Glamis Gold Ltd. Vs United States of America Award and Its Implication on the Scope of Article 1105 Minimum Standard of Treatment.

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The Glamis Gold Ltd. Vs United States of America award, rendered on the 8th of June 2009, is the latest NAFTA chapter 11 award.¹ Under the auspices of the International Center for the Settlement of Investment Disputes, the three arbitrators, Michael K. Young, President, David D. Caron and Kenneth D. Hubbard, in a not so short award, rejected unanimously Glamis Gold’s contentions. This case aroused controversy with regard to the scope, ratione personae, of the federal mining law of 1872.² The present note will focus on Glamis Gold’s article 1105 minimum standard of treatment claim.

Act one- Setting the scene.

Glamis Gold Ltd. (hereafter Glamis or Claimant) is a company incorporated in 1972 under the law of British Columbia, Canada. Through subsidiaries, Glamis operates in the exploration, development and extraction of precious metals in the US and Latin America. Glamis had successfully operated in the California desert throughout the 1980s and 90s. To pursue its development, Glamis decided to operate in the Imperial County situated less than ten miles from its previously operated mines.³ The Imperial project’s anticipated life was 19 years, starting in 1998 and ending in 2017. Through open-pit mining techniques, Glamis planned to remove 150 million tons of ore and 300 million tons of waste rock. The whole process would require three open pits, and the estimated yield was 1.17 million ounces of gold.⁴

³ Glamis, supra note 1 ¶ 27-29.
⁴ Ibid. ¶ 33.
Before moving onto the specific details of the Imperial project, let us first outline the legal framework of mineral operations in the US. The right to explore the valuable mineral deposits is enshrined in the federal mining law of 1872. The mining law authorizes US citizens to commence mineral operations on public lands in the absence of a patent. A valid mining claim suffices. This implies that the operator has to perfect its discovery by demonstrating that its plan is feasible. This confers to the operator a valid existing right (hereafter VER). With the VER, the operator can oppose to any subsequent withdrawal of land.\(^5\)

Under the Federal Land Policy and Management Act of 1976 (hereafter FLPMA), the Congress established the California Desert Conservation Area (hereafter CDCA), a large strip of land in southern California, because of its exceptional environmental qualities and fragile ecosystem. While designating the CDCA, the Congress highlighted that subject to VER, nothing in this Act shall affect the applicability of the US mining laws on the public lands within CDCA. However, an exception was introduced via the concept of “unnecessary or undue degradation”. Thus, FLPMA bestows the Secretary of Interior the power to amend the mining law if actions were necessary to prevent unnecessary or undue degradation of the environment.\(^6\) This concept, which is at the heart of the dispute, was later on interpreted by subsequent regulation.

While elaborating the CDCA plan, a native Indian tribe’s interests, the Quechan Tribe, were taken into consideration. Accordingly, several plots of land within the CDCA were designated as Area of Critical Environmental Concern (hereafter ACEC) whereby special management attention is required. One such area lies within one mile from the Imperial project site.\(^7\)

In 1980, pursuant to FLPMA, the Bureau of Land Management (hereafter BLM) promulgated the 3809 Regulations. In conformity with theses regulations, operators have to submit a Plan of Operation (hereafter POO) to the BLM. In turn, the federal and local agencies carry out a joint environmental impact assessment of the project.\(^8\) Since the Imperial project falls within the CDCA, including ACEC, BLM’s approval of the POO is required prior to the commencement of mining activities.\(^9\)

\(^5\) Ibid. ¶ 36-39, n. 67.
\(^6\) Ibid. ¶ 43, 44, 48.
\(^7\) Ibid. ¶ 52, 66.
\(^8\) Ibid. ¶ 62, 69-71.
\(^9\) Ibid. ¶ 47, 55-56.
In 1994, the California Desert Protection Act (hereafter CDPA) was promulgated. The CDPA designated several areas as components of the National Wilderness Preservation System. So doing, the CDPA established no buffer zones between the wilderness areas and the non-protected areas, allowing non-wilderness activities to be carried out immediately outside the perimeter of the wilderness areas.\(^{10}\)

The California legislature passed the Surface Mining and Reclamation Act (hereafter SMARA) in 1975. Under SMARA, a permit is required by the County’s lead agency in order to conduct surface mining operations. To receive the permit, the operator must submit a reclamation plan and financial assurances for the reclamation.\(^{11}\)

The federal and state legal framework having set up, we shall now proceed to the particulars of the Imperial project. Glamis acquired mining claim in the Imperial project in 1987, and a year later, Glamis started its exploration activities. From 1988 to 1996, BLM approved the different exploration and drilling projects of Glamis.\(^{12}\) In December 1994, pursuant to the 3809 Regulations and SMARA, Glamis submitted its Imperial project POO and its reclamation plan to the BLM and the lead agency respectively.\(^{13}\) At this stage, the federal and state authorities have to issue a joint environmental impact study.

In the meantime, Glamis completed its feasibility study confirming the project’s economic viability.\(^{14}\) The first joint draft environmental impact study was issued in November 1996. The authorities validated the POO, and alongside recommended some mitigation measures. But from the Quechan Tribe’s point of view, the POO led to a permanent destruction of a historical trail. BLM reacted by withdrawing the first draft, and decided to issue a new one taking into account the Quechan Tribe’s concerns. One year later, the second joint draft was released. The study concluded that the Imperial Project including an alternative that required complete backfilling of all open pits would have significant unavoidable impact on the tribe’s religious interests. However, the study validated the POO with some mitigation measures.\(^{15}\)

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\(^{10}\) Ibid. ¶ 67-68.

\(^{11}\) Ibid. ¶ 58, 72-74.

\(^{12}\) Ibid. ¶ 85-87, 97.

\(^{13}\) Ibid. ¶ 95-96.

\(^{14}\) Ibid. ¶ 97.

\(^{15}\) Ibid. ¶ 99, 102, 109-10.
Two interests were in conflict in this case. On one hand, Glamis has acquired a property right to carry out exploration and extraction under the mining law of 1872. And since the POO met the requirements of the 3809 Regulations, denying the project would be equivalent to taking of rights. In theory, approval of POO has to be based solely on the economic viability of the project. On the other hand, the First Amendment to the US Constitution protects the religious practice of native Indians.\textsuperscript{16}

In order to broaden its leeway, BLM considered withdrawing the affected land from further mineral entry. That option would allow BLM to deny authorization of any subsequent mining POO. So did BLM in October 1998. This segregated the lands for a period of two years. Prior to the withdrawal, Glamis was given the assurance that it would have \textit{de facto} VER as of the date of withdrawal pending the outcome of a formal VER, and that the review of the POO and preparation of environmental impact study will be carried out as initially planned.\textsuperscript{17} However, Solicitor Leshy requested that the Imperial project study be delayed until his report, known as the M-opinion, is closer to termination.\textsuperscript{18}

In December 1999, Solicitor Leshy issued his M-opinion. It clarifies BLM’s obligation under FLPMA regarding the protection of cultural and historical resources. The M-opinion reiterates the right to perform mining operations under the mining law of 1872, but goes further in interpreting the “undue impairment” standard of the FLPMA. Unlike the “unnecessary or undue degradation” standard, the “undue impairment” standard accords BLM the authority to deny permit of POO if the impairment of other resources is particularly undue and no reasonable measures are available to mitigate that harm.\textsuperscript{19} Glamis challenged without success the M-opinion before domestic courts.\textsuperscript{20}

The final joint environmental impact study was issued in September 2000. Unlike the previous drafts, the final study recommended that no action should be taken on the affected lands.\textsuperscript{21} Moreover, the Department of Interior issued a final withdrawal of affected lands from further mineral entry for 20 years, and in January 2001, the Secretary of Interior signed a

\textsuperscript{16} \textit{Ibid.} ¶ 114, 118.  
\textsuperscript{17} \textit{Ibid.} ¶ 128- 30.  
\textsuperscript{18} \textit{Ibid.} ¶ 131- 35.  
\textsuperscript{19} \textit{Ibid.} ¶ 140, 143- 44.  
\textsuperscript{20} \textit{Ibid.} ¶ 146- 47.  
\textsuperscript{21} \textit{Ibid.} ¶ 149.
Record of Decision (hereafter ROD) denying the POO. Once again, Glamis challenged without success the ROD and the withdrawal of lands.22

The events took a dramatic u-turn when in October 2001, the Bush administration came into office. The new Interior Solicitor believes that the interpretation of “undue impairment” provided by the M-opinion was inappropriate. Consequently, the M-opinion was rescinded. And since the ROD was based on the M-opinion, the ROD too was rescinded.23 BLM therefore resumed its work, and concluded in September 2002 that Glamis has a VER, and that the requirements of the mining laws have been satisfied for the mining claims on the critical dates of November 1998 (date of segregation and withdrawal of lands) and April 2002 (date of completion of examination). Furthermore, BLM concluded that the project would yield profit, but the backfilling of east pit was not economically feasible.24

The normal step was for BLM to review the POO and issue a new ROD. But in December 2002, Glamis requested BLM to suspend the review. BLM accepted to do so on the condition that Glamis relieves it of any legal liability for the suspension. Since the condition was not met, BLM continued with the review until July 2003.25

This decision of Glamis was without doubt motivated by the legislative obstruction at state level. In December 18, 2002, emergency regulations were passed enforcing mandatory complete backfilling of all metallic mines, regardless of their proximity to Native American sacred sites. In April 2003, Senate Bill 22 (hereafter SB 22) was enacted which put into effect mandatory backfilling requirements. SB 22 posed two conditions for approval of project. First, the reclamation plan must provide backfilling and grading to the original contours, and secondly, financial assurances must be provided for the backfilling and grading.26 At this stage, no compromise was on the table. Glamis then considered the venue of NAFTA’s Chapter 11 dispute settlement mechanism.

22 Ibid. ¶ 152-53.
23 Ibid. ¶ 157- 58.
24 Ibid. ¶ 162.
25 Ibid. ¶ 164- 65.
26 Ibid. ¶ 183, 166, 175- 76.
Act two- Respondent’s objection and Claimant’s article 1110 claim.

Respondent put forward two preliminary objections. First, Respondent argued that Glamis’s claims lack ripeness because no refusal of the project has been issued, its reclamation plan has not been denied, and the California measures have not been applied to it. Secondly, Respondent pointed out article 1117(2) and argued that Claimant’s action is time barred. However, Respondent did not raise the matter of Claimant’s quality as a foreign investor. As regards the first objection, the Tribunal pointed out that it is certain the California measures would have applied to Imperial Project, and if Claimant had waited for final decision, it would have been a denial. Hence, Tribunal ruled that Claimant has properly constructed its claim to demonstrate that the measures had the effect of an expropriation on the date of their passage. As to the second objection, the Tribunal ruled it out since Claimant does not bring its claims on the basis of earlier events argued by Respondent.

Two points of law have been raised in this case. Glamis brought its claims under article 1105 providing fair and equitable treatment (hereafter FET) to foreign investors, and article 1110 providing adequate compensation to foreign investors in the case of an expropriation.

Glamis made an indirect expropriation claim. Several acts and several dates of expropriation were discussed. At state level, the passing of the emergency regulations on December 12, 2002 was chosen to be the last date of expropriation, and at federal level, January 17, 2001, date when ROD denied the POO, was chosen to be the last date of expropriation. The Tribunal analyzed the expropriation claim from an economic stand point. The Tribunal took each successive measure, and determined whether the financial impact of the complained measure was sufficient to constitute a taking. Five elements of Claimant’s valuation were disputed: - cost of backfilling; pre-backfill valuation of the third pit; consideration of the price of gold during the proceeding; cost of financial assurances; the probability of risks in the

27 Respondent was represented by the Office of International Claims and Investment Disputes of US Department of State.
28 Glamis, supra note 1 ¶ 312- 50.
29 Ibid. ¶ 185.
30 Ibid. ¶ 359.
business and the associated cost. After considering and adjusting the valuation of each element, the Tribunal finds that the post-backfilling valuation of the Imperial project exceeds 20 million dollars. Thus, the Tribunal rejects the article 1110 claim since the complained measures did not cause a sufficient economic impact to the Imperial project in order to effect an expropriation. The following analysis will focus on Glamis’s claim based on article 1105.

**Act three- Claimant’s 1105 claim.**

Both parties agree that FET is a “recognized standard under customary international law”, and that it is “firmly within the minimum standard of treatment to be accorded under customary international law.” But they disagree on the applicable threshold under customary international law (hereafter CIL), and on the acceptable authorities to define that threshold.\(^{31}\)

i. **Claimant’s stance.**

Claimant does not dispute the Free Trade Commission’s (hereafter FTC) interpretation, but rather argues that it incorporates current international law whose content is shaped by the numerous bilateral investment treaties (hereafter BITs). Therefore, decisions of tribunals applying an autonomous FET based on the language of the treaty are to be taken into consideration in addition to tribunals applying FET based on CIL.\(^{32}\)

Throughout its arguments, Claimant tries to demonstrate that the threshold of FET attached to CIL is no different from that of an autonomous FET. According to Claimant, “the duty to act in good faith, due process, transparency and candor, and fairness and protection from arbitrariness,” constitutes a universal principle. Citing OEPC and CMS tribunals, Claimant contends that the international minimum standard has evolved from the 1926’s egregious level to converge with the autonomous FET providing the protection of legitimate expectations.\(^{33}\) The latter is manifested through the establishment of a transparent and predictable business and legal framework. Furthermore, Claimant argues that this new FET

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\(^{33}\) *Ibid.* ¶ 545, 547, 551.
threshold also encompasses protection from arbitrary measures. Thus, government actions are arbitrary when the conduct is grossly unfair, unjust, clearly improper and discreditable.\(^{34}\)

Contesting the federal measures, Claimant argues that under the mining law of 1872, if an operator demonstrates the feasibleness of its project, it is entitled to approval of its POO even if subsequent mining would destroy sacred sites. This rule has been applied for decades. Moreover, Claimant argues that the CDPA gave specific assurances that there would be no buffer zones around wilderness areas. This lead to its reasonable expectation of the ability to mine in the project’s zone.\(^{35}\) Claimant also points out the unreasonable and intentional delay in the process. Due to Solicitor Leshy’s intervention, the process was delayed by nearly four years (VER was issued in September 2002).\(^{36}\) Arguing that the review of Imperial project was arbitrary and non-transparent, Claimant mentions that other operators were granted permit in spite of the lack of difference in the extent of degradation to historic sites.\(^{37}\)

Contesting the actions of the Government of California, Claimant argues that the SB 22 was specifically targeted at Imperial project with the goal of making it financially infeasible.\(^{38}\) Mostly, the requirement of mandatory backfilling was novel and was not necessary in the protection of the environment.\(^{39}\)

ii. **Respondent’s stance.**

Counter to Claimant’s standpoint, Respondent insisted that the threshold of FET attached to CIL is indeed different from that of an autonomous FET. The former derives from general and consistent practice of states followed by them out of a sense of legal obligation or *opinio juris*.\(^{40}\) Accordingly, BITs adopting an autonomous standard cannot be taken into consideration. Respondent purports that the repeated inclusion of FET in BITs proves nothing.\(^{41}\)

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\(^{34}\) *Ibid.* ¶ 561, 568, 570, 572-73, 583, 585.


\(^{40}\) *Ibid.* ¶ 543, 553.

\(^{41}\) *Ibid.* ¶ 556, 558.
To rebut Claimant’s stance on legitimate expectation, Respondent argues that it must demonstrate something more than a contractual breach. A denial of justice or repudiation in a discriminatory way, or in a manner motivated by non-commercial considerations is required.\textsuperscript{42} Moreover, Respondent contends that NAFTA’s chapter 11 contains no transparency obligation.\textsuperscript{43} As regards the duty to protect against arbitrariness, citing Thunderbird and SD Myers tribunals, Respondent argues that the threshold of arbitrariness is very high.\textsuperscript{44}

Counterattacking Claimant’s arguments, Respondent points out that the Solicitor of Interior had full authority to issue the M-opinion, and it was the first time that a mining project had irreversible impact on historical resources. After all, the M-opinion and ROD were rescinded. Any potential error was therefore corrected.\textsuperscript{45} To refute Claimant’s argument on the unreasonable delay, Respondent indicates that during the finalization of the VER in 2002, representatives of Claimant were working directly with high level BLM officials, and the outcome of the VER was positive. Instead of cooperating in finalizing the Imperial project, Claimant decided to abandon the process.\textsuperscript{46}

As to the Californian legislation, Respondent contends that SB 22 and the requirement of mandatory backfilling were justified, non-discriminatory and rational measures.\textsuperscript{47} In response to Claimant’s argument that both SB 22 and SMGB Regulations were construed to avoid Imperial project, Respondent specifies that the purpose of SB 22 was the protection of Indian historical sites, and that of SMGB Regulations was the protection of the environment by ensuring the proper refilling of open pits.\textsuperscript{48}

\textbf{iii. Tribunal’s ruling- a new threshold for NAFTA tribunals?}

Until now, the different NAFTA tribunals have sent out one common signal:

True, the FTC’s note of interpretation fully applies.

True, the FET requirement of article 1105 minimum standard treatment refers to CIL.

\textsuperscript{42} Ibid. ¶ 575- 77.
\textsuperscript{43} Ibid. ¶ 578, 580, n. 1192.
\textsuperscript{44} Ibid. ¶ 597.
\textsuperscript{45} Ibid. ¶ 652, 654- 55, 658.
\textsuperscript{46} Ibid. ¶ 661, 672-73.
\textsuperscript{47} Ibid. ¶ 720ff.
\textsuperscript{48} Ibid. ¶ 748.
But, the minimum treatment standard has evolved from the 1926 level.  

The Glamis Tribunal approaches the scope of 1105’s FET in a somehow different manner. The Tribunal points out that State parties to NAFTA, at least Canada and Mexico, agree that the Neer test continues to apply. The proof of an evolution of CIL is incumbent upon the Claimant. This requires the demonstration of state practice and *opinio juris*. These two elements are exhibited in treaty ratification language, statements of governments, treaty practice and pleadings. Surprisingly, the Tribunal rules that because of the difficulty in proving a change in CIL, this effectively freezes the protection at the 1926 conception of egregiousness. Furthermore, the Tribunal points out that awards which have applied an autonomous FET will not be taken into account. Since most of Claimant’s arguments were based on such tribunals, they were rejected without much difficulty.

On the contents of article 1105’s FET, unlike its predecessors, the Glamis Tribunal mentions that at minimum, 1105’s FET is equivalent to the Neer test. The Tribunal sees two possible kinds of evolution. Either what the international community views as outrageous may have changed over time, or the minimum standard of treatment has moved beyond the 1926 level. The Tribunal rules in favor of the first type of evolution. Nevertheless, the Tribunal specifies that bad faith is not required to find a violation of FET, but its presence is conclusive evidence of such. Regarding Claimant’s position on the protection of legitimate expectations, the Tribunal endorses Thunderbird Tribunal, and elaborates further stating that this concept requires the evaluation of whether a State made any specific assurance or commitment to the investor so as to induce its expectations.


50 *Glamis*, supra note 1 ¶ 601- 04, n. 1246.


52 But see *Thunderbird*, supra note 49 ¶ 194 (“Notwithstanding the evolution of customary law since decisions such as *Neer Claim* in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high”).

53 *Glamis*, supra note 1 ¶ 612- 14.

“Failing to live up to expectations is not enough. Where a Party’s conduct creates reasonable and justifiable expectations on the part of an investor to act in reliance on said conduct, a State may be tied to the objective expectations that it creates in order to induce investment.”55

As regards the protection from arbitrary measures, the Tribunal again endorses Thunderbird Tribunal which applied a high level of arbitrariness - arbitrariness that “amounts to gross denial of justice or manifest arbitrariness falling below acceptable international standard.”56

Thus, the Tribunal holds that

“a violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently egregious and shocking - a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons- so as to fall below accepted international standards and constitute a breach of Article 1105. Such a breach may be exhibited by a “gross denial of justice or manifest arbitrariness falling below acceptable international standards;” or the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations. The Tribunal emphasizes that, although bad faith may often be present in such a determination and its presence certainly will be determinative of a violation, a finding of bad faith is not a requirement for a breach of Article 1105(1).”57

So doing, the Glamis Tribunal positions itself in a slightly different plane from that of its predecessors. Earlier NAFTA tribunals mentioned explicitly that CIL has evolved from the 1926 level, and refused to use the Neer formula, whereas the Glamis award uses the egregious formula and links very clearly the minimum standard to the Neer test. However, the Tribunal has just added another brick in the construction started by its predecessors. The post FTC’s note tribunals have adopted a trend which consists in converging the minimum standard with the level of protection provided by autonomous FET. They have done so via the concept of “legitimate expectation” and “duty of transparency”.58 Here, the Tribunal incorporates the

55 Ibid. ¶ 620-21.
56 Ibid. ¶ 625.
57 Ibid. ¶ 627.
protection of “objective expectation” in article 1105 minimum standard. Without extrapolating the Tribunal’s ruling, if article 1105 refers to “the fundamentals of the Neer standard”\textsuperscript{59}, and even so encompasses the protection of objective expectations, the Tribunal has just rendered the Neer formula highly elastic.

Having thus defined the threshold applicable in the context of article 1105, the Tribunal proceeded in examining the factual contentions of the parties. The Tribunal systematically applied the threshold to each disputed measure. The Tribunal points out that under the decade-long rule of “unnecessary or undue degradation” standard, mining operators developed expectations that the discovery of Native American artifacts at a mining site could necessitate mitigation, but would not lead to a denial of POO. The Tribunal agrees that the shift in the 1999 M-opinion to a definition of “undue impairment” that allows for denial of POO represents a significant change from settled practice. However, the Tribunal believes that the M-opinion was a “reasoned opinion based upon preexisting legal authority”.\textsuperscript{60} The Tribunal reminds that it is not its duty to delve into the details of the justifications for domestic laws, the proper venue being domestic courts.\textsuperscript{61} The Tribunal finds that the M-opinion was not arbitrary since it was requested by BLM, that it did not exhibit a manifest lack of reasons since it contained detailed factual and legal analysis, and that it does not exhibit blatant unfairness or evident discrimination to the particular investor since it is one of general applicability.\textsuperscript{62} The argument of Claimant based on its reasonable expectations also failed since the federal Government did not make specific commitments to induce Claimant. It did not guarantee Claimant’s approval of its claims, nor did it offer Claimant any benefit to pursuing such claims beyond the customary chance to exploit federal land for possible profit.\textsuperscript{63} Concerning the unreasonable delay claim, the Tribunal points out that the delay was justified since the issue was complex.\textsuperscript{64} Furthermore, the Tribunal points out that

\textsuperscript{59} Glamis, supra note 1 ¶ 616 (Tribunal’s own words).
\textsuperscript{60} Ibid. ¶ 758- 60.
\textsuperscript{61} Ibid. ¶ 762.
\textsuperscript{62} Ibid. ¶ 763- 65.
\textsuperscript{63} Ibid. ¶ 767.
\textsuperscript{64} Ibid. ¶ 775.
Respondent’s determination was neither arbitrary nor unreasoned since it was based on expert studies.\[^{65}\]

Pertaining to the actions of the government of California, the Tribunal rules that SB 22 applies to potentially several mines, without retroactive effect.\[^{66}\] In response to Claimant’s claim that the “no buffer zone” was a specific assurance, the Tribunal reminds its understanding of the concept and insists on the active inducement of a quasi-contractual expectation as a threshold condition.\[^{67}\] The Tribunal rejects the remaining claims since Claimant has not demonstrated that SB 22 is manifestly arbitrary, evidently discriminatory or exhibits a complete lack of reasons.\[^{68}\] Thus, the Tribunal dismisses Claimant’s article 1105 claim.

It so appears that Tribunals dealing with investment claims tend to apply two degrees of FET. NAFTA tribunals apply the FTC’s note which ties FET to CIL minimum standard. This gives rise to a minimal protection. Non-NAFTA tribunals apply an autonomous FET that gravitates around the concept of “protection of legitimate expectation”. The latter gives rise to an optimal protection. NAFTA as well as non-NAFTA tribunals have emitted signals that in substance, those two degrees of protection are not different.\[^{69}\] The Glamis Gold award joins this trend, even though at first glance one may think the contrary. The scope of this optimal protection and the intertwining use of “legitimate protection”, “transparency”, “stability” and “investment backed assurances” is yet another topic which requires further elaboration.\[^{70}\]

\[^{65}\] Ibid. ¶ 781ff.
\[^{66}\] Ibid. ¶ 794.
\[^{67}\] Ibid. ¶ 799, 801-02.
\[^{68}\] Ibid. ¶ 803-06, 811ff.
\[^{70}\] Forthcoming paper.