THE ENERGY CHARTER TREATY'S INVESTOR PROTECTION PROVISIONS: POTENTIAL TO FOSTER SOLUTIONS TO GLOBAL WARMING AND PROMOTE SUSTAINABLE DEVELOPMENT

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It is with pleasure that I join my esteemed colleagues on the panel. With the importance of the reliability of energy supply in today's world and the impact of the energy sector on global warming and international security, a review of the only multilateral treaty that deals specifically and exclusively with energy is timely. As last night's plenary session addressed climate change issues, I will also discuss the important role the Energy Charter Treaty can play in fostering greenhouse gas mitigation and sustainable development.

I. ENERGY CHARTER TREATY BACKGROUND

The Energy Charter Treaty (ECT) had its genesis in the ending of the Cold War, which offered an opportunity for mutually beneficial cooperation between Russia and its many neighbors who needed major investments in their energy

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rich resources and the states of western Europe who had a strategic interest in diversifying their sources of energy. As stated in Article 2, the ECT "establishes a legal framework in order to promote long term cooperation in the energy field"; by so doing, it increases confidence by investors and the financial community and promotes investment and trade flow among members.[1]

The ECT was signed in 1994 and entered into force in 1998. It has been signed or acceded to by fifty-one states, mainly countries in Europe and the former U.S.S.R., as well as the EU, Japan and Australia (Contracting Parties). The ECT has many states with observer status including the United States (U.S.), China, Saudi Arabia, Iran, Venezuela, Tunisia, United Arab Emirates, and many other Persian Gulf states as well as international organizations such as the World Bank and the Association of Southeast Asian Nations. [2]

The ECT provisions[3] 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;
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.

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

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1. The Energy Charter Treaty, 34 I.L.M. 360, 385 (1995) [hereinafter ECT]. For comprehensive information about the ECT and the activities of the Energy Charter Treaty Secretariat, see www.encharter.org.

2. The Energy Charter, Members & Observers, *available at* http://www.encharter.org/index.php?id=61 (last visited Jan. 30, 2008).

3. ECT, *supra* note 1.

provides "a covered investor an almost unprecedented remedy for its claims against a host state." [4]

II. ECT INVESTMENT PROTECTIONS

Article 10 of the ECT provides for a variety of protections for foreign investments, including:

General protections: Contracting Parties must accord "fair and equitable treatment," "constant protection and security" and "shall in no way impair by unreasonable or discriminatory measures the management, maintenance, use enjoyment or disposal of an investment;" in no case shall "treatment be less favorable than that required by international law;"[5]

Discrimination: Contracting Parties must accord investors treatment no less favorable than that accorded to its own investors or to investors of any other state;[6]

Expropriation: Investments shall not be expropriated, nationalized or subjected to measures which have an effect equivalent to expropriation or nationalization unless certain limited exceptions are met and then only if a prompt, adequate and effective compensation payment equivalent to fair market value is made;[7]

Fund Transfers: Contracting Parties guarantee freedom to transfer funds in and out of the country without delay and in a freely convertible currency;[8]

Interplay with Other Treaties: If two or more Contracting Parties enter into a prior or subsequent international agreement, the provision more favorable to the Investor shall govern where there are disparities.[9]

III. DISPUTE RESOLUTION PROVISIONS

In international disputes, resorting to arbitration over domestic courts has generally been viewed as preferable because of concerns about neutrality, competence, process, efficiency and respect for rule of law in local courts. Equally important is the question of enforceability of any decision rendered. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) is the most successful

4. Plama Consortium Ltd. v. Republic of Bulgaria, 44 I.L.M. 721, 739, 742 (2005) [hereinafter Plama].

5. ECT, *supra* note 1, art. 10.

6. *Id*.

7. *Id*.

8. *Id*.

9. *Id*.

international treaty to date with over 130 countries as signatories.[10] Pursuant to the New York Convention, the signatory countries have committed to enforcing arbitration awards; the grounds for refusing to enforce arbitration awards are extremely limited.[11] There is no parallel international treaty that has been broadly adopted for recognition of foreign court decisions. While the new Hague Convention on Choice of Court Agreements[12] may change that, it is years away from widespread adoption and it is not yet clear how widely it will be accepted. Thus the ECTs provisions governing dispute resolution are of great importance to the protection of investors in the energy sector.

The ECT enables an investor to make claims against a Contracting Party in case of a breach of an obligation relating to investment protection. It mandates conciliation as a first step, but if that fails the investor can choose the forum for dispute resolution: either a domestic court or international arbitration. The ECT creates "arbitration without privity," i.e. the host country need not be a party to the investment contract to be subject to the claim.[13] Under the ECT the Contracting Party gives its "unconditional consent to the submission of the dispute to international arbitration."[14] This commitment is viewed as an "offer" which can be "accepted" by the investor.

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

IV. DECISIONS UNDER THE ECT

As the ECT is a relatively new treaty there have been few cases decided to date, but claims under the treaty are emerging. Several publicly reported decisions on the merits are of interest: *Petrobart* won a claim against the *Kyrgyz Republic* for the state's decision to transfer assets out of KGM, a state owned company, to which Petrobart had delivered gas to their own detriment as KGMs judgment creditor.[15] *Nykomb Synergetics* won a claim against the

10. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), 21 U.S.T. 2517 (1970).

11. *Id.*

12. *See generally* Hague Convention on Choice of Court Agreements, 44 I.L.M. 1294, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=98 (last visited Feb. 16, 2008).

13. *See* ECT, *supra* note 1.

14. *Id.*

15. *See generally* Petrobart Ltd. v. Kyrgyz Republic, Arb. No. 126/2003, *available at* http://www.iisd.org/pdf/2005/investsd_petrobart_kyrgyz.pdf (last visited Mar. 2, 2008).

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 plant.[16] In both of these decisions the tribunals addressed the applicability of the ECT and found in favor of the claimant. In the *Plama* (jurisdictional) decision, the tribunal found in favour of a narrow scope for the most favoured nation clause and controversially restricted the scope of application for the "denial of benefits" to "mailbox" companies.[17]

An interesting case is presented in the $10 billion claim of Libananco, a Cypriot company affiliated with Turkish interests, against Turkey for cancellation of several large-scale electric power concessions asserted to be politically motivated. The case raises the question as to what extent companies from within the ECT area are protected by the Treaty's arbitration and investment protection provisions, even if some of the major shareholders are from the respondent country.

Another interesting case now pending was brought in connection with the Yukos Oil Company dispute in which the Group Menatep shareholders are seeking $30 billion against Russia claiming that Russia's actions in connection with the forced auction of Yukos amounted to virtual expropriation. This arbitration will likely require the tribunal to address the question of whether Russia, which signed but has not ratified the ECT, is governed by its provisions. The ECT in Article 45 commits each signatory to apply the ECT "provisionally pending its entry into force . . . to the extent that such provisional application is not inconsistent with its constitution, laws or regulations."[18] This provision will undoubtedly be argued to bind Russia to the ECTs provisions. Article 25 of the Vienna Convention on the Law of Treaties expressly provides for provisional application if the treaty so provides.[19] The ECT specifically authorizes states to deliver a declaration that they are not able to accept provisional application; several states did deliver such a declaration but Russia did not do so.[20]

16. Nykomb Synergistics Tech. Holding AB v. The Republic of Latvia, Arb. Inst. of the SCC, Case No. 118/2001 (2003), *available at* http://ita.law.uvic.ca/documents/ Nykomb-Finalaward.doc (last visited Mar. 2, 2008).

17. Plama, 44 I.L.M. at 739, 742.

18. ECT, s*upra* note 1, art. 45.

19. Vienna Convention on the Law of Treaties, art. 25, May 23, 1969, 1155 U.N.T.S. 331.

20. *See* Matteo Winkler, *Arbitration Without Privity and Russian Oil: The Yukos Case before the Houston Court*, 27 U. PA. J. INT'L ECON. L. 115, 146 (2006).

The recent decision in *Ioannis Kardassapoulos v. Georgia* [21] is likely to be argued to be of precedential value on this issue, as the tribunal explored for the first time the issue of jurisdiction under the ECT pursuant to the "provisional application" language.[22] Claimant contended that Respondent, the Republic of Georgia (Georgia), had violated the terms of the ECT after issuing a decree which was alleged to have expropriated a concession granted earlier for reconstruction of energy pipelines and infrastructure.[23] In its procedural defenses to the proceeding, Georgia challenged the tribunal's jurisdiction under the ECT because the actions in issue, although they took place after Georgia signed the ECT, occurred before it ratified the ECT and before the ECT took effect upon ratification by thirty states.[24] The arbitral tribunal rejected this argument noting that if it were to limit the application of the ECT to after it definitively entered into force, it would "exclude from the scope of the ECT" the provisional period before entry into force and "such a result would strike at the heart of the clearly intended provisional language."[25]

As the filing of investor-state claims pursuant to rights claimed under investment treaties continues to grow, the ECT, a relatively young treaty, is one to watch. The growing body of decisions interpreting the ECT[26] will create greater certainty as to the meaning, scope and application of its provisions. [27]

V. United States and the ECT

The United States was heavily involved in the early stages of the development of the Energy Charter, but it is not a party to the ECT. Ria Kemper, then Secretary General of the Energy Charter Secretariat delivered a speech in 2001 stating that she had been informed that the United States had not signed the treaty because:

21. Kardassapoulos v. Georgia, ICSID Case No. ARB/05/18, *available at* http://ita.law.uvic.ca/documents/Kardassopoulos-jurisdiction.pdf (last visited Mar. 3, 2008), [hereinafter Kardassapoulos]. For a discussion of this decision, see Investment Treaty News, August 2007, at http://www.iisd.org/pdf/2007/itn_aug10_2007.pdf (last visited Mar. 3, 2008).

22. Kardassapoulos, ICSID Case No. ARB/05/18.

23. *Id.* ¶ (A)(2), at 1.

24. *Id.* ¶ (B)(23), at 6.

25. *Id.* ¶ (D)(1)(A)(222), at 59.

26. For a complete list of publicly known cases under the ECT, see the Energy Charter Treaty website at http://www.encharter.org/index.php?id=213&L=0 (last visited Mar. 3, 2008).

27. For an excellent discussion of many issues under the ECT see Thomas Walde, *Investment Arbitration under the Energy Charter Treaty: An Overview of Key Issues*, TRANSNATIONAL DISPUTE MANAGEMENT, Volume I, Issue 2, 2004, *available at* http://www.transnational-dispute-management.com/samples/freearticles/tv1-2-article224b.htm (last visited Mar. 3, 2008).

a) The protections of investments in the ECT are not as strong as those contained in U.S. bilateral agreements;
b) There is a potential conflict between the ECTs unconditional provisions on most favored nation treatment and the Jackson-Vanik Amendment to the 1970 U.S. Trade Act; and
c) There would be difficulty in ensuring that the ECTs provisions are implemented on a sub-federal level. Others have suggested that the U.S. did not become a party to the treaty because no resolution was reached on how to legally bind the parties at the pre-investment stage which relates to such issues as access conditions as opposed to the post-investment risks ultimately covered by the ECT.[28]

As the United States is not a party to the ECT, many practitioners recommend that in structuring deals for multi-national U.S. companies, consideration be given to selecting an entity domiciled in a state that is party to the ECT, as the contracting party, in order to benefit from its protections. Indeed, as there are many countries that are parties to the ECT with whom the U.S. has not entered into a bilateral investment treaty, it would seem advisable in structuring deals to conduct a review of which countries will be involved in the project and what investment treaties are in effect that may be applicable with respect to those countries; many energy projects span several countries, last for decades and require enormous capital investments making investor protection particularly significant. While tax treaty considerations are generally considered to be of greater importance in structuring the deal, the investment protection aspects should not be ignored. In fact, investment treaty protection is becoming a more significant factor in the corporate structuring of foreign investment transactions.

If seeking coverage under the ECT, the selection of the corporate domicile of the contracting entity should include a review of Section 17 of the ECT. This section provides that a Contracting Party reserves the right to deny the benefits of the ECT to a legal entity if citizens or nationals of a third state own or control that entity, and that entity has no substantial business activities in the area of the Contracting Party.[29]

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28. For a discussion of the United States in the context of the ECT negotiations, see William Fox, *The United States and the Energy Charter Treaty: Misgivings and Misperceptions*, *in* THE ENERGY CHARTER TREATY: AN EAST WEST GATEWAY FOR INVESTMENT AND TRADE 194 (Thomas Walde ed., 1996). For a review of the ECT negotiation process and its provisions, see Craig Bamberger, Jan Linehan and Thomas Waelde, *The Energy Charter Treaty*, *in* ENERGY LAW IN EUROPE, 171 (Roggenkamp ed., 2000), *available at* http://iis-db.stanford.edu/evnts/3917/Charter.pdf (last visited Mar. 25, 2008). A re-written version by Bamberger & Wälde will appear in 2008 in the 2nd edition of this book.

29. *See also* ECT, *supra* note 1.

Additional signatories to the ECT and broad provisional application of the ECT may be in the wings. Pakistan recently became an ECT observer and is in the process of acceding to the ECT. Afghanistan is also in the process of acceding to the ECT. Other countries are in serious discussions on accession to the treaty. While the ECT does not expressly provide how it should be applied temporally parties will undoubtedly argue that the investor protections of the ECT govern with respect to contracts entered into before accession to the ECT by a Contracting Party but where the incriminated governmental misconduct took place after the treaty became effective. While whether such a construction will prevail has yet to be decided, in *Nykomb Syngernetics Technology Holding vs. the Republic of Latvia*, *supra,* the tribunal determined that Latvia was subject to the ECT for action with respect to a contract entered into before the ECT came into force but subsequent to Latvia's signature and ratification of the treaty.

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

As the theme of last night's plenary session was global warming, we should consider what role the ECT can play in addressing this important issue. The recent scientific reports issued by the International Panel on Climate Change (IPCC)[30] forcefully confirm that the earth is warming due principally to greenhouse gas (GHG) emissions generated by human use of fossil fuels. The reports vividly describe the dire consequences of continued releases of GHGs at the projected rates. In the wake of these reports all avenues to address the problem must be studied. As the ECT is the only multi-lateral treaty that deals specifically with the energy sector it must be carefully reviewed to see if it can play a role. One must conclude that it can and should. As I will discuss in further detail, the importance of international investment in the energy sector in the developing countries to arrest the growth of GHG has been a theme of the discussions on climate change for many years. The developing countries have steadfastly refused to be bound by GHG emissions caps. Having rejected emissions caps binding on them, it behooves the developing countries to combat climate change by fostering foreign investment to mitigate GHG emissions in their countries. Accession to the ECT would contribute significantly to the attractiveness of investment in the developing countries and should serve to reduce the cost of such investments, thus making more investment possible.

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30. Intergovernmental Panel on Climate Change Fourth Assessment Report, (Nov. 2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf (last visited Mar. 3, 2008). The International Panel on Climate Change (IPCC) reports are available at http://www.ipcc.ch/ipccreports/ (last visited Mar. 3, 2008).

Building on the 1992 United Nations Framework Convention on Climate Change (UNFCCC)[31], under the Kyoto Protocol[32], which over 160 nations have ratified, all of the major industrialized countries, with the exception of the United States, have committed to reduce their GHG emissions and have set binding emission reduction goals through 2012. However, the developing countries, which are parties to the Kyoto Protocol, have no GHG limits and have taken the position that to similarly bind them to reducing their emissions would preclude them from developing their economies and bettering the lives of their populations as energy generation and usage is crucial to modern life and the growth of modern economies. They argue that imposing an emissions cap on developing nations would not be equitable 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. The developing countries have accordingly consistently refused to be bound by GHG emission caps.

The developing countries' contribution to global GHG emissions is significant and increasing exponentially. Any solution to climate change must deal with this reality. It was reported that in 2007, while the United States remained the largest emitter of GHG on a per capita basis, China exceeded the United States in total GHG emissions. The growth of GHG emissions in the developing countries is expected to burgeon in the coming years if no action is taken. The International Energy Association (IEA) reported that on a business as usual basis the world's energy demand would be well over 50% higher in 2030 than today, and that China and India alone account for 45% of this increase in demand and developing countries as a group account for 74% of the increase.[33] In this business as usual scenario the IEA projected a 57% jump in global GHG emissions by 2030[34] rather than the 80% reduction by 2050 that the IPCC warns is needed to avoid the worst consequences of climate change. [35]

There is a general consensus that the path to mitigating GHG emissions lies in moving towards sustainable development and the developing countries are looking to the industrialized nations to assist them in accomplishing that

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31. United Nations Conference on Environment and Development: Framework Convention on Climate Change, 31 I.L.M. 849 (1992).

32. For a general discussion on the Kyoto Protocol, see http://unfccc.int/kyoto_protocol/items/2830.php (last visited Mar. 3, 2008); Edna Sussman, *New York Addresses Climate Change with the First Mandatory U.S. Greenhouse Gas Program*, 78 NYSBA J. 43 (May 2006), *available at* http://www.hnrklaw.com/articles/pdfs/RGGI_NYSbarjournal5-06.pdf (last visited Mar. 3, 2008).

33. International Energy Agency, *World Energy Outlook 2007*, *China and India Insights*, 3, 11 (Nov. 2007), *available at* http://www.iea.org/Textbase/npsum/WEO2007SUM.pdf (last visited Mar. 3, 2008).

34. *Id.* at 11.

35. *See* Sussman, *supra* note 32.

goal. Transfers of technology, technical assistance and investment in sustainable development projects in the developing nations have been accepted by all as a crucial, albeit only a part, of the solution to climate change. Indeed, the Kyoto Protocol expressly allows credit against emission caps under the "Clean Development Mechanism" (CDM)[36] for sustainable development emission reduction projects in developing countries. At the December 2007 United Nations conference under the UNFCCC and the Kyoto Protocol on climate change, vigorous negotiations were held over the respective obligations of developing and developed countries. The "Bali Roadmap," which sets out a framework for negotiations over the next two years, included an acceptance by all countries of a proposal from India that the developing countries would agree to take "measurable, reportable and verifiable" mitigation actions but their actions would be supported by "technology, financ(e) and capacity—building" from the developed countries which would also be "measurable, reportable and verifiable."[37] Thus the stage is set diplomatically to negotiate binding measures consistent with these guidelines; measures which would seem to include significant investment-related commitments by all parties.

Progress on such investments is essential and must be fostered and supported. Immense investments in GHG mitigation projects in the developing countries will be necessary to keep their GHG emissions to a minimum as their economies grow. The ECT can serve an important role in making such investments more attractive. The need for equitable, stable and effective legal regimes to promote investment in the energy sector has been recognized repeatedly at gatherings of nations. At the G8 Summit in 2006 the Energy Security Declaration[38] issued explicitly "support[ed] the principles of the Energy Charter and the efforts of participating countries to improve international energy cooperation" and committed to a set of principles which included: "open, transparent, efficient and competitive markets for energy production, supply, use, transmission and transit services as a key to global energy security; [and] transparent, equitable, stable and effective legal and regulatory frameworks, including the obligation to uphold contracts, to generate sufficient, sustainable international investments upstream and downstream;"[39]

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36. For a background discussion of the international climate change regime, see Sussman, *supra* note 27.

37. Bali Action Plan, ¶¶ (1)(b)(i)–(ii), *available at* http://unfccc.int/files/meetings/cop_13/application/pdf/cp_bali_action.pdf (last visited Mar. 3, 2008). The decisions adopted at COP 13 and CMP 3 which comprise the Bali Roadmap are available at http://unfccc.int/meetings/cop_13/items/4049.php (last visited Mar. 3, 2008).

38. G8/2006 Russia, Global Energy Security, (Jul. 16, 2006), *available at* http://www.globalbioenergy.org/uploads/media/0607_G8_Russia_-_Global_Energy_Security_2006.pdf (last visited Mar. 3, 2008).

39. *Id.*

The 2007 G8 Summit Declaration[40] noted the importance of "improving (the) investment climate in the energy sector", supported the principles of the Energy Charter and invited China, Brazil, India, Mexico and South Africa and other emerging economies to adopt the Global Energy Security Principles established at the G8. [41]

Accession to the ECT by emerging nations would improve the investment climate in the energy sector by: (1) creating a more secure investment environment and (2) lowering the cost of investments. The marketplace reacts favorably to investment protection treaties. There is increasing sensitivity in investment decision making to whether the protection of an investment treaty is available. A recent survey conducted by The Economist in conjunction with the Columbia Program on International Investment reported that 67% of respondents were greatly or somewhat influenced by the existence of an international investment treaty in deciding in which markets to invest.[42] This is particularly true in the energy sector. Recent incidents of direct or masked expropriations in various countries have raised concerns about investments in this sector which may spill beyond the borders of the countries involved. Moreover, the economics of many sustainable clean energy projects are

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40. G8 Summit 2007 Heiligendamm, *Growth and Responsibility in the World Economy*, (Jun. 7, 2007), *available at* http://www.g-8.de/Content/EN/Artikel/__g8-summit/anlagen/2007-06-07-gipfeldokument-wirtschaft-eng,templateId=raw,property=publicationFile.pdf/2007-06-07-gipfeldokument-wirtschaft-eng (last visited Mar. 3, 2008).

41. *Id*. at 14; Other regional organizations have issued similar pronouncements. The ASEAN nations recognize the importance of creating an investment friendly environment for energy as stated in The 25th ASEAN Ministers on Energy Meeting (AMEM), Energy Policy and Planning Office, Singapore, Aug. 23, 2007, *available at* http://www.eppo.go.th/inter/asean/AMEM25/20844.htm (last visited Mar. 3, 2008). ("The Ministers encouraged Member Countries to create suitable conditions that facilitate energy infrastructure investments, in particular, in energy production, to secure adequate and stable supply of energy. The Ministers expressed hope that through energy infrastructure investments and cross-border trade, ASEAN economies can better access the energy resources and technologies to meet the region's energy needs."), Riyadh Declaration, The Third Summit of Heads of State and Government of OPEC Member Countries, Nov. 17, 2007, *available at* http://www.opec.org/aboutus/III%20OPEC%20Summit%20Declaration.pdf (last visited Mar. 3, 2008) (The OPEC nations too have recognized the importance of facilitating investment and in The Riyadh Declaration of the Third Summit of Heads of State and Government of OPEC Member Countries November, 2007 resolved to: "Work with other governments, international organizations and the international business community to facilitate investment in, and the transfer of technology to, our Member Countries, in order to diversify our economies and achieve social progress and sustainable development.")

42. Economic Intelligence Unit, *World Investment Prospects to 2011*, Foreign Direct Investment and the Challenge of Political Risk, 96 (Sept. 2007), *available at* http://www.cpii.columbia.edu/pubs/documents/WorldInvestmentProspectsto2011.pdf (last visited Mar. 3, 2008). Nineteen percent responded that they were influenced to a very great extent and forty-eight percent responded that they were influenced to a limited extent. Only twenty-three percent responded that they were not influenced at all and nine percent responded that they did not know.

grounded in part on local governmental subsidies and incentives and require that those be maintained in the form presented at the time the investment is commenced. There is considerable concern in the investment community currently about the stability of the relevant rules and regulations in many of the developing countries.

As demonstrated by the decision in the *Nykomb* matter, the ECT, if binding on the host country, would create rights for investors against a host government for changing incentives and subsidies committed to a foreign investor or other laws or regulations in violation of the ECT investor protection provisions.[43] The increased certainty afforded by investment treaty protection should serve to significantly increase the availability of funds for investment in GHG mitigation projects in the developing countries. In essence, membership in the ECT enables a host state to make a credible and internationally enforceable promise about investment incentives and guarantees with respect to climate-change promoting energy investment.

With the reduced investment risk resulting from the investor protections afforded by the ECT, the cost of investment should go down allowing a greater number of investments to be made. Risk is a factor in determining the rate of return necessary to make an investment attractive. Reduced risk should lead to lower expected rates of return; those lowered rates of return as applied to a variety of projects should make more projects financially attractive. Moreover, where prudence would dictate the purchase of political risk insurance, the existence of an investment treaty may, in many cases, obviate the need for expensive political risk insurance, or at the least drive down the cost of such insurance.[44] Again this would drive down the cost of the investment and make a greater number of sustainable energy investments attractive.

There are numerous and extensive international negotiations ongoing under the UNFCCC and the Kyoto Protocol to develop an international treaty regime that addresses climate change. Theoretically these negotiations could also encompass investor protections to achieve the goals I have discussed. However, there are incredibly complex tasks already before the negotiators including: whether emissions caps should be binding and on which nations; at what level the emissions caps should be set over what period of time; what trading mechanisms should be in place and how to create linkages among them to create the most robust trading market; what nations without emission caps

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43. Nykomb Synergistics, Inst. of the SCC, Case No. 118/2001 at 31-32.

44. *See generally* Noah D. Rubins & N. Stephan Kinsella, International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide (OXFORD UNIVERSITY PRESS 2005); P. COMEAUX & N. KINSELLA, REDUCING POLITICAL RISK IN DEVELOPING COUNTRIES: BILATERAL INVESTMENT TREATIES, STABILIZATION CLAUSES, AND MIGA & OPIC INVESTMENT *INSURANCE*, 15 N.Y.L. Sch. J. Int'l & Comp. L. 1, 5 (1994).

should be obligated to do and what support for them from developed countries will be required; what kinds of projects in what nations should count as offsets and how to make sure that they are additional, verifiable, permanent, and enforceable; how to prevent further deforestration, how to address the critical issue of adaptation and much more. A suggestion that these negotiators also address is the issue of how to craft an acceptable multi-lateral investment treaty that is simply not practical and the ECT presents a ready made investment protection treaty already ratified by over fifty nations. It is this treaty that the developing nations should be urged to adopt as an important contribution on their part to arresting climate change, in the absence of GHG emission reduction caps binding on them.

The application of the ECT to climate change solutions is well grounded in its original intention and in its provisions. The ECT specifically recalls the United Nations Framework Convention on Climate Change in its preamble. As set forth in Article 31 of the Vienna Convention on the Law of Treaties,[45] this preamble reference is relevant to the interpretation of the ECT. Article 1 ¶ 6 of the ECT defines covered "Investments" as investment associated with an "Economic Activity in the Energy Sector" which is defined in ¶ 5 as an "economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing or sale of Energy Materials (or) Products."[46] These are defined in ¶ 4 as including the items listed in Annex EM.[47] Annex EM covers nuclear energy, coal, natural gas, petroleum and petroleum products, and "electrical energy."[48]

These provisions are broad enough to cover many if not all of the currently known GHG mitigation measures including nuclear energy, coal gasification and carbon sequestration. "Electrical energy" includes all of the newer technologies including solar, wind, biomass, tidal, wave, hydropower and even plug in hybrid cars. Indeed "electrical energy" has to be read to also include energy efficiency, green building and other measures such as geothermal or combined heat and power, that serve to reduce the demand for energy as they are "economic activity concerning" energy items listed in Annex EM. The ECT should also be read broadly to include technological improvements relating to energy in the industrial sector that reduce GHG emissions such as improvements in cement production which is a major emitter of GHG or aluminum product manufacture, which is a highly energy intensive process, as they reduce "trade" and "sale" through energy efficiency and thus would constitute "economic activity concerning" products specified in Annex EM. In addition,

45. *See* Vienna Convention, *supra* note 19.

46. ECT, *supra* note 1, art. 1, ¶¶ 5-6.

47. *Id.* at 41.

48. *Id.* at 93.

the ECT specifically provides in Article 1 ¶ 6 that "Investment" also refers to investments designated by a Contracting Party in its Area as a "Charter efficiency project" and so notified to the Secretariat. Any uncertainty as to the scope of coverage of the ECT to include climate change mitigation measures that are now known and those as yet unknown can be resolved by adopting an amendment, understanding or declaration to the ECT.

VII. CONCLUSION

The number of investor-state arbitrations based on international investment agreements is growing; of the over 2000 known investor-state arbitrations to date, two-thirds commenced since the beginning of 2002. Several of these commenced under the ECT and more will likely follow. The ECT is a young treaty and the Energy Charter Secretariat is working on raising awareness of the ECT, developing areas of consensus among member states and observers on key issues such as energy security, transit issues and energy efficiency, and attracting additional Contracting Parties.

With today's focus on climate change and energy security it is essential that there be a thorough review of how the ECT can be utilized to shape decisions on how energy is developed around the world. Investment treaty analysis and climate change concerns have developed since the drafting of the ECT and political changes and realignments have occurred which may require some fine tuning or adjustments in the ECT provisions; modifications necessary to gain broad scale global acceptance should be considered.[49] The ECT Secretariat has been working cooperatively with other prominent organizations that deal with climate change and global energy concerns. Such collaborative efforts should facilitate the development of a workable global energy investment environment that promotes sustainable energy projects which serve to mitigate GHG emissions.

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