

The Role of International Environmental Principles in Investment Treaty Arbitration: Precautionary and Polluter Pays Principles and Partial Compensation

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Introduction: Investment-Environment ‘Conflicts’ in Investment Arbitration

- Investment treaty arbitration as an important international forum in which investment-environment ‘conflicts’ are discussed: e.g. *Chevron v. Ecuador*; *Vattenfall v. Germany I and II*; *Glamis v. US*, *Clayton/Bilcon v. Canada*, *Unglaube v. Costa Rica*, *Pac Rim Cayman v. El Salvador*, *Allard v. Barbados*, *Renco v. Peru*, and *Abengoa v. Mexico*.
- A Balance is required – the question is *how*
- Balancing at the remedy phase – the role of international environmental principles

Outline of the Presentation

Part I

- Partial Compensation in General and in Investment Arbitration

Part II

- The Polluter Pays Principle/the Precautionary Principle and Partial Compensation

Part III

- Application: The *Santa Elena* Case Revisited

Part I: Partial Compensation in International Tribunals

Case	Grounds for the Reduction	Statements
<i>Himpurna v. PLN</i> (2000)	-the general principles of law and the doctrine of 'abuse of right' the amount of <i>lucrum cessans</i> was limited	' [in the calculation of compensation] approximations are inevitable ... considerations of fairness enter into the picture, to be assessed – inevitably – by reference to particular circumstances'
<i>Starrett Housing v. Iran</i> (1983)	- equitable considerations	'[equitable considerations are applied] to come to a "reasonable approximation" of the FMV of the property expropriated'

Part II: Partial Compensation in Investment Arbitration(1)

Case	Grounds for the Reduction	Statements
<i>AMT v. Zaire</i> (1997)	- equitable considerations and the tribunal's discretionary power	‘[the tribunal must] take into account the existing conditions of the country [when assessing the amount of compensation]’
<i>MTD v. Chile</i> (2004)	- conduct of investors	‘[the Claimants] had made decisions that increased their risks in the transaction and for which they bear responsibility, regardless of the treatment given by Chile to the Claimants’
<i>Middle East Cement v. Egypt</i> (2002)	- conduct of investors	‘[the investors’ duty to mitigate damages] can be considered to be part of the General Principles of Law’

Part I: Partial Compensation in Investment Arbitration(2)

Case	Grounds for the Reduction	Statements
<i>Occidental v. Ecuador II</i> (2012)	- contributory negligence on the part of the investor	‘as a result of their material and significant wrongful act, the Claimants have contributed to the extent of 25% to the prejudice which they suffered...’
<i>SPP v. Egypt</i> (1992)	- adjustment in light of the UNESCO convention	‘[the tribunal] could award <i>lucrum cessans</i> until 1979’ (because) ‘[f]rom that date forward, the Claimants’ activities on the Pyramids Plateau would have been in conflict with the Convention’



International tribunals, including investment arbitration tribunals, have awarded partial compensation on various grounds

Part II: The precautionary principle and the polluter pays principle and partial compensation (1)

● The Precautionary Principle

- (i) Clean production methods, best available technology and best environmental practices must be applied;
- (ii) Comprehensive methods of environmental and economic assessment must be used in deciding upon measures to enhance the quality of the environment;
- (iii) Scientific and economic research that contributes to a better understanding of the long-term options available must be stimulated;
- (iv) Shift of the burden of proof (in certain circumstances); and
- (v) Duty to environmentally educate and inform decision-makers.

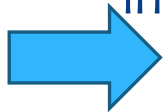
● The Polluter Pays Principle

- (i) (potential) polluter should internalise the cost of complying with environmental measures, or negative externalities that they impose on society at large
- (ii) [p]rices that are paid by producers and consumers should accurately reflect the full cost of their production and/or consumption (i.e. including the environmental costs)

Part II: The precautionary principle and the polluter pays principle and partial compensation (2)

Legal status of these principles?

- * Have these principles become customary international law? : (at least) not decisive
 - The 'orthodox' criteria for ascertaining the existence of customary international law (*North Sea Continental Shelf*)
 - ✓ a fundamentally norm-creating
 - ✓ state practice
 - ✓ *opinio juris*
 - The uncertainty of the principle and divergent views held by scholars
 - Lack of consistent state practice
 - Lack of recognition of these principles as customary international law by international courts and tribunals



Does it (really) matter?

Part II: The precautionary principle and the polluter pays principle and partial compensation (2)

J. Turk, 'Compensation for "Measures Tantamount to Expropriation" under NAFTA: What It Means and Why It Matters' (2005) 1 Int'l L. & Mgmt. Rev. 41-78, at 71:

Suppose a factory is constructed at a cost of \$25 million. The factory emits air pollution that will cost the government \$20 million to clean up. According to the polluter pays principle, the factory owner would have to pay for the cost of the clean-up. However, suppose that instead of requiring the factory owner to pay for the pollution it has caused, the government enacts a law prohibiting the operation of the factory. In such a case the government should compensate the investor \$5 million-the difference between the cost of his investment and the harm averted.

Part III: Application: The *Santa Elena* Case Revisited (1)

***Santa Elena v. Costa Rica* (2000)**

- The issues: (i) the date of expropriation; (ii) the determination of FMV on the date of expropriation
- The tribunal's approach

‘While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.’

***Marion Unglaube v. Costa Rica* (2012)**

Part III: Application: The *Santa Elena* Case Revisited (2)

- The potential role of the precautionary and polluter pays principles
- (a) The approximation of FMV by incorporating future environmental costs into the calculations under the DCF method
 - (i) even if the expropriation did not take place, the Property would at some point be subject to some kind of environmental laws and regulations applicable to the area that would restrict its use;
 - (ii) the investor should have expected the introduction of such environmental measures
- (b) The reduction of the amount of compensation *after* determining the FMV (in partial compensation)

Conclusion and...

THANK YOU
for
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