A South American Energy Treaty: How the Region Might Attract Foreign Investment in a Wake of Resource Nationalism

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Introduction

South America has a wealth of diverse energy resources,[1] but its nations have had difficulty maximizing these resources within and across

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1. *See* Thomas F. McLarty, III & Richard Klein, *A Latin American Opportunity in World Energy Woes*, 29 Fletcher F. World Aff. 75, 76–78 (2005) (discussing the oil and natural gas reserves in South America); *see also* Peter Meisen & Sebastian Krumpel, Global Energy Network Inst., Renewable Energy Potential of Latin America 22–76 (2009) (surveying the renewable energy resources of many of the South American countries).

their borders.[2] Although many South American countries have seen steady economic growth in the past fifty years, others have lagged.[3] However, the rapidly developing nations and the poorer nations have one feature in common: an inability to secure steady and efficient energy supplies.[4] Several factors contribute to this phenomenon. First, the energy infrastructure of South America is inadequately developed to maximize the potential of the continent's energy resources.[5] Second, international tensions among neighboring countries have led to strained political and economic relationships.[6] Third, domestic political policies often trump the desire for regional integration.[7] Finally, in the absence of an international legal framework for protecting energy investments, foreign investors are somewhat reluctant to contribute to the South American regional energy infrastructure.[8]

Many South American countries are alike insofar as they have underdeveloped energy infrastructures. These countries can additionally reap the benefits of common infrastructure development. Several South American nations have tended to adhere to nationally oriented development poli-

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2. *See* Stephanie Hanson, *Energy Bottlenecks in South America*, COUNCIL ON FOREIGN RELATIONS (Apr. 21, 2008), http://www.cfr.org/publication/16037/energy_bottlenecks_in_south_america.html (noting that the political policies of some South American countries have stymied international energy investment and slowed the development of energy infrastructure).

3. *See* ANDRÉS SOLIMANO & RAIMUNDO SOTO, ECONOMIC GROWTH IN LATIN AMERICA IN THE LATE 20TH CENTURY: EVIDENCE AND INTERPRETATION 10 (2004) ("[T]here is substantial heterogeneity in growth experiences across Latin American economies.").

4. *See, e.g.*, Dean Anderson, *Is South America Set for Huge Energy Crisis?*, POWER & ENERGY NEWS (Nov. 27, 2009), http://www.nextgenpe.com/news/south-america-energy-crisis (noting concerns that South America may enter an energy crisis due to a lack of energy security); *see also* José Miguel Insulza, *Energy and Development in South America*, *in* ENERGY AND DEVELOPMENT IN SOUTH AMERICA: CONFLICT AND COOPERATION 9, 9 (Cynthia J. Arnson et al. eds., 2008) ("[T]here is concern throughout the Americas about the inability to supply reliable and affordable energy to meet national and regional needs.").

5. *See* Hanson, *supra* note 2 ("In South America, the opportunity to develop a lucrative natural gas market is hindered by the lack of sufficient infrastructure."); *see also* Luis Alberto Moreno, President of the Inter-American Development Bank, Speech at the Canning House Conference: Enhancing Competitiveness in Latin America: The Role of Infrastructure (Jan. 21, 2008) ("As it stands, Latin America is clearly far behind other regions in providing access to public utilities.").

6. *See The Difficult Path toward Energy Integration in South America*, UNIVERSIA KNOWLEDGE@WHARTON (July 26, 2006), http://www.wharton.universia.net/index.cfm?fa=viewfeature&id=1204&language=english [hereinafter UNIVERSIA] ("[M]any experts have doubts about the viability of the anticipated integration of this sector in South America, given the diplomatic and trade conflicts that currently afflict the region.").

7. *See* David Mares, *Energy, Development, and Regional Integration*, *in* ENERGY AND DEVELOPMENT IN SOUTH AMERICA: CONFLICT AND COOPERATION 61, 69 (Cynthia J. Arnson et al. eds., 2008) (discussing some nations' propensity to value resource nationalism over regional cooperation).

8. *See* ADILSON DE OLIVEIRA, INT'L INST. FOR SUSTAINABLE DEV., ENERGY SECURITY IN SOUTH AMERICA, THE ROLE OF BRAZIL 14 (2010) (noting the lack of a legal system that facilitates private investment in energy), *available at* http://www.iisd.org/tkn/pdf/energy_security_south_america.pdf.

cies;[9] however, recently they appear to be more open to regional cooperation. First, "[i]n the energy sector, the Latin American Energy Organization (OLADE) was created with the objective of promoting regional trade in energy."[10] OLADE was formed in 1973 and is comprised of a number of Latin American countries, including ten South American nations.[11] One of OLADE's primary strategic objectives is "[t]o promote the development of regional and sub-regional energy integration activities."[12]

Additionally, in 2000, the South American presidents met in Brasilia, Brazil "to promote the process of political, social and economic integration of South America . . . ."[13] At this meeting, the South American presidents agreed to create the Initiative for the Integration of Regional Infrastructure in South America (IIRSA).[14] IIRSA "aims at developing the regional integration of transport, communication and energy infrastructure . . . ."[15] Through the IIRSA framework, member governments have established 524 infrastructure projects with an estimated investment of US $96.12 billion.[16] Through the establishment of OLADE and IIRSA, it appears as though the South American nations are making greater efforts to address energy infrastructure development at a regional level.[17]

Furthermore, in 2008, leaders from the members of the Andean Community (CAN),[18] Mercosur,[19] and non-Andean Community member South American countries[20] formed the South American Union of Nations (UNASUR).[21] In the UNASUR Constitutive Treaty, the member states cite that a specific objective is the attainment of "[e]nergy integration for the

9. For instance, Chile has stated that it has a priority of becoming autonomous in the energy sector. UNIVERSIA, *supra* note 6. Additionally, Bolivia decided to nationalize its hydrocarbon industry in 2006. Hanson, *supra* note 2.

10. DE OLIVEIRA, *supra* note 8, at 2.

11. These members are Argentina, Brazil, Chile, Paraguay, Uruguay, Bolivia, Colombia, Ecuador, Peru, and Venezuela. *OLADE: Who are we?*, OLADE, http://www.olade.org.ec/en/who-are-we (last visited Oct. 6, 2010).

12. *OLADE: Integration Department*, OLADE, http://www.olade.org/en/integration-department (last visited Oct. 6, 2010).

13. *IIRSA: Origins*, IIRSA, http://www.iirsa.org/BancoConocimiento/O/origenes/origenes_ENG.asp?CodIdioma=ENG&CodSeccion=117 (last visited Oct. 6, 2010).

14. *Id.*

15. DE OLIVEIRA, *supra* note 8, at 1.

16. *IIRSA Projects Portfolio*, IIRSA, http://www.iirsa.org//Cartera_ENG.asp?CodIdioma=ENG (last visited Mar. 3, 2011).

17. *But see* DE OLIVEIRA, *supra* note 8, at 1 (arguing that IIRSA has largely neglected projects related to energy infrastructure).

18. The Andean Community is a trade bloc currently comprised of Peru, Bolivia, Ecuador, and Colombia. *Who Are We?*, COMUNIDAD ANDINA, http://www.comunidadandina.org/ingles/quienes/brief.htm (last visited Oct. 6, 2010).

19. Mercosur is a trade bloc comprised of Argentina, Brazil, Uruguay, and Paraguay. Mercosur (Common Market of the South) – Profile, BBC NEWS, June 16, 2010, http://news.bbc.co.uk/2/hi/americas/5195834.stm.

20. Most notably, with Chile and Venezuela (both former members of the Andean Community).

21. South American Union of Nations Constitutive Treaty, May 23, 2008, *available at* http://www.comunidadandina.org/INGLES/csn/treaty.htm (last visited Oct. 6, 2010) [hereinafter UNASUR Treaty].

integral and sustainable use of the resources of the region . . . ."[22] Whether UNASUR will be effective in implementing this vision remains to be seen. However, energy integration may achieve many benefits.

First, through energy integration, South American countries can achieve energy security.[23] Energy security refers to two primary concepts: Reliability of energy flow and security of energy supply.[24] Reliability of energy flow is achieved when an energy system is able to withstand abrupt cuts in energy supply to end-users.[25] In order to achieve reliability of energy flow, an energy distribution system must be nimble enough to provide alternate routes to consumers in the event that a storm, system failure, or catastrophe affects a particular segment of the infrastructure.[26] Security of energy supply "refers to protection from events that require energy supply cuts for long periods of time."[27] Energy security can be furthered by regional integration, since a regional infrastructure facilitates a broader network of distribution channels and helps stabilize energy prices in the event that any particular country's energy supply is cut for a long period of time.[28]

Additionally, energy integration facilitates economic efficiency.[29] For one, increased access to energy is a precursor for economic growth.[30] Additionally, "[c]ross-border cooperation in all areas, including in energy of various forms, brings about important savings and cost reductions."[31] By regionally integrating projects and facilities, South American countries could lower transaction costs.[32] Furthermore, South American countries could satisfy their combined energy needs by establishing a framework of regional reserves.[33] A regionally integrated reserve system would help establish longer-term energy prices that are less susceptible to short-term domestic price fluctuations.[34]

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22. *Id.*

23. *See* de Oliveira, *supra* note 8, at 2–7 (discussing how a regional market would facilitate a system whereby countries could guarantee adequate energy levels for their demands); *see also* World Energy Council, Regional Energy Integration in Africa 12 (2005) ("Security of supply is one of the primary drivers in developing power interconnections between countries and regions.").

24. *See* de Oliveira, *supra* note 8, at 2.

25. *Id.*

26. *Id.*

27. *Id.*

28. *See id.* at 3 (discussing how the lack of regional integration leads to situations where "low-cost energy resources remain underutilized" and price regulation becomes difficult).

29. *See* World Energy Council, *supra* note 23, at 12.

30. *See id.* at 25.

31. Francisco Rojas Aravena, *Energy Integration in Latin America: Limits and Possibilities*, *in* Energy and Development in South America: Conflict and Cooperation 13, 14 (Cynthia J. Arnson et al. eds., 2008).

32. World Energy Council, *supra* note 23, at 26.

33. *See* de Oliveira, *supra* note 8, at 12–13 (discussing the benefits of a multilateral energy security reserve).

34. *See id.* at 13 ("[T]he energy prices in the energy security flows between countries of the region would not be linked to the prices currently set in the domestic markets.").

Although South American countries would benefit from regional integration of their energy infrastructure, several obstacles to energy integration exist. First, certain political stances stymie the integration process. For example, some countries seem intent on maintaining autonomous national energy sectors.[35] Other countries have historically poor international relations with one another, creating political tension around many of their dealings.[36] Second, economic considerations also stifle the process of integration. For instance, some of the energy exporting countries appear more interested in maximizing the short-term benefits they can achieve by charging high prices to neighboring countries than realizing the long-term benefits of regional integration.[37] Finally, the lack of an effective legal framework for international investment casts a shadow of uncertainty over integration efforts.[38]

In the early 1990s, Europe sought to address similar obstacles in its own effort to achieve regional energy integration.[39] The end of the Cold War created an opportunity for increased regional cooperation and interdependence.[40] Russia and many of the former Soviet Union states had substantial energy resources, while the Western European countries sought to diversify their energy supply in an effort to decrease their dependence on Middle Eastern oil resources.[41] In an effort to help former Soviet Union countries assimilate into the broader European community, Dutch Prime Minister Ruud Lubbers proposed the creation of a regional integration mechanism.[42] The regional energy integration process began with the signing of the 1991 European Energy Charter, "a declaration of political intent to promote East-West energy cooperation . . . ."[43] In 1994, the overwhelming majority[44] of signatories to the European Energy Charter decided to enter into a legally binding multilateral agreement known as the

35. *See* UNIVERSIA, *supra* note 6 (discussing Chile's intention to create an autonomous national energy supply).

36. *See id.* ("Bolivia refuses to sell directly to Chile because Chile has not agreed to Bolivia's historical demands for 'access to the sea,' the Pacific Ocean.").

37. *See id.* (noting the arrangement between Bolivia and Argentina, whereby Argentina buys natural gas from Bolivia for higher prices, then sells the natural gas at a premium to Chile, Brazil, Paraguay and Uruguay).

38. *See* DE OLIVEIRA, *supra* note 8, at 14 (noting the deficit of a legal framework to facilitate private investment); *see also* Alexia Brunet & Juan Agustin Lentini, *Arbitration of International Oil, Gas, and Energy Disputes in Latin America*, 27 NW. J. INT'L L. & BUS. 591, 592 (2007) ("Policies discouraging the use of international arbitration and enforcement of arbitral awards are re-surfacing to impede foreign investment in energy sectors throughout Latin America.").

39. *See* Andrei Konoplyanik & Thomas Wälde, *Energy Charter Treaty and its Role in International Energy*, 24 J. ENERGY & NAT. RESOURCES L. 523, 524-25 (2006) (discussing the creation of the Energy Charter Treaty as a means to regionally cooperate to develop energy infrastructure).

40. *Id.* at 524.

41. *Id.*

42. *Id.*

43. *Id.* at 525-26.

44. All of the signatories to the European Energy Charter are members of the Energy Charter Conference except Serbia and Montenegro, which is an observer to the Energy Charter Conference. *See id.* at 525.

Energy Charter Treaty (ECT).[45]

One of the cardinal objectives of the ECT "is to 'strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, thereby mitigating risks associated with energy-related investment and trade.'"[46] The content of the ECT is based on three sources: "(1) The well-established practice of [bilateral investment treaties] . . . (2) The liberalisation [sic] impetus from several 'Directives' reforming EU energy law—Directives on 'licensing upstream energy resources,' on utility procurement, on transit, on non-discriminatory access to energy transport infrastructure . . . [and] (3) GATT . . . ."[47] The ECT's protection of foreign investments is premised on the principle of non-discrimination.[48] ECT member countries have a binding obligation to treat investors from other member states according to "national treatment, or most-favoured nation treatment (whichever is more favorable) . . . ."[49] This aspect of the ECT effectively carries the legal weight of an ad hoc bilateral investment treaty created between the foreign investor and the state receiving the investment.[50]

Additionally, a mechanism for "[i]nvestment arbitration . . . is a key feature of the ECT . . . ."[51] Under the ECT, foreign investors can sue a host state before an international arbitral tribunal.[52] In a dispute, the standards used to judge a sovereign's conduct "are exogenous to that sovereign's own legal system."[53] Although some countries have been reluctant to submit to an external authority in dispute resolution,[54] this feature of the ECT's dispute mechanism lends credibility to the agreements made by member countries.[55] Indeed, "without such external authority, the duties assumed mean little in practice."[56]

Although no South American country chose to participate in the ECT,[57] the ECT can provide a model framework for enhancing the region's international investment framework. More specifically, South America, as

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45. *Id.* at 525–26.

46. Matthew T. Parish & Charles B. Rosenberg, *An Introduction to the Energy Charter Treaty*, 20 AM. REV. INT'L ARB. 191, 191 (2009) (quoting *Energy Charter: About the Charter*, ENERGY CHARTER, http://www.encharter.org/index.php?id=7 (last visited Mar. 30, 2011) [hereinafter "About the ECT"]). *See also* DE OLIVEIRA, *supra* note 8, at 3 ("The Energy Charter contains foreign investment protection clauses and mechanisms for conflict resolution.").

47. Konoplyanik & Wälde, *supra* note 39, at 528.

48. *Id.* at 532.

49. *Id.* at 533.

50. *Id.*

51. *Id.* at 546.

52. *Id.*

53. Parish & Rosenberg, *supra* note 46, at 192.

54. *See* Konoplyanik & Wälde, *supra* note 39, at 546 (nothing that countries "with a traditional emphasis on national sovereignty" have great problems accepting the authority and jurisdiction of an international tribunal).

55. *Id.*

56. *Id.*

57. DE OLIVEIRA, *supra* note 8, at 4. It should be noted, however, that Venezuela is currently an observer to the Energy Charter. *Id.* at 4 n.8.

a region, may be able to further attract foreign investment by adopting a regional energy investment treaty similar to the ECT. This Note will assess the feasibility of a South American Energy Treaty, considering the political, economic, and legal obstacles that exist in the region. Part I of this Note will discuss some of the recent trends in the region that trouble foreign investors, focusing on a renewed spirit of resource nationalism exhibited by some of the resource-rich countries. Part II will provide a brief, general overview of international investment law. Part III will summarize the ECT, providing an overview of its key aspects and noting its ability to facilitate energy integration by promoting foreign investment. Part IV will assess the feasibility of a South American Energy Treaty. The benefits of such a legal framework, and the obstacles it faces, will be discussed in detail. Finally, I provide concluding remarks.

I. The Growing Specter of Resource Nationalism: A Threat to Foreign Investment

Two somewhat divergent trends generally color South American attitudes toward the energy sector. On the one hand, there is a growing sense of resource nationalism in the region.[58] In the face of rising energy prices, countries driven by resource nationalism seek to assert the state's sovereign authority over the activities of international energy companies operating in their territory.[59] On the other hand, some South American countries exhibit a willingness to allow a greater degree of international investment in the energy sector.[60] These countries have embraced various levels of foreign investment by privatizing or partly privatizing state-owned energy companies, promoting "the creation of independent power producers[,] or encourag[ing] the construction of new power plants by the private sector."[61]

However, the renewed spirit of resource nationalism, reflected in some recent actions taken by resource-rich countries, may be of concern to foreign investors.[62] Resource nationalism signals, among other things, a nation's willingness to take certain actions toward their natural resources that may be detrimental to foreign investors.[63] Energy investments are gen-

58. Christine St. Germain, Note, *What Does the Bank of the South Really Signify?*, 14 LAW & BUS. REV. AM. 835, 843 (2008); *see also* Toni Johnson, *The Return of Resource Nationalism*, COUNCIL ON FOREIGN RELATIONS (Aug. 13, 2007), http://www.cfr.org/publication/13989/return_of_resource_nationalism.html (discussing recent actions taken by Venezuela, Ecuador, and Bolivia to nationalize certain activities in the energy sector).

59. *See* A.F.M. Maniruzzaman, *The Issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry*, 5 TEX. J. OIL GAS & ENERGY L. 79, 79-80 (2009-2010).

60. Brunet & Lentini, *supra* note 38, at 593.

61. *Id.* at 597-98.

62. *See* Maniruzzaman, *supra* note 59, at 79-80.

63. *See* Nouriel Roubini, *Is Resource Nationalism Back?*, FORBES, Sept. 10, 2009, http://www.forbes.com/2009/09/09/opec-brazil-oil-china-rare-metals-alberta-opinions-columnists-nouriel-roubini.html ("While these policy changes may be politically popular—and according to some analysts, may even help fund infrastructure development—they also run the risk of further deferring investment in the oil and gas sector.").

erally long-term capital-intensive projects.[64] The geographically fixed, capital-intensive nature of energy investments makes them particularly susceptible to certain political and economic risks, most notably nationalization or expropriation.[65] Countries exhibiting signs of resource nationalism may appear riskier to foreign investors because these countries demonstrate an increased willingness to expropriate or nationalize energy projects in the interest of maintaining greater control over their natural resources.[66]

Over the past decade, a few of the more resource-rich South American countries have taken actions that may worry foreign investors. Specifically, Venezuela, Bolivia, and Ecuador have all taken actions that demonstrate a spirit of resource nationalism, such as the seizure of assets of foreign oil companies and revisions to contracts.[67] At the very least, some of these actions indicate a greater willingness to eschew liberal foreign investment policies in favor of asserting sovereignty over the state's natural resources.[68] Because these countries lay claim to substantial natural energy resources,[69] they are particularly powerful players in the region's energy sector. Since these countries potentially pose a serious obstacle to the region's ability to obtain foreign investment, their actions indicate a problem that a regional energy treaty might overcome.

A. Venezuela

Venezuela plays a key role in future efforts to achieve South American energy integration, since it has the largest proven oil and natural gas reserves on the continent.[70] As of January 1, 2010, the country boasted 99.4 billion barrels of proven oil reserves and 176 trillion cubic feet of natural gas reserves.[71] As a result of its vast energy resources, Venezuela has had an important voice in the international community: in 1960, the Venezuelan Minister of Petroleum, Perez Alfonso, proposed the founding of the Organization of the Petroleum Exporting Countries (OPEC).[72] Since

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64. *See* Mirian Kene Omalu, NAFTA and the Energy Charter Treaty: Compliance with, Implementation and Effectiveness of International Investment Agreements 7 (1998).

65. *Id.*

66. *See* Maniruzzaman, *supra* note 59, at 82.

67. *See* Sid Verma, *Resource Nationalism: Alive and Well*, Emerging Markets (Feb. 23, 2010), http://www.emergingmarkets.org/Article/2449493/RESOURCE-NATIONALISM-Alive-and-well.html.

68. *See* Maniruzzaman, *supra* note 59, at 82 (noting the various stages of resource nationalism).

69. *See* Energy Info. Admin., Country Analysis Briefs: Venezuela 9 (2010), http://www.eia.doe.gov/emeu/cabs/Venezuela/pdf.pdf [hereinafter Venezuela Brief]; Bolivia Confirms Pipeline to Supply Paraguay and Uruguay with Natural Gas, MercoPress, July 17, 2010, http://en.mercopress.com/2010/07/17/bolivia-confirms-pipeline-to-supply-paraguay-and-uruguay-with-natural-gas; Brunet & Lentini, *supra* note 38 at 629.

70. Larry B. Pascal, *Developments in the Venezuelan Hydrocarbon Sector*, 15 Law & Bus. Rev. Am. 531, 531 (2009).

71. Venezuela Brief, *supra* note 69, at 9.

72. Pascal, *supra* note 70, at 532–33. *See also* Luis E. Cuervo, *The Uncertain Fate of Venezuela's Black Pearl: The Petrostate and its Ambiguous Oil and Gas Legislation*, 32

the election of President Hugo Chávez in 1999, Venezuela has reasserted its commitment to OPEC,[73] criticized former President George W. Bush and his policies,[74] and proposed the creation of a South American regional development bank.[75] Additionally, Venezuela's rich oil and gas resources have made it attractive to international energy companies seeking to engage in exploration and production activities.[76]

Venezuela's willingness to allow foreign energy companies to operate within its territory has been somewhat erratic. In 1975, Venezuela adopted the Ley Orgánica que Reserva al Estado la Industria y el Comercio de los Hidrocarburos ("Nationalization Law") in an initial effort to nationalize its natural resources.[77] This law granted Venezuela a monopoly over oil and gas operations within its territory, terminated all outstanding concessions, and allowed expropriation of concessionaries' assets only on certain terms.[78] While this law effectively signaled Venezuela's move to obtain control over its natural resources, "the government could still enter into association contracts with private parties."[79]

In the 1990s, Venezuela became increasingly open to foreign investment in the energy sector.[80] Under the program known as Apertura Petrolera (the "Petroleum Opening"), Venezuela promoted international investment in oil projects.[81] The primary goal of the Petroleum Opening was to rejuvenate existing oil fields, develop Venezuela's extra-heavy crude oil, and further explore new fields.[82]

The Petroleum Opening entailed three rounds of bidding.[83] The first round sought to auction off some of the more labor-intensive oil fields; however, only five of the nine fields offered received bids.[84] The second round offered more attractive oil fields, which resulted in an increased foreign interest.[85] Forty-four companies or syndicates bid on eleven of the thirteen fields offered.[86] Finally, Venezuela put twenty oil fields on the auction block in the third round.[87] This round attracted 259 bidders, partly because of the favorable contract terms allowing operators to receive

HOUS. J. INT'L L. 637, 641 n.13 (2010) (describing Pedro Alfonso as a founding father of OPEC).

73. Pascal, *supra* note 70, at 533.
74. Cuervo, *supra* note 72, at 654 n.99.
75. St. Germain, *supra* note 58, at 835.
76. *See* Cuervo, *supra* note 72, at 649-51.
77. *Id.* at 642-43.
78. *Id.* at 644-45.
79. *Id.* at 645.
80. Pascal, *supra* note 70, at 533.
81. *Id.*
82. Larry Spancake, *Venezuela Offers Full Market Value to Encourage Foreign Investment in Oil*, U.S. ENERGY INFO. ADMIN. (Mar. 1999), http://www.eia.doe.gov/emeu/finance/usi&to/upstream/venezuela.html.
83. Jay G. Martin, *Venezuela as an Opportunity for Investment in the Petroleum Industry*, 20 ENERGY L.J. 325, 329 (1999).
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*

"the full market value of additional output, less one-sixth royalty and administrative costs, until they recover their investment."[88] Ultimately, the Petroleum Opening resulted in "thirty-two operating service agreements . . . and four risk profit sharing agreements with twenty-two separate foreign oil companies, including international oil majors like Chevron, BP, Total, and Repsol-YPF."[89]

Although the Petroleum Opening increased foreign investment, the program also received criticism within Venezuela.[90] The most notable critic, Hugo Chávez, was elected president of Venezuela in December 1998.[91] In February of the following year, the Venezuelan National Assembly promulgated a new law granting the President fairly sweeping powers to issue decrees governing many sectors of the economy.[92] Under this law, President Chávez enacted a series of decrees and policies aimed toward recovering greater state control over the country's natural resources.[93]

In 2001, President Chávez enacted a new Organic Hydrocarbons Law ("Hydrocarbons Law").[94] Some of the notable features of this law include a broad purview over oil and gas activities, a recognition that Venezuela owns all hydrocarbon resources within its territory, and an increased power for the executive to change contractual agreements and revoke rights to engage in energy activities.[95] Additionally, the Hydrocarbons Law indicated that international conventions and treaties apply to Venezuela's oil and gas business, reaffirming Venezuela's obligations under its bilateral and multilateral investment treaties, as well as its ongoing relationship with OPEC and foreign nations.[96] Finally, the Hydrocarbons Law substantially increased royalties from 16.66%[97] to a flat 30%,[98] and it contained a provision that established a rental fee of 100 tax units per square kilometer, which increases 5% per year.[99]

One important question is the significance of Article IV of the Hydrocarbons Law, which confirms the "public policy" principle.[100] The "public policy" principle is a well-established feature of oil and gas law, which affirms a state's sovereign power to expropriate or nationalize hydrocarbon-related activities in the public interest.[101] According to this provision,

88. *Id.*
89. Pascal, *supra* note 70, at 533.
90. *Id.*
91. *See id.*
92. *See id.*
93. *See id.*; Thomas J. Pate, Note, *Evaluating Stabilization Clauses in Venezuela's Strategic Association Agreements for Heavy-Crude Extraction in the Orinoco Belt: The Return of a Forgotten Contractual Risk Reduction Mechanism for the Petroleum Industry*, 40 U. Miami Inter-Am. L. Rev. 347, 376 (2009).
94. Pate, *supra* note 93, at 376.
95. *See* Cuervo, *supra* note 72, at 659–63 (detailing the powers given to the executive by the new law).
96. *Id.* at 663–64.
97. *See* Martin, *supra* note 83, at 330.
98. Cuervo, *supra* note 72, at 665.
99. *Id.* at 666.
100. *Id.* at 660.
101. *Id.*

it appears as though the state may expropriate resources and revoke permits when necessary.[102] But it is unclear how this provision may affect choice-of-law provisions in contracts between Venezuela and international companies.[103] On the one hand, "[m]andatory applicable law and jurisdiction clauses are deemed incorporated in . . . all oil-and-gas-related contracts."[104] On the other hand, however, it is unclear whether clauses providing for international arbitration would be salient in the face of the Hydrocarbons Law.[105]

The Hydrocarbons Law signified an initial swing of the pendulum back toward policies grounded in a sense of resource nationalism, and more recent policies reaffirmed this trend. First, on October 10, 2004, the Venezuelan government announced the Plena Soberanía Petrolera policy ("Full Petroleum Sovereignty" plan),[106] which aimed at achieving complete national sovereignty over Venezuela's energy reserves.[107] Second, in 2005, the Venezuelan Ministry of Energy and Petroleum (MEP) announced that four joint venture agreements with foreign investors were illegal under the Nationalization Law.[108] The MEP unilaterally modified the strategic agreements, indicating that the foreign investors "would have to 'migrate' their projects into mixed companies in which the state would have at least a 51% interest."[109] Furthermore, in 2006, "despite assurances in 2002 that the Hydrocarbons Law would only apply to new projects, [President] Chávez announced that the tax rates stipulated in the Hydrocarbons Law would apply retroactively to [the four strategic association agreements with foreign investors], thus raising the applicable income tax rate from 34% to 50%."[110]

Finally, in February 2007, President Chávez issued a presidential decree, which ordered the adjustment of all contracts relating to associations operating in the Orinoco Belt and all production sharing agreements.[111] This decree replaced all such contracts with joint ventures in which Petróleos de Venezuela, S.A. (PDVSA), Venezuela's national oil company,[112] or "its subsidiaries would have at least a 60% ownership."[113] Companies that were party to these agreements had four months to consider and agree on the terms of the new joint ventures.[114] Furthermore, the decree stipulated that any disputes arising out of the decree "would be governed by Venezuelan law and be subject to the jurisdiction of Venezue-

102. *See id.* at 660–61 (suggesting the consequences of the "public policy" principle).
103. *Id.* at 660 ("[T]he validity of choice-of-law provisions choosing anything other than Venezuelan law—as well as all arbitration clauses—would be in question.").
104. *Id.*
105. *See id.*
106. *Id.* at 666.
107. Pascal, *supra* note 70, at 548.
108. *See* Pate, *supra* note 93, at 377.
109. *Id.*
110. *Id.*
111. Cuervo, *supra* note 72, at 676.
112. *See* Pascal, *supra* note 70, at 531.
113. Cuervo, *supra* note 72, at 676.
114. *Id.* at 676–77.

lan courts."[115] New joint venture agreements were reached with four international energy companies; however, ExxonMobil and ConocoPhillips instead decided to leave the Orinoco Belt and commence arbitration proceedings.[116] As of the time of publication of this Note, these arbitration proceedings are currently pending before the International Centre for the Settlement of Investment Disputes (ICSID).[117]

B. Bolivia

Although considerably smaller than Venezuela in terms of its overall natural resources, Bolivia still lays claim to substantial oil and natural gas reserves.[118] Bolivia has roughly 1.4 billion barrels of oil reserves, and it has an estimated 54 trillion cubic feet of natural gas reserves.[119] Bolivia is a key energy supplier in the region, supplying approximately 30 million cubic meters of natural gas to Brazil daily.[120] Additionally, Bolivia is currently holding discussions with Uruguay and Paraguay about creating a pipeline that would supply natural gas to the two countries.[121]

Like Venezuela, Bolivia has recently taken steps toward resource nationalism. First, in May 2005, Bolivia enacted Hydrocarbon Law 3058.[122] Hydrocarbon Law 3058 contains several provisions that understandably concern foreign investors. For instance, Article 5 of the law grants ownership of all hydrocarbons produced at the wellhead to Bolivia.[123] Furthermore, Hydrocarbon Law 3058 requires contractors to alter their risk-sharing contracts granted under the former hydrocarbons law—Law 1689—within six months.[124] Additionally, the new royalties and taxes on hydrocarbon production paid to the state under these new contracts must not equal less than "fifty percent of the value of the hydrocar-

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115. *See id.* at 677.

116. *Id.*

117. *See List of Pending Cases*, International Centre for Settlement of Investment Disputes (Mar. 6, 2011), http://icsid.worldbank.org/ICSID/ (click "Cases" on the left menu; then click "List of Cases" on the drop-down menu; then follow "Pending Cases" hyperlink) (showing Mobil Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27 and ConocoPhillips Co. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30).

118. *See Bolivia Confirms Pipeline to Supply Paraguay and Uruguay with Natural Gas*, MercoPress, July 17, 2010, http://en.mercopress.com/2010/07/17/bolivia-confirms-pipeline-to-supply-paraguay-and-uruguay-with-natural-gas ("Bolivia has the second largest proven reserves of gas in South America behind Venezuela.").

119. *Petrobras Plans to Explore Three New Fields in Bolivia*, Energy-Pedia News, Jan. 19, 2011, *available at* http://www.energy-pedia.com/article.aspx?articleid=143796.

120. *Id.*

121. *See* MercoPress, *supra* note 118 (noting that Argentina is also included in the discussions because the proposed pipeline would have to cross part of Argentina).

122. Maniruzzaman, *supra* note 59, at 84. Note that Hydrocarbon Law 3058 was implemented before President Morales took office. Hydrocarbon Law 3058 was a referendum voted on by the people of Bolivia before Evo Morales was inaugurated. *See* María V. Vargas, *Latin America: 2005 Developments in Hydrocarbons Law*, 1 Tex. J. Oil Gas & Energy L. 185, 185 (2006).

123. Vargas, *supra* note 122, at 185.

124. *Id.* at 185-86.

bon production."[125]

Second, Evo Morales, the current president of Bolivia,[126] appears to be another South American leader poised to act on a growing sense of resource nationalism. He has appeared on billboards along with the slogan "[w]ithout nationalization there is no development,"[127] and his populist rhetoric turned into action quite early in his presidency. Under President Morales' leadership, Bolivia took several ambitious actions toward Bolivia's energy sector that may repel foreign investors.[128]

In May 2006, less than six months after President Morales took office, the Bolivian government "issued a decree nationalizing the hydrocarbons sector and calling for the renegotiation of contracts with hydrocarbons companies."[129] This decree mandated private energy producers operating in certain Bolivian areas to give an additional 32% of their production to YPFB, the Bolivian state-owned energy company.[130] This effectively gave YPFB 82% of production in these areas, as opposed to the 50% production they enjoyed before the decree.[131]

Additionally, the Bolivian government carried out the 2006 nationalization decree in an aggressive political manner. After issuing the decree, President Morales ordered Bolivian troops to occupy the country's natural gas fields.[132] Some of Bolivia's foreign investors, who had invested roughly $4 billion in the energy sector since it became privatized in the 1990s, reacted negatively to the country's aggressive posturing.[133] For example, Spanish-Argentine joint venture Repsol YPF indicated that "it will act to protect its investments and take legal action if necessary."[134] Brazil's state-owned energy company, Petrobras, responded similarly and halted further investments.[135]

Although some assert that President Morales' "bark is worse than his bite,"[136] gas exports to Brazil fell by a third in 2009.[137] Whether the

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125. *Id.* at 187.

126. *See* Frank M. Walsh, *The Legal Death of the Latin American Democracy: Bolivarian Populism's Model for Centralizing Power, Eliminating Political Opposition, and Undermining the Rule of Law*, 16 LAW & BUS. REV. AM. 241, 252 (2010).

127. Naomi Mapstone, *Bolivia's President Keeps Faith with Populism*, FIN. TIMES, Dec. 4, 2009, *available at* http://www.ft.com/cms/s/0/f48c1118-e0fd-11de-af7a-00144feab49a.html#axzz1BzElE8D6.

128. *See infra* Part I.B.

129. U.S. DEP'T OF STATE, BACKGROUND NOTE: BOLIVIA (2010), http://www.state.gov/r/pa/ei/bgn/35751.htm.

130. Diego Rojas, *The Bolivian Nationalization of Hydrocarbons Process*, INT'L LEGAL NEWS, Jan. 12, 2007, http://www.imakenews.com/iln/e_article000722418.cfm?x=b11,0,w.

131. *Id.*

132. Carin Zissis, *Bolivia's Nationalization of Oil and Gas*, COUNCIL ON FOREIGN RELATIONS, (May 12, 2006), http://www.cfr.org/publication/10682/bolivias_nationalization_of_oil_and_gas.html.

133. *See id.*

134. *Id.*

135. *Id.*

136. Sid Verma, *Resource Nationalism: Alive and Well*, EMERGING MARKETS, Mar. 23, 2010, http://www.emergingmarkets.org/Article/2449493/RESOURCE-NATIONALISM-Alive-and-well.html (quoting former Bolivian president Carlos Mesa Gisbert as stating

Morales administration will flexibly deal with foreign investors in the future remains to be seen. However, the actions that President Morales took toward nationalizing Bolivia's energy sector at the beginning of his administration strongly signify that Bolivia may be driven by an attitude of resource nationalism. Accordingly, foreign investors may be increasingly wary of investing in the Bolivian energy markets.

C. Ecuador

Ecuador is another resource-rich country that offers numerous investment opportunities for foreign energy companies,[138] yet is facing a large number of energy-related arbitration claims.[139] Ecuador is notoriously oil-rich, having proven reserves of 4.63 billion barrels.[140] Indeed, Ecuador has the third largest oil reserves on the continent, behind Venezuela and Brazil.[141] However, despite its large oil reserves, Ecuador has not been able to effectively tap its energy potential.[142]

Ecuador has had difficult relations with foreign energy investors for some time. First, at the beginning of the millennium, Ecuador's internal revenue agency refused to allow the return of roughly $200 million in value-added tax drawbacks withheld from foreign oil companies.[143] Ecuador's value-added tax laws arguably created greater uncertainty for investors, since the Ecuadorian internal revenue service's interpretation differed from the expectations of investors.[144] Although this action did not necessarily indicate a growing sense of resource nationalism within Ecuador, it arguably increased investment risks.

Furthermore, the Ecuadorian climate for foreign investment has been increasingly unattractive since President Rafael Correa took office.[145] Since President Correa was elected, Ecuador has taken an increasing

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that "'[Evo Morales] is very radical in his words, but more flexible when it comes to business with the investing companies.'").

137. *See id.*

138. Brunet & Lentini, *supra* note 38, at 598 ("In 2005, Petroecuador's production represented only 38% of national crude oil output, with the remainder coming from private projects between the Ecuadorian government and foreign oil producers.").

139. *See id.* at 610 ("Most of the energy related disputes are filed against Argentina, Ecuador, Peru and Venezuela.").

140. *See id.* at 629.

141. *Id.*

142. McClarty & Klein, *supra* note 1, at 78 (noting that as of 2005 only three percent of Ecuador's oil reserves were tapped).

143. Hamed Amiri Ghaemmaghami, Note, *Can't Live With'em, Can't Live Without'em: Ecuadorian Value-Added Tax Laws, Foreign Oil Investors, and the Andean Trade Preferences Act*, 10 Sw. J. L. & Trade Am. 391, 392–93 (2004).

144. *See id.* at 403 ("Assuming that these companies have forecast their earnings and made business decisions on the fact that the VAT drawbacks would be refunded, the failure to do so would cause severe disparities between the oil companies' expectations and their actual results.").

145. *See* Maniruzzaman, *supra* note 59, at 85; *see also* David Mares, Resource Nationalism and Energy Security in Latin America: Implications for Global Oil Supplies 24 (Jan. 2010) (unpublished working paper, on file with the James A. Baker III Institute for Public Policy) (noting that the Correa administration is more likely to push energy policy toward resource nationalism than certain other South American leaders).

amount of net income from oil projects.[146] After passing a reformed energy law (Law 42) in April 2006, the government took as much as seventy percent of the average amount of income.[147] After contract negotiations mandated by the Correa administration were finalized in late 2007, the government now receives closer to eighty percent of net oil income.[148]

Along with these quite dramatic increases in the Ecuadorian government's share of oil income, the government has also physically taken facilities from foreign investors.[149] For instance, Occidental was Ecuador's largest investor, responsible for roughly twenty percent of Ecuador's total oil production.[150] Ecuador argued that Occidental breached its contract with the country by inappropriately conveying a portion of its interest in Ecuadorian oil fields to another company.[151] As a result of that alleged breach, the state took Occidental's assets.[152] However, Occidental argues that Ecuador took its facilities "in retaliation for the company's victory against [the state] in a $75-million tax-arbitration case."[153] The company responded to the seizure by filing an arbitration claim against Ecuador at the International Center for Settlement of Investment Disputes (ICSID).[154] That arbitration hearing is currently pending.[155]

II. International Investment Law: A Brief Overview

The actions of nations guided by a spirit of resource nationalism signal increased risk to foreign investors. These risks essentially derive from a state's willingness to unilaterally change the bargain of a contract between the state and a foreign investor, or to expropriate or nationalize the foreign investor's assets to some extent.[156] Generally speaking, international investment law arose as a means of ensuring foreign investors a certain

146. LatinBusinessChronicle.com, Ecuador Oil: Reduced Investments, http://www.latinbusinesschronicle.com/app/article.aspx?id=4468 (last visited Jan. 22, 2011).

147. *Id.*

148. *Id.*

149. *See* Parmy Olson, *Ecuador Takes Field from Irani's Occidental Petroleum*, FORBES, May 17, 2006, http://www.forbes.com/2006/05/17/occidental-petroleum-ecuador-cx_po_0517autofacescan01.html.

150. Reuters, *Ecuador Cancels an Oil Deal with Occidental Petroleum*, N.Y. TIMES, May 17, 2006, *available at* http://www.nytimes.com/2006/05/17/business/worldbusiness/17oil.html.

151. Hal Weitzman, *Ecuador 'Was Right to Revoke Occidental License'*, FIN. TIMES, May 21, 2006, *available at* http://www.ft.com/cms/s/2/89d2a3d8-e8f3-11da-b110-0000779e2340.html#axzz1Bp71ZwLH.

152. *Id.*

153. Elizabeth Douglass, *Occidental's Profit Cut by Ecuador Loss*, L.A. TIMES, July 6, 2006, *available at* http://articles.latimes.com/2006/jul/06/business/fi-oxy6.

154. *Id.*

155. *See* Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Hydrocarbon Concession (Jul. 13, 2006).

156. *See* Maniruzzaman, *supra* note 59, at 82 ("Other specific manifestations of resource nationalism may be found in the resource-producing country's move to maximize revenue from oil and gas production by unilaterally changing the terms of the original contract (the phenomenon described by Harvard economist Raymond Vernon as 'obsolescing bargain'), by forced renegotiation of the original contract, or by other forms of economic coercion such as forced sale.").

level of protection over their investments made in host countries.[157] Originally, under foreign investment law, it was understood that states lacked the ability to "expropriate or nationalise [sic] foreign assets."[158] This understanding stemmed from the idea that foreign investors were subject to the laws of their home country, and that country alone should have the power to determine the investors' property rights.[159]

However, this understanding evolved into a doctrine under which states may invoke their sovereignty to expropriate foreign assets, subject to certain criteria of international law.[160] It is now an established principle of international investment law that a state may protect its own subjects if they are injured by a state act contrary to treaty law or customary international law.[161] States often enter into treaties with other states to define more precisely and to guarantee agreed-upon standards of protection to give to foreign investors, as well as the mechanism to resolve disputes arising out of the investments.[162] This section will very briefly discuss some of these standards of international law, as well as its dispute resolution mechanisms, in order to better facilitate a treatment of the Energy Charter Treaty (ECT).

A. Standards of Protection in International Investment Law

1. *Most-Favored Nation Treatment*

Most-favored-nation treatment (MFN treatment) is a cardinal principle of international investment law.[163] MFN treatment dates back to the fifteenth century, finding its way into a treaty between the King of England and the Duke of Burgundy.[164] Essentially, MFN treatment "is a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation [sic] treatment in an agreed sphere of relations."[165] The goal underlying MFN treatment is for state parties to treat each other, as well as their respective citizens, at least as well as each state party treats third party states and their citizens.[166] For example, in a hypothetical investment treaty between Venezuela and Canada, MFN treatment guarantees that Venezuela will not treat investments from Canada any less favorably than it would treat investments from Brazil or Chile. The idea is to create a non-discrimination clause in the investment treaty, ensuring that the party state is not denied any investment benefits.[167] As a result,

157. *See* Surya P. Subedi, International Investment Law: Reconciling Policy and Principle 8 (2008).
158. *Id.*
159. *See id.* at 7-8.
160. *See id.* at 8-9.
161. *See id.* at 12-13.
162. *See* Omalu, *supra* note 64, at 8-9.
163. *See* Subedi, *supra* note 157, at 68.
164. *Id.*
165. *Id.* (internal quotations omitted) (citations omitted).
166. Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 186 (2008).
167. *See* Subedi, *supra* note 157, at 68.

"as soon as [a] state . . . confer[s] a relevant benefit [to a third party state], [that benefit] is automatically extended to the state that benefits from the MFN clause,"[168] putting the party state and its citizen investors on an equal ground with investors from other states.

2. *National Treatment*

Whereas MFN treatment assures that no state or its citizens will be discriminated against in relation to other states and their citizens, the principle of national treatment guarantees party states and their citizens the same treatment as nationals.[169] In accordance with the principle of national treatment, "a host state [is] to make no negative differentiation between foreign and national investors when enacting and applying its rules and regulations . . . ."[170] Some treaties contemplate national treatment as treatment "no less favorable" than treatment afforded to nationals.[171] The idea behind this understanding of the principle is that international law might afford investors greater protection than a host country provides to its own nationals.[172] By using the term "no *less* favorable," a country implicitly acknowledges that national treatment does not necessarily entail treating an investor in the same manner as a national, in the event that such treatment falls below the international minimum standard.[173] Other treaties contemplate national treatment as applying only when the foreign and domestic investors are in "like circumstances."[174] However, "tribunals have been cautio[us] not to construe the basis of comparison for the applicability of the national treatment standard too narrowly."[175]

B. Dispute Resolution

Although the standards of protection discussed above endeavor to provide agreed-upon standards of treatment to foreign states and their citizens' investments, parties occasionally have to deal with a breach of those standards. In the event that an investor is not granted the standards of protection afforded by treaty, an investor should have some means of recourse against the breaching host country. In accordance with "traditional international law, investors did not have direct access to international remedies to pursue claims against foreign states for violation of their rights."[176] Instead, investors were forced to rely on diplomatic action taken on their behalf.[177] However, since diplomatic action generally politicizes disputes, an arguably better dispute resolution mechanism would empower investors

168. DOLZER & SCHREUER, *supra* note 166, at 186.
169. *See id.* at 178.
170. *Id.*
171. *See id.*
172. *Id.*
173. *See id.*
174. *Id.* at 178-79; *see* SUBEDI, *supra* note 157, at 71.
175. DOLZER & SCHREUER, *supra* note 166, at 180.
176. *Id.* at 211.
177. *Id.*

to bring claims directly against an offending host state.[178] Treaties now typically provide for dispute resolution by way of investor-state arbitration.[179]

One of the main advantages of providing for investor-state arbitration is that it signals that, in the event of a dispute arising out of contract with a host state, an investor has recourse to an independent dispute settlement mechanism.[180] The International Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID) was created in order to establish an independent dispute resolution process.[181] A host state's ratification of the ICSID signals that it has agreed to resolve disputes upon consent.[182] However, "Article 26 of the ICSID Convention makes it clear that a state may make the exhaustion of local remedies a condition of consent to arbitration."[183] In such circumstances, a state may make a foreign investor first resort to domestic legal processes.

In the late 1800s, a doctrine that required foreign investors to submit disputes to local courts found favor among several Latin American countries.[184] Known as the "Calvo doctrine"—named for Argentine jurist Carlos Calvo—this doctrine required foreign investors to "exhaust local remedies prior to resorting to international arbitration or international adjudication."[185] The Calvo doctrine essentially puts foreign investors at the mercy of domestic courts applying domestic laws.[186] Latin America's flirtation with the Calvo doctrine may not be completely over. Although there are signs indicating that some Latin American countries are increasingly wary of the ICSID and may favor domestic dispute mechanisms,[187] the region may recognize that foreign investors are unlikely to continue investing in South American energy if the region lacks an independent dispute resolution mechanism.[188]

178. *See* SUBEDI, *supra* note 157, at 97.

179. *See* DOLZER & SCHREUER, *supra* note 166, at 213-14.

180. *See* SUBEDI, *supra* note 157, at 30.

181. *See id.*

182. *Id.* at 31.

183. DOLZER & SCHREUER, *supra* note 166, at 215.

184. *See* SUBEDI, *supra* note 157, at 14-15.

185. *Id.* at 14.

186. *See* Laura Henry, *Investment Agreement Claims under the 2004 Model U.S. BIT: A Challenge for State Police Powers?*, 31 U. PA. J. INT'L L. 935, 936 n.2 (2010) (citations omitted).

187. *See* Ignacio A. Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16 LAW & BUS. REV. AM. 409, 410 (2010) ("The most critical examples of recent hostility against ICSID in Latin America are found in the cases of Bolivia, Ecuador, and Venezuela. In fact, in 2007 Bolivia became the first country ever to denounce the Washington Convention, thus formally withdrawing from ICSID. Ecuador followed Bolivia's path and became the second country to denounce the Washington Convention, and the Venezuelan Supreme Court issued an opinion limiting the reach of the country's consent to submit to the Centre's jurisdiction.").

188. *See* SUBEDI, *supra* note 157, at 31 ("[ICSID] states would . . . stand a better chance of attracting foreign investment from those investors wary of losing their investment through expropriation, nationalisation or other government actions.").

III. The Energy Charter Treaty in a Nutshell

One of the unique aspects of the European Energy Charter Treaty (ECT) is that it is a sector-specific investment treaty.[189] In other words, European community states developed the ECT in order to facilitate trade and investment in the energy sector.[190] After the fall of the former Soviet Union, there was some concern that Europe might face energy supply problems as the former Soviet bloc integrated into the greater European community.[191] In June 1990, Ruud Lubbers, the former Prime Minister of the Netherlands, brought the idea of a "European Energy Community" to a European Council meeting.[192] After several years of negotiation, this idea developed into the Energy Charter Treaty, which "was signed in Lisbon on December 17, 1994 by 49 States and the European Community."[193]

Another unique aspect of the ECT is its multilateral nature.[194] The ECT has fifty-one member states,[195] including the twenty-seven member states of the European Union (EU), and twenty-four non-EU states.[196] Indeed, the ECT was adopted as a multilateral treaty precisely because "multilateral rules can provide a more balanced and efficient framework for international cooperation than is offered by bilateral agreements alone or by non-legislative instruments."[197] Accordingly, the ECT endeavors to provide a common "legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits."[198]

The ECT deals with four aspects of the energy sector: transit, environment, trade, and investment.[199] While a comprehensive analysis of the ECT may offer additional specific model provisions for a regional energy treaty, the parts of the ECT dealing with transit, trade, and the environment are outside the scope of this Note. Instead, some of the key investment provisions included in Parts III and V of the ECT will be outlined in order to highlight some of the ECT's international investment protection aspects.[200] The provisions of Parts III and V of the ECT can serve as a model for a South American regional energy investment treaty, which the region's countries might alter in order to better serve their interests.

189. *See* Dolzer & Schreuer, *supra* note 166, at 27.

190. Graham Coop, *Energy Charter Treaty and the European Union: Is Conflict Inevitable?*, 27 No. 3 J. Energy & Nat. Resources L. 404, 415 (2009).

191. *See* Omalu, *supra* note 64, at 51.

192. *Id.*

193. *Id.* at 51-52.

194. *See id.* at 51 n.62.

195. About the ECT, *supra* note 46.

196. Coop, *supra* note 190, at 415-16.

197. About the ECT, *supra* note 46.

198. Lucy Reed & Lucy Martinez, *The Energy Charter Treaty: An Overview*, 14 ILSA J. Int'l & Comp. L. 405, 406 (2008) (internal quotations omitted) (citation omitted).

199. Danae Azaria, *Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade*, 27 J. Energy & Nat. Resources L. 559, 563 (2009).

200. Loukas A. Mistelis & Crina Mihaela Baltag, *Denial of Benefits and Article 17 of the Energy Charter Treaty*, 113 Penn St. L. Rev. 1301, 1302 (2009).

A. ECT Standards of Protection

Under Article 10 of the ECT, investors are to be afforded "treatment . . . by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable."[201] This provision essentially guarantees investors either national treatment or most-favored nation treatment.[202] Most-favored nation treatment ensures that investors are treated no less favorably than investors from other third party states.[203] National treatment affords investors the same protection that nationals enjoy.[204] In the event that third parties are treated better than nationals, under ECT Article 10, most-favored nation treatment would apply, giving all investors the level of protection that the most-favored nation enjoys.[205]

Additionally, the ECT sets out some very important provisions regarding expropriation.[206] Article 13 of the ECT generally prohibits host countries from nationalizing or expropriating investments.[207] However, a host state may engage in nationalization or expropriation in certain limited circumstances.[208] Expropriation is acceptable when it is "(a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation."[209] Thus, the ECT's provision dealing with expropriation does not prohibit states from expropriating a foreign investors' assets outright; it does, however, mandate compensation in the event of expropriation.[210] In this sense, the ECT strikes a balance between a state's need to exercise its sovereignty and an investor's interest in having a more predictable and reliable investment environment.

B. Dispute Settlement Mechanism: Investor-State Arbitration

Perhaps one of the most important features of the ECT is its section governing dispute resolution. Under Article 26, the ECT affords investors several options with regard to settling disputes arising under the treaty.[211] Indeed, the dispute settlement clause of the ECT allows investors to seek resolution in the courts of the host state, in accordance with an agreed-upon dispute resolution procedure, or in front of an international arbitration tribunal.[212] The last option—international arbitration—is considered by some to be "the 'most potent' method in the treaty's investment

201. Energy Charter Treaty art. 10(3), 34 I.L.M. 360, 389 (1995) [hereinafter ECT].
202. Reed & Martinez, *supra* note 198, at 414–15.
203. *See supra* Part II.A.1.
204. *See supra* Part II.A.2.
205. *See* Reed & Martinez, *supra* note 198, at 414–15.
206. *See id.* at 407.
207. ECT, *supra* note 201, art. 13(1).
208. *See id.*
209. *Id.*
210. *See id.*
211. *Id.*, art. 26(2).
212. *Id.* art. 26(2)-(3).

regime."[213]

Pursuant to Article 26 of the ECT, member states generally unconditionally consent to submit disputes to international arbitration, if that is the means by which an investor wishes to settle a dispute.[214] However, certain member states have qualified their consent to arbitration in various ways.[215] Annex ID of the ECT lists certain member countries that have agreed to consent to arbitration so long as the investor has not pursued domestic remedies or submitted to another previously agreed-upon mode of dispute settlement.[216] Known as the 'fork in the road provision,' Article 26(3)(b) of the ECT essentially forces investors to make a decision with regard to the dispute settlement forum.[217] If an investor brings a claim against one of the member countries listed on Annex ID in that host country's domestic courts or in another agreed-upon forum, that investor may not double-dip by seeking relief in international arbitration.[218] Additionally, Article 26(3)(c) provides that none of the member states listed on Annex IA of the ECT have consented to have claims brought before an international arbitration tribunal.[219] Disputes with these states must be resolved in domestic courts or in another agreed-upon dispute resolution forum, pursuant to ECT Article 26(2).[220] Finally, the ECT expressly recognizes three acceptable international arbitration forums if an investor chooses to bring a claim before an international arbitration tribunal.[221] The three recognized options are the ICSID,[222] an arbitration tribunal "established under the Arbitration Rules of the United Nations Commission on International Trade Law"[223] (UNCITRAL), or "an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce."[224]

IV. A South American Energy Treaty

By adopting a multilateral energy investment treaty similar to the ECT, the countries of South America may be better able to promote foreign investment in their respective energy sectors. For one, foreign investors would have a better understanding of the standards of protection provided by member states, since such standards of protection are explicitly defined

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213. OMALU, *supra* note 64. at 88 n.118 (citation omitted).
214. *See* ECT, *supra* note 201, art. 26(3)(a).
215. *See id.* art. 26(3)(b)-(c).
216. *See id.* art. 26(3)(b); *see also* ECT Annex ID (listing, *inter alia*, the European Communities, the Russian Federation, and several non-EU member states).
217. *See* Reed & Martinez, *supra* note198, at 423.
218. *See id.*
219. *See* ECT, *supra* note 201, art. 26(3)(c); *see also* ECT Annex IA (listing Australia, Hungary and Norway). It should be noted that Canada is a state listed on Annex IA but Canada has not signed the ECT. ECT Annex IA.
220. *See* ECT, *supra* note 201, art. 26(2).
221. *See Id.* art. 26(4).
222. *Id.* 26(4)(a).
223. *Id.* 26(4)(b).
224. *Id.* 26(4)(c).

and agreed-upon by party states.[225] Additionally, these standards of protection would afford foreign investors the better of national or most-favored-nation treatment.[226] This would signal to foreign investors that their investments would be protected to the same extent that the investments of nationals or third parties are protected.[227] Foreign investors would no longer fear discriminatory treatment by the host country.

Additionally, such a regional energy treaty would provide for agreed-upon dispute resolution processes.[228] A South American energy treaty could explicitly arrange acceptable modes of dispute settlement so that investors would know their options in the event that a dispute arises between them and a host state. Furthermore, as in Annexes ID and IA of the ECT, South American countries could expressly qualify their consent to submit to certain dispute resolution forums, strengthening the predictability of their commitments.[229] This would allow the South American countries some flexibility in their commitments to submit to arbitration, while also signaling a greater recognition of the need for a dispute resolution mechanism that carries a degree of independence. Ultimately, a regional energy treaty would promote foreign investment because it would provide clearer standards of protection, more predictable terms of expropriation, and more independent mechanisms under which to settle investment disputes.[230]

However, despite these advantages, there are several obstacles that stand between the region and an effective multilateral energy treaty. For one, it may be difficult to adequately coordinate the region. After all, the ECT grew out of meetings of the European Council.[231] Europe already had a fairly consolidated regional framework in place before discussions of the ECT commenced.[232] In South America, there are currently several regional communities established.[233] However, no one international organization fully and effectively integrates the region.[234] Perhaps the region will be better able to facilitate international discussions leading to a regional energy treaty after the creation of UNASUR, but the viability of that regional body remains to be seen.

Second, there may be signs indicating that some South American countries are beginning to eschew international arbitration as a dispute resolution mechanism,[235] returning to a policy that more heavily favors the

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225. Of course, investors would only receive protection under such a treaty if they were citizens of a party state or otherwise fell within the purview of the treaty's investment protection provisions.
226. *See* ECT, *supra* note 201, art. 10(3).
227. *See supra* Part II.A.
228. *See supra* Part II.B.
229. *See generally id.*
230. *See supra* Part II.; *see also* ECT art. 10.
231. *See* Omalu, *supra* note 64, at 51.
232. *See id.*
233. *See* Introduction (discussing MERCOSUR and the Andean Community).
234. *See* Universia, *supra* note 6 (noting the dubious potential for energy integration in South America, given the political and economic obstacles that exist in the region).
235. *See* Vincentelli, *supra* note 187, at 454.

Calvo doctrine with regard to international investment disputes.[236] Bolivia renounced the ICSID as a dispute settlement forum, and formally withdrew from it in 2007.[237] Ecuador quickly followed Bolivia's lead, and Venezuela has recently limited its relationship with the ICSID.[238] Although these actions may be interpreted as indicating an increased reluctance to submit to international dispute mechanisms, it may be possible for the region to create its own international arbitration system in a character more in tune with the region's political dynamics. Perhaps such an individualized arbitration mechanism might entail a panel of one or two regional arbitrators on a panel along with a sufficient number of extra-regional arbitrators.

Additionally, a regional arbitration center might be created that also adopts an appellate review system. An appellate system might be desirable to member states insofar as it would perceivably reduce the power of any single panel of arbitrators. Although some have argued that an appellate mechanism might create several practical problems for the ICSID,[239] it may be possible to create a regional arbitration center that has such an appellate system in place. Ultimately, these are issues for the region to decide, but they may be issues worth further analysis and intra-regional discussion.

Third, some of the South American countries may have strained political relationships with one another and with extra-continental nations.[240] This may be problematic insofar as some South American countries do not wish to offer certain foreign investors most-favored-nation treatment or national treatment. These countries may indeed wish to discriminate against certain countries and their investors. It is most likely in these countries' best interests to reconcile their political differences with their interest in promoting greater economic development by way of increased foreign investment. After all, "non-discrimination has . . . been regarded as the fundamental principle of liberalism."[241] However, it may instead be more realistic for the South American nations to adjust the definition of "investment" under a regional energy treaty, perhaps excluding certain kinds of investments from the protection of the treaty. The energy treaty would thereby discriminate against certain investments rather than certain investors. In this way, the South American region may avail itself of the benefits of a multilateral energy investment treaty while accounting for the particular interests and needs of the region.

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236. *See* SUBEDI, *supra* note 157, at 191.

237. Vincentelli, *supra* note 187, at 410.

238. *See id.*

239. August Reinisch, *The Future of Investment Arbitration*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPHER SCHREUER 894, 910 (Christina Binder et al. eds., 2009).

240. *See Venezuela 'to Break Off Diplomatic Relations with Colombia'*, THE TELEGRAPH, http://www.telegraph.co.uk/news/worldnews/southamerica/venezuela/6090910/Venezuela-to-break-off-diplomatic-relations-with-Colombia.html (last visited Jan. 24, 2011) (discussing Venezuela's criticism of Colombian and U.S. policy); *but see Colombia and Venezuela Restore Diplomatic Relations*, BBC, Aug. 10, 2010, http://www.bbc.co.uk/news/world-latin-america-10926003 (discussing Venezuela's intention to rekindle diplomatic relations with Colombia).

241. OMALU, *supra* note 64, at 91.

Conclusion

South America, although resource-rich, is not fully maximizing the potential of its energy supplies.[242] Several factors contribute to the continent's under-production, but a primary concern is the region's lack of an integrated and effective investment protection system.[243] Indeed, foreign investors may be increasingly wary of investing in the region's energy sectors, since some of the more resource-rich states—including Venezuela, Bolivia, and Ecuador—have recently engaged in activities that indicate an increasing attitude of resource nationalism.[244] As a result, foreign investors may view the region's energy projects as unduly risky.

The ECT was created in an effort to facilitate investment in the European community after the fall of the Soviet Union.[245] The European states united to adopt a multilateral energy treaty that provides for the protection of foreign investments in the energy sector.[246] By providing member states and their investors certain standards of protection and mechanisms to resolve disputes, the ECT creates a more predictable legal framework for international investments.

Although the ECT may not be wholly transportable to South America, many of its precepts could inform the creation of a South American regional energy treaty. With proper coordination and consideration of local interests, the region may be able to agree on the terms of a multilateral investment treaty that will provide greater clarity for investors. Although such a treaty may be many years from fruition, it is important for the region to begin considering a comprehensive plan to promote energy investment.

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242. *See* Hanson, *supra* note 2.
243. *See supra* Introduction.
244. *See supra* Part I.
245. *See* Omalu, *supra* note 64, at 51.
246. *See supra* Part III.