
2. Beyond the WTO: Regional and Bilateral Rules Affecting Energy and Energy Investments

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1 Introduction

This chapter looks at developments outside the WTO framework that affect energy goods, services and investments, including obligations of states to accord energy investments internationally-recognised standards of treatment. Of particular interest in the context of this volume are the large and growing number of regional and bilateral trade agreements containing rights and obligations affecting energy that are outside the multilateral system. This includes the conclusion of bilateral investment-protection agreements, at what seems to be an accelerating rate.

An important issue for examination is not only the scope of these treaty obligations but also the circumstances under which state regulation can be challenged by energy and resource investors through international arbitration. Some arbitration awards have shed light on the answer to this question and these therefore merit careful attention by the energy business and its advisors. After exploring energy investments and host-state obligations, this chapter also looks at some other issues in regional agreements, beyond those in the WTO Agreement, affecting trade-in-energy goods and services trade, including energy transit, as possible models for post Doha-Round thinking.

This examination finds that jurisprudence outside of the WTO context is developing in a variety of ways, as dispute settlement panel decisions and arbitration awards are rendered under these bilateral and regional treaties. The challenge for the international community is, somehow, to try to ensure consistent application of these rules so that the integrity and authority of the multilateral system is not weakened.

2 Regional trade agreements and the rules of the GATT

Regional trade agreements ('RTAs') have proliferated outside of the WTO system in recent years. Numerous articles and scholarly papers have documented them and analyzed their significance in relation to the multilateral regime embodied in the

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General Agreement on Tariffs and Trade (GATT) and the WTO Agreement.¹⁹ Given the continuing prominence of these RTAs, questions arise as to how rules applied in the regional context might influence future WTO negotiations and interpretations of WTO rules by panels or by the Appellate Body. While this is a large subject outside the scope of this paper, the issue is a critical one, as RTAs continue to emerge and as these dispute settlement bodies develop their own 'extra-WTO' jurisprudence.

The most prominent RTA, of course, is the Treaty of Rome and the multitude of subsidiary instruments, regulations, and directives making up the EU, with its common external tariff and removal of border restrictions among member states (although the EU is an institution of quasi-sovereign status involving much more than a classic trade agreement). This note does not intend to deal with EU institutions and its myriad of internal market regulations, since those are covered in abundant literature elsewhere. The focus of this article is on more typical trade and customs agreements and their close cousins, bilateral investment-protection agreements.

Among key RTAs is the MERCUSOR, a regional trade and customs agreement formed by the Treaty of Asuncion in 1991. There are no specific energy chapters in MERCUSOR or in its subsidiary treaties. However, as both tariffs and non-tariff barriers (NTBs) are reduced, and in some cases eliminated, under the treaty's trade liberalisation measures, MERCUSOR ensures that energy goods and services flow among the parties without restriction. The European Free Trade Association (EFTA) and The Caribbean Community are RTAs that follow similar approaches. They do not address specific sectors or industries but apply tariff preferences and GATT-based most-favoured-nation (MFN) non-discrimination rules across the board to all goods, including energy.

The ASEAN FTA is of interest in that one of its subsidiary agreements, the Framework Agreement on Enhancing ASEAN Economic Cooperation (Singapore, 1992), includes commitments among members to enhance cooperation in energy, including energy planning, information exchanges, research and development, and the exploration, production, and supply of energy resources. The Framework Agreement is a soft set of commitments, falling short of hard legal rules. However, there are useful ideas here in terms of prescribing standards of regional cooperation in energy that could serve as models in future international examination of energy issues.

While this sketchiest of reviews cannot do justice to the importance of these issues, it at least underscores the point that these 'extra-WTO' trade agreements – partly in response to the stalled Doha Round and the difficulty of getting consensus on major opening of markets for goods, services, and investments – will inevitably impact the multilateral system. As governments respond to pressures to resolve trade and investment concerns through discrete agreements as a more expedient route, it comes as no great revelation that this places increased strains on the multilateral system.

19 There are far too many to cite here. However, for a good review of these RTAs and their compatibility with the WTO Agreement, see: Bartels, L. and Ortino, F., *Regional Trade Agreements and the WTO Legal System*, Oxford University Press (2006); Crawford, J. and Fiorentino, R., 'The Changing Landscape of Regional Trade Agreements', Discussion Paper No. 8, WTO 2005. As that study points out, as of 2005 there were 170 RTAs notified to the GATT/WTO that were in force.

3 NAFTA and the Energy Charter Treaty

Chapter 6 of the NAFTA (Energy and Basic Petrochemicals) contains a series of GATT-inspired legal obligations for the treatment of trade in energy and basic petrochemical goods and cross-border trade in services associated with such goods. While not specifically stated, the purpose of Chapter 6 is to move the three Parties towards a single North American energy market. Subject to limited exceptions, the NAFTA incorporates all GATT rights and obligations to North American trade in energy goods and services. Export restrictions are permitted in accordance with Article XI and Article XX of the GATT, but subject to a proviso that guarantees a proportion of supply to importing NAFTA members. In terms of internal 'energy regulatory measures', GATT non-discrimination requirements apply.

The Energy Charter Treaty (ECT) is unique as a stand-alone treaty that is specific to the energy sector and therefore highly significant in any examination of the development of rules and disciplines outside the WTO context.²⁰ The underlying purpose of the ECT is to ensure Western European states security of supply of energy (notably natural gas from Russia) in exchange for obligations respecting border treatment of exports and investments. ECT provisions are based on the GATT/WTO pillars of non-discrimination, national treatment, prohibition of export and import restrictions, and access to markets on an open and transparent basis. These cover: i) Protection of foreign investments, based on the extension of national-treatment or MFN treatment (whichever is more favourable), ii) free trade in energy through non-discriminatory conditions for trade-in-energy materials, products and energy-related equipment, iii) freedom of transit through pipelines and grids, iv) promotion of energy efficiency and minimizing the environmental impact of energy production and use, and v) resolution of disputes between participating states, and – in the case of investments – between investors and host states.²¹

On investments, the ECT breaks new ground in setting out sector-specific obligations on the part of host States respecting investments related to 'Energy Materials and Products.'²² Article 26 creates investor-state dispute settlement provisions modelled on NAFTA Chapter 11, allowing an investor to invoke binding rules under the ICSID or UNCITRAL Rules or, additionally, under the Arbitration Institute of the Stockholm Chamber of Commerce. We will return to these investment provisions below, in discussing developments in investment arbitration

20 There is a vast amount of material published on the ECT, some of which is cited below. The legal documents comprising the Treaty can be found in *The Energy Charter Treaty and Related Documents*, published by the Energy Charter Secretariat (2004), at: www.encharter.org.

21 Konoplyanik, Andrei and Wälde, Thomas, 'Energy Charter Treaty and its Role in International Energy', (2006) 24 *Journal of Energy & Natural Resources Law* 523 at 529.

22 As summarised on the website of the Energy Charter Secretariat: 'The investment provisions of the Treaty aim to promote and protect foreign investment in member countries. To this end, the Treaty grants a number of fundamental rights to foreign investors with regard to their investment in the host country. Foreign investors are protected against the most important political risks, such as discrimination, expropriation and nationalisation, breach of individual investment contracts, damages due to war and similar events, and unjustified restrictions on the transfer of funds. The dispute settlement provisions of the Treaty, covering both state to state arbitration and investor-state dispute settlement, reinforce these investor rights'. ECT website, www.encharter.org.

awards in the ECT context. What is important to signal at this juncture is that investment disputes and trade disputes are increasingly intertwined and that, inevitably, jurisprudence in investment disputes will have a bearing on application of the rules governing the international trading system.

4 Transit rights and energy

The GATT transit provisions in Article V were written for movement of hard goods under an earlier time with different circumstances when trade in energy goods and services was less of an issue. GATT Article V allows the transit state to apply reasonable charges and regulations 'having regard to the conditions of the traffic', provided that 'all charges, regulations and formalities in connection with transit' are applied on an MFN basis. The provisions prevent one WTO member from interfering with freedom of transit of energy goods from another member 'via the routes most convenient for international transit'.

Article V contains no national-treatment requirement, however, and, as worded, means that energy goods in transit can be subject to a range of measures that are more onerous than those applicable to local goods. Moreover, the MFN obligation deals only with 'charges, regulations and formalities in connection with transit' and leaves open the possibility of discriminatory measures respecting grid and distribution access.

There are a number of other uncertainties in Article V. First, transit requirements cannot be so onerous as to derogate from the primary freedom-of-transit rule and any charges and regulations must be 'reasonable, having regard to the conditions of the traffic'. There may be a point where these become genuinely restrictive and interfere with the right of transit. In the case of environmentally sensitive energy goods, for example, at what point does the right of the transit state to control and regulate environmental concerns run up against the primary right of the sending state to transit freedom?

Securing more robust transit rights than GATT Article V was one of the main objectives of the ECT, a factor of paramount importance given the geographic situation of many Western and Central European States in relation to energy supplier countries.²³ Article 7, paragraph (1), states that ECT Contracting Parties

...shall take the necessary measures to facilitate the Transit of Energy Materials and Products consistent with the principle of freedom of transit and without distinction as to the origin, destination, or ownership of such Energy Materials and Products or discrimination as to pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions, or charges.

Article 7, paragraph (3) provides that in respect to the use of 'Energy Transport Facilities', each Party shall treat energy materials and products in transit 'in no less favourable a manner than its provisions treat such materials and products originating in or destined for its own Area, unless an existing international agreement provides

23 Konoplyanik, A and Wälde, T, 'Energy Charter Treaty and its Role in International Energy', (2006) 24 *JENRL*, *supra*, at p. 543.

otherwise.' The ECT thus creates firm obligations on ECT members to authorise and facilitate energy transit, including what has been described as a 'soft' obligation to favour the construction of new facilities, to abstain from unwarranted closure of transit facilities (e.g., for political reasons), and to make sure state and private transit operators do not undermine that obligation.²⁴

The NAFTA applies GATT to trade in energy goods but contains nothing beyond GATT Article V in terms of transit. The ASEAN FTA transit provisions apply to trade in goods and to road, rail, and air transit, without any special reference to energy goods *per se*. Likewise, there are no specific energy transit provisions in MERCUSOR or EFTA. Detailed directives are in force in the EU respecting transit obligations of energy among member States, however, that is a matter of internal market regulation by the Commission and not an international trade obligation in the sense addressed in this note.

Given the increased importance of access to and transit of energy resources in various regional contexts, the question arises whether governments should examine better and more concrete obligations (and rights) in this domain, building on GATT Article V, with reference to regional precedents, including the NAFTA and particularly the Energy Charter Treaty. This entire subject of energy transit would seem to be worthy of post-Doha Round examination by governments.

5 Bilateral investment treaties and energy

We now turn to the interesting issue of bilateral investment treaties ('BITs'), sometimes called international investment agreements ('IIAs') or foreign investment protection agreements ('FIPAs'). These treaties set down standards of treatment for foreign direct investment and, like the NAFTA and the ECT, establish frameworks for settling disputes where the host State fails to live up to those obligations.

Whether styled as FIPAs, IIAs or BITs, these treaties ensure that foreign energy sector investors will not be treated worse than similarly situated domestic investors or other foreign investors, that they will not have their investments expropriated without prompt and adequate compensation, and that they will not be subject to less than a minimum standard of treatment, often referred to as the 'fair and equitable treatment' standard. Many follow the NAFTA and ECT, although other bilateral models are current, including those based on one developed within the OECD.²⁵

The impact of these treaties on international trade in the energy sector cannot be ignored. Arbitration panels are dealing with the application of standards of host-state

24 Konoplyanik, A. and Wälde, T., *ibid.*, p. 543. As discussed by the authors, ECT members are aiming to enhance the treaty's transit provisions through the conclusion of a Transit Protocol in order to put in place 'a regime of commonly accepted operations principles covering transit flows of energy resources, both hydrocarbons and electricity, crossing at least two national boundaries, designed to ensure the security and non-interruption of transit'. *Op. cit.*, 544.

25 For a useful summary of the contents and the terms of BITs, see: UNCTAD, *Investment Agreements On-Line*, www.unctadxi.org. UNCTAD has been monitoring the increase in the number of bilateral treaties for the promotion and protection of foreign investment (BITs). The number of BITs increased dramatically during the 1990s. Their number rose from 385 in 1989 to a total of 2,265 in 2003. They now involve bilateral relations among 176 countries, virtually every State on the planet.

treatment affecting some of the most important areas of capital flows into resource and energy development and, directly and indirectly, transnational business in these sectors. One of the more interesting issues in application of these treaties is the way panels are applying rules regarding ‘fair and equitable treatment’ and ‘full protection and security’, terms widely used in these treaties.

5.1 Fair and equitable treatment standard in regional treaty regimes

The concept of ‘fair and equitable treatment’ – and the related notion of ‘full protection and security’ – is largely a post-World War II development. Reference to these terms is found in the 1948 Havana Charter and a number of draft conventions that evolved since, including the 1967 draft OECD Convention on the Protection of Foreign Property, the draft United Nations Code of Conduct on Transnational Corporations and number of other international drafting initiatives.²⁶ Later efforts by the OECD to consolidate these in a multilateral agreement on investment (‘MAI’) in the 1990s foundered, largely because of the public controversy over the right of foreign investors to invoke binding arbitration against governments. However, before that exercise folded, the 1998 draft contained a provision that codified previous efforts, stating,

Each Party shall accord *fair and equitable treatment and full and constant protection and security* to foreign investments in their territories. In no case shall a contracting party accord treatment less favourable than that required by international law. [emphasis added]

The MAI formulation, in fact, is very close to the words used in NAFTA Article 1105:

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, *including fair and equitable treatment and full protection and security.*²⁷ [emphasis added]

The ECT investor-State provisions are modelled on Chapter 11 of the NAFTA, with more expansive (some would say confusing) wording in Article 10, which provides:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. *Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.* Such Investments shall also enjoy the most *constant protection and security* and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party. [emphasis added]

26 The history of these efforts and a useful analysis of the jurisprudence is provided in an OECD report in *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on International Investment, 2004/3, September 2004: www.oecd.org.

27 NAFTA also contains obligations of NAFTA Parties regarding non-discrimination and to ensure that expropriation of investments can only be for a public purpose, with due process and followed by prompt and effective compensation.

Other multilateral instruments contain references to the 'fair and equitable' standard, including the 1994 Colonia Protocol signed by MERCUSOR member-states and the 1987 ASEAN Treaty for the Promotion and Protection of Investments. Like the NAFTA, these provisions apply across the board. While offering protection to investors in all sectors, they provide these important procedural and substantive rights equally to energy investors and are of value for that reason.

It is obvious to any lawyer that, with these various formulations, there remains uncertainty as to whether 'fair and equitable treatment' is an objective standard based on public international law or a more pragmatic, flexible, and subjective standard based on the circumstances and context of the particular treaty. As noted in a study of investment treaties by UNCTAD (2007),

According to some scholars, the obligation to grant foreign investment 'fair and equitable treatment' is not different from the obligation to treat investment in accordance with the international minimum standard . . . According to other scholars, however, 'fair and equitable treatment' means something different from the international minimum standard. On this view, the term 'fair and equitable treatment' should be given its plain meaning. This results in a case-by-case application of a test based on equity in order to determine whether the standard has been infringed.²⁸

This conundrum is illustrated by recent awards and the debate in legal academic circles over different approaches to application of the term and its proper scope in international law.²⁹ Presently, we will see how this debate has played out in some important arbitration decisions that have had to deal with this issue.

IAs, FIPAs and BITs, no matter what they are called, include similar obligations on minimum standards of treatment, and ensure, as in the ECT and the NAFTA, 'fair and equitable treatment' and 'full protection and security'. As in the case of the multilateral treaties just reviewed, these terms are sometimes linked to the phrase, 'in accordance with customary international law', which implies reference to an objective, external standard.³⁰ Whatever the formulation, the effect is to provide a legally enforceable floor, ensuring that host-state treatment will not fall below minimum standards, whether they are grounded in the treaty itself or externally referenced to customary international law.³¹

28 *Bilateral Investment Treaties, 1995-2006: Trends in Investment Rulemaking* (UNCTAD, United Nations, New York and Geneva, 2007, p. 28).

29 A very thoughtful analysis of the variety of formulas and interpretations of the fair and equitable standard under rules of treaty interpretation can be found in Hird, R. A., 'Thomas Wälde and Fair and Equitable Treatment', (2009), 27 *Journal of Energy & Natural Resources Law* 377.

30 For example, the U.S. Model Bilateral Investment Treaty (2004) and a number of recently-concluded US FTAs provide that 'Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.' (*Fair and Equitable Treatment Standard in International Investment Law*, OECD, *supra*, p. 12.) Canada's model FIPA uses similar words that link fair and equitable treatment of an investment to a minimum standard or 'floor' level of treatment below which state actions cannot fall: www.dfait-maeci.gc.ca/tna-nac.

31 Most FIPAs and BITs provide for dispute resolution where an investor alleges that the host state has not lived up to these treaty obligations. A common approach is to provide for arbitration under the International Convention on the Settlement of Investment Disputes (ICSID) or using the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

5.2 Scope of 'Fair and Equitable Treatment'

The incorporation of a minimum level treaty obligation ensures an *objective* element for energy investors, absent in the *relative* standards of non-discrimination and national treatment derived from the GATT and the WTO Agreement. The OECD study, referred to earlier, states that,

The obligation to provide 'fair and equitable treatment' . . . is an 'absolute', 'non-contingent' standard of treatment, i.e., a standard that states the treatment to be accorded in terms whose exact meaning has to be determined, by reference to specific circumstances of application, as opposed to the 'relative' standards embodied in 'national treatment' and 'most favoured nation' principles which define the required treatment by reference to the treatment accorded to other investment..³²

One of the challenges here is to define the content of that absolute standard and determine whether, in any given case, the terms are autonomous (i.e., determined by the specific investment treaty or agreement) or incorporate or are linked to an international law norm that exists outside the treaty itself. Some arbitral awards confine 'fair and equitable' to the four corners of the particular treaty in the absence of language that incorporates customary international law. Others have looked beyond the treaty to external norms where the words 'in accordance with customary international law' are employed.³³

The reference to customary international law raises additional challenges of interpretation as to what that standard is and how state action should be judged in relation to that standard. To put it another way, if the fair and equitable concept refers to a minimum standard recognised under customary international law, is that standard frozen in time, or has it evolved to take into account changing notions of acceptable conduct on the part of governments? Some clarification is provided by arbitration decisions under the ECT and the NAFTA and ICSID awards under various investment protection agreements.³⁴

Few of the twenty-odd investor-state cases under the ECT have proceeded to conclusion and, unfortunately, the few that have been decided have not been made public.³⁵ However, the recent ECT award in *Plama Consortium v. Bulgaria*³⁶ is available and sheds light on the scope of the 'fair and equitable treatment' obligation under ECT Article 10. In this case, the claimant argued that the government of Bulgaria and various State agencies frustrated the refinancing of a bankrupt lubricant-producing refinery, thereby decimating its investments and effectively expropriating its assets. Rejecting these claims, the tribunal found that the regulatory proceedings in Bulgaria to be within the bounds of what is fair and equitable under the circumstances.

32 *Fair and Equitable Treatment Standard in International Investment Law*, OECD, *supra*, p. 2.

33 *American Manufacturing & Trading (AMT)(US), Inc. v. Zaire*, ICSID Case No. ARB/93/1, Award 21 February 1997; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil (US) v. Estonia*, ICSID Case No. ARB/99/2.

34 A compendium of recent ICSID investment arbitration awards under these BITs or IIAs can be found in UNCTAD's most recent report, *Latest Developments in Investor-State Dispute Settlement*, IIA Monitor No. 1 (2008), UNCTAD/WEB/ITE/2008/3.

35 See the heading 'Investor-State Disputes' on the ECT website at: www.encharter.org.

36 Award, 27 August 2008: ICSID Case No. ARB/03/24.

Refusing to be drawn into considerations of customary international law, the tribunal stated that, 'a balanced interpretation which takes into account the totality of the Treaty's purpose is appropriate.'³⁷ With respect to the fair and equitable treatment obligation under ECT Article 10, it concluded that,

The stability of the legal framework has been identified as 'an emerging standard of fair and equitable treatment in international law'. However, the State maintains its legitimate right to regulate, and this right should also be considered when assessing the compliance with the standard of fair and equitable treatment.³⁸

With respect to the full protection and security under Article 10 of the ECT, rejecting the claimant's arguments here as well, the tribunal said that, 'the standard is not absolute and does not imply strict liability of the host State.'³⁹

Reading the *Plama* award, it seems that the tribunal wished to not be drawn into an examination of customary international law doctrine. Instead, it opted for a pragmatic, teleological approach, defining Bulgaria's obligations by reference to the words in the ECT as used in their context, in perfect accord with the Vienna Convention rules.⁴⁰ The result is that, in the ECT context at least, the obligation of fair and equitable treatment and full protection and security is to be applied as an autonomous treaty obligation based squarely on the treaty context and purpose and without reference to an external or 'objective' customary international law norm.

Several NAFTA arbitration awards have also dealt with the relationship between treaty obligations and customary international law. Not all are consistent in their legal reasoning. As noted in the OECD study referred to earlier, however, no NAFTA award confines the notion of 'fair and equitable treatment' to an autonomous standard within the NAFTA itself.⁴¹

The recent NAFTA arbitration award in *Glamis Gold v. United States*⁴² is illustrative

37 *Ibid.*, para. 167, following the views of the arbitration tribunal in *El Paso Energy v. Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 26 April 2006.

38 *Ibid.*, para. 177. Referring to *CMS v. Argentina*, the tribunal accepted the following proposition: 'It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of voiding such adverse legal effects.' [*CMS Gas Transmission Company v. Argentina*, Award of 12 May 2005, ICSID Case No. AR/01/8, para. 277.]

39 *Ibid.*, para. 181.

40 Article 31 of the *Vienna Convention of the Law of Treaties* (1969), oft-quoted in international adjudications, contains the well-known provision that a 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

41 *Fair and Equitable Treatment Standard in International Investment Law*, OECD, *supra*, p. 17. See, for example, the NAFTA awards in *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award 2 September 2000; *ADF Group v. United States*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003; *International Thunderbird Gaming Corp. v. Mexico*, Award, 26 January 2006.. It should be noted that the NAFTA Free Trade Commission issued an interpretative note in 2001 stating that the concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by minimum standard under customary international law. www.dfait-maeci.gc.ca.

42 ICSID Arbitration Award, May 2009, available at <http://www.state.gov/documents/organisation/110307.pdf>.

of this approach. Glamis, a Canadian mining company, claimed that newly enacted Californian regulations requiring mining companies to backfill and grade their excavations, plus Federal government delays in issuing mining approvals, among other things, breached the fair and equitable treatment obligations in NAFTA Article 1105. The tribunal undertook a close examination of the 'fair and equitable' doctrine and its evolution under customary international law. At the end, it dismissed Glamis' case, finding that none of California's actions nor those of the US federal government crossed the requisite threshold.

A number of previous NAFTA awards had found that the standard was not static but had evolved over time and, as stated in *ADF v. United States*, was 'constantly in a process of development'.⁴³ The *Glamis* award took a different approach. It noted that there was no disagreement between the parties that the requirement of fair and equitable treatment in NAFTA Article 1105 incorporated the customary international law minimum standard.⁴⁴ However, as stated by the tribunal,

The question thus becomes: what does this customary international law minimum standard of treatment require of a State Party vis-à-vis investors of another State Party? Is it the same as that established in 1926 in *Neer v. Mexico*? Or has the Claimant proven that the standard has 'evolved'? If it has evolved, what evidence of custom has Claimant provided to the Tribunal to determine its current scope?⁴⁵

Embarking on its examination, the Tribunal noted that, '[t]he customary international law minimum standard of treatment is just that, a [minimum standard]. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community.'⁴⁶ After reviewing developments, the tribunal held that the claimant had not proven that the standard had changed since 1926 and, based on the *Neer* doctrine,⁴⁷ required a measure to be 'egregious and shocking', citing as examples a 'gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons'. As stated by the tribunal, '[t] the fundamentals of the *Neer* standard thus still apply today.'⁴⁸

43 *ADF Group v. United States*, *supra*, para. 179. Other NAFTA investment awards under Chapter 11 also make reference to the 'evolutionary character of international law'. See also: *Mondev International v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 116. Interestingly, while both the *ADF* and *Mondev* awards accepted the evolutionary theory, both dismissed the claims as not having shown that governmental actions crossed the required threshold.

44 The NAFTA Free Trade Commission (made up of trade ministers of the three governments) had issued an earlier binding note of interpretation on 31 July 2001, stating that 'Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party'.

45 *Glamis Gold v. United States*, *supra*, Award, para. 600.

46 *Ibid.*, para. 615.

47 *Neer v. Mexico*, 4 Rep. Int'l Arb. Awards 60 (15 October 1926).

48 *Glamis Gold v. United States*, *supra*, Award, para. 616.

5.3 Arbitration awards under other BITs/FIPAs

A word should be said about investment awards under other bilateral investment treaties. While there are several that accept the 'objective' international law minimum standard,⁴⁹ others apply an autonomous and subjective standard under the treaty itself. For example, in *Tecmed v Mexico*⁵⁰, an award under an investment treaty between Spain and Mexico, the tribunal applied an autonomous treaty standard in accordance with the ordinary meaning of the words in their context, as opposed to incorporating an external, customary international law norm.

Other BIT and IIA awards vary in the articulation of the requisite standard, depending on the formulation in the treaty. While the choice of words is not always as precise as it could be, several awards apply an autonomous standard within the context of the treaty as opposed to struggling with identifying the applicable customary international law rule.⁵¹

The point of this examination is to show that energy and resource investors can draw some comfort from regional and bilateral investment agreements that provide defined (or 'absolute') standards protection, in contrast to the 'relative' standards inherent in the national-treatment and MFN rules. However, formulations in these treaties vary, and where the minimum international law standard has been incorporated, judging from *Glamis Gold* and a number of other NAFTA awards examined in this note, the very high bar of the *Neer* doctrine ('shocking and egregious') continues to apply.

The *Glamis* case is not the last word, of course. The award is confined to the NAFTA context and even within the NAFTA, awards are not precedents in the sense of *stare decisis* and future panels may disagree. That being said, governments may want to better define what they intend when the term 'in accordance with customary international law' is employed in these agreements.

6 Conclusions

This brief *tour d'horizon* of treaty rules affecting energy trade and investment outside the WTO context results in a number of issues for consideration in the post-Doha Round context.

1. Regional and bilateral trade agreements are proliferating outside the WTO Agreement. Many incorporate GATT and WTO Agreement-type rules and disciplines and assure open markets in the movement of energy goods, services and investments, even when energy is not singled out in these agreements for special treatment.
2. Even though these RTAs and FTAs typically incorporate multilaterally agreed norms and standards, some attention is warranted to analyzing their consistency, both in formulation and application, and the extent to which that they conform to the basic rules of the multilateral system.

49 *Fair and Equitable Treatment Standard in International Investment Law*, OECD, *supra*, p. 13, et seq.

50 *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003.

51 For example, *American Manufacturing and Trading v. Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997.

3. In addition to RTAs and FTAs, bilateral investment protection agreements (variously called FIPAs, BITs, IIAs) are growing in number, with possibly as many as 2,500 worldwide. The prominence of these investment agreements, which are also outside of the WTO orbit, has implications for the energy sector and for cross-border capital flows into energy-related projects.
4. Recent investment arbitration awards under these agreements, which are ad hoc in nature, have dealt with the kind of minimum standard of behaviour required of host States and thereby has direct implications for the energy sector. These awards are not necessarily consistent, however.
5. This may warrant further analysis and the need for some kind of agreed criteria – perhaps through protocols or interpretative notes issued by the Parties to the particular RTAs or BIT/FIPAs – as to the kinds of state actions that will be deemed contrary to treaty obligations. These criteria, even by way of an illustrative list, could assist future panels in applying the ‘fair and equitable’ doctrine in concrete instances.