec. 1, 2007, 2007 O.J. (C 304).

208 Treaty on the Functioning of The European Union, Sept. 5, 2008, 2008 O.J. (C 115) art. 64, P 2.

209 Proposal For a Regulation of The European Parliament and of The Council Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries, at 1, COM (2010) 344 final (July 7, 2010); Communication From The Commission to The Council, The European Parliament, The European Economic and Social Committee, and The Committee of The Regions, COM (2010) 343 final (July, 7, 2010).

210 Graham Coop, The ECT and The European Union: Is Conflict Inevitable?, 27 IBA Energy & Resources L. 404 (Aug. 2009).

211 World Investment Report 2010, supra note 46, at 84.

212 Kirsten Westphal, Energy Policy Between Multilateral Governance and Geopolitics: Whither Europe?, European Energy Pol'y, 44, 55-56 (Apr. 2006); Energy Rules, E.U. Bus., May 27, 2009, http://www.eubusiness.com/news-eu/1240237042.93/ (explaining the background and basics of Russia's proposal).

213 Conceptual Approach to The New Legal Framework for Energy Cooperation (Goals and Principles), President of Russia Official Web Portal (Apr. 21, 2009), available at http:// www.kremlin.ru/eng/text/docs/2009/04/215305.shtml. See also Russia's Medvedev Offers to Rewrite Energy Rules, E.U. Bus., May 27, 2009, http:// www.eubusiness.com/news-eu/1240237042.93/ (explaining the background and basics of Russia's proposal).

214 Id.

215 Andrey Konoplyanik, Energy Charter Plus--Russia to Take The Lead Role in Modernizing ECT?, 7 Oil, Gas & Energy L. Intelligence 1, 2 (2009).

216 Andrey Konoplyanik, Russia Remains a Signatory of The Energy Charter Treaty, Fin. Times, Aug. 26, 2009, http://www.ft.com/cms/s/0/00b3fd5e-91d8-11de-879d-00144feabdc0.html; Russia PM Putin Rejects International Energy Charter, Reuters, Aug. 6, 2009, http:// in.reuters.com/article/oilRpt/idINL639469220090806.

217 Yukos Universal Ltd. (Isle of Man) v. Russian Fed'n, PCA Case No. AA 227, 146, (Perm. Ct. Arb. 2009), available at http://www.encharter.org/fileadmin/user_upload/document/Yukos_interim_award.pdf.

218 Id. at 125.

219 Id. at 124-25.

220 See generally Andrey Konoplyanik, A Common Russia-EU Energy Space: the New EU-Russia Partnership Agreement, Acquis Communautaire and the Energy Charter, 27 J. Energy Nat. Resources L. 258-91 (2009), available at http://www.konoplyanik.ru/ru/publications/articles/Konoplyanik%20article%20-% 20May%202009.pdf.

221 William Fox, The United States and The Energy Charter Treaty: Misgivings and Misperceptions, in The Energy Charter Treaty: An East West Gateway for Investment and Trade 194 (Thomas Wälde ed., 1996) (discussing the United States in the context of the ECT negotiations).

222 Id.

223 Baker Inst. & Council on Foreign Relations, Strategic Energy Policy: Challenges for the 21st Century 82 (2001).

224 President Barack Obama, Speech to the U.N. Gen. Assembly, Sept. 22, 2009.

225 Dag Hammarskjold, Markings 7 (Leif Sjoberg & W.H. Auden trans., 1965).

End of Document