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NOTE

# *Compensation for Unlawful Expropriation: Targeting the Illegality*

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**Abstract**—Most investment treaties prohibit expropriation, except where certain criteria of legality are met. One of such criteria almost invariably is to provide compensation for expropriation. The obligation to pay for a taking is a primary duty created by the relevant non-expropriation provision and, thus, must be distinguished from the secondary duty to provide compensation for unlawful expropriation as a modality of reparation. Once this distinction is drawn, the following becomes clear: (i) a failure to comply with the obligation to provide compensation for a taking is a violation of the primary obligation created by the applicable treaty; (ii) the treaty standard of compensation, as a primary obligation, may not derogate from the secondary duty of full reparation; and, thus, (iii) the principle of full reparation applies even where the expropriation is wrongful solely for the lack of compensation. This latter proposition does not mean, however, that the application of the principle of full reparation will yield the same result irrespective of the manner in which the expropriation is tainted by illegality. Rather, the law of State responsibility, properly interpreted, envisages the possibility of targeting the remedial response at the nature of the unlawfulness of the expropriation in each given case.

## I. INTRODUCTION

Most international investment agreements (IIAs) contain provisions on expropriation. In an attempt to strike a balance between the sovereign authority to dispose of private property[2] and the interests of investment protection,[3] those provisions prohibit expropriation except where certain criteria are met. Namely, under most IIAs, expropriation is prohibited unless it is (i) for a public purpose; (ii) non-discriminatory; (iii) carried out in accordance with due process of law and (iv) accompanied by prompt, effective and adequate compensation. Based on

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[2] Upton Case, US–Venezuela Mixed Claims Commission, Award (17 February 1903) reprinted in UNRIAA, vol IX, 236: '[T]he right of a State ... to appropriate private property for public use is unquestioned'.

[3] More broadly, investors' rights stem from the standard of peaceful enjoyment of property. See eg Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) (ECHR); Protocol no 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 20 March 1952, entered into force 18 May 1954) (Protocol no 1) art 1.

treaty provisions on expropriation and applicable customary international law, a distinction between lawful and unlawful expropriation seems clear. A lawful expropriation is the one that meets all procedural and substantive criteria of legality established by the applicable treaty and customary international law. A failure to comply with any one of those criteria must render an expropriation unlawful.

That being said, the noticeable difference in gravity among different types of unlawful expropriations has blurred the borderline between lawful and unlawful expropriations. Despite the often clear wording of the applicable treaties, which prohibit expropriation without compensation, it is sometimes submitted that a failure to provide compensation does not render an expropriation unlawful since the international tribunal hearing the dispute is in charge of determining the due compensation. Some tribunals and commentators also consider that if a taking only lacks compensation, the expropriating State is not obliged to provide full reparation since the treaty standard of compensation acts as *lex specialis* derogating from the customary rule of full reparation.

It is one of the pillars of this article that the current state of case law and doctrine concerning the lawfulness of expropriation merely lacking compensation is premised on the failure to distinguish the primary obligation to provide compensation for a taking from the secondary duty of full reparation mandating compensation for an unlawful expropriation. The first section of the article is dedicated to drawing that conceptual distinction, thereby proposing a borderline between lawful and unlawful expropriations.

Even if the criteria of lawfulness of expropriation are correctly categorized, the determination of the consequences of unlawful expropriation poses an even greater challenge. The current approach towards compensating the injury caused by an unlawful expropriation is rather rigid. The customary rule of full reparation in this context is understood to mandate compensation in the amount of the full value of the expropriated asset,[4] irrespective of the gravity and the type of the illegality underlying the unlawful expropriation in question. The second section of this article reconsiders the consequences of the application of the standard of full reparation on unlawful expropriation. In doing so, it looks at expropriation as a composite act and examines whether the consequences of the unlawful constituent acts of expropriation can be separable from those of the lawful conduct of the expropriating State, and, if so, whether the reparation can be targeted only at the consequences of the unlawful constituent conduct. With that, the article proposes different reparation formulas for different types of unlawful expropriation.

## II. PRIMARY DUTY OF COMPENSATION AS A CONDITION OF LEGALITY

Most IIAs include non-expropriation provisions that impose certain requirements for an expropriation to be lawful. Article 13 of the Energy Charter Treaty (ECT)

[4] The latest approach is to award the value of the asset on the date of the award/payment, unless the value was higher on the date of the expropriation. The awards include foregone net cash flows from the date of the taking until the date of the award/payment. See *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No ARB/03/16, Award (2 October 2006) para 497.

is an eminent illustration of how the majority of IIAs outlaw expropriation.[5] It reads as follows:

> Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'Expropriation') except where such Expropriation is:
>
> (i) for a purpose which is in the public interest;
> (ii) not discriminatory;
> (iii) carried out under due process of law; and
> (iv) accompanied by the payment of prompt, adequate and effective compensation.[6]

The provision sets cumulative requirements that must be met in order for a taking to be lawful. These requirements differ in character and arguably in importance. Indeed, an expropriation committed for the personal gain of the ruling elite on the premises of ethnic discrimination appears to be a graver wrong than, for instance, a taking for environmental purposes, which can only be faulted for the absence of the accompanying compensation.

Tribunals and commentators have gone as far as to suggest that an expropriation merely lacking compensation is lawful. For instance, in *LIAMCO v Libya*, the Tribunal considered that Libya's 1973 nationalization decree that deprived the Claimant of its 51 percent share in oil concessions was expropriatory. It also established that Libya failed to offer the Claimant any indemnity for the expropriated interests. The Tribunal reasoned, however, that the taking that can only be faulted for 'the failure to pay the just price of what had been expropriated' is lawful. It nevertheless awarded compensation, stating that the nationalization, although legitimate and non-discriminatory, entailed a liability to compensate.[7]

More recently, an ICSID Tribunal in *Goetz v Burundi* held, irrespective of the explicit requirement to pay compensation for expropriation contemplated by Article 4 of the Belgium–Burundi bilateral investment treaty (BIT), that the lack of compensation was not sufficient 'to taint this measure as illegal under international law'.[8] The Tribunal nevertheless awarded compensation, stating that a breach of international law would only crystalize if Burundi were to refuse to comply with the Tribunal's ruling on compensation.[9]

An ICSID Tribunal in *Tidewater v Venezuela* adopted a similar stand. Although it established that Venezuela's seizure of the Claimant's vessels and other assets constituted expropriation, it reasoned that 'an expropriation wanting only a determination of compensation by an international tribunal is not to be treated as an illegal expropriation'.[10] Similarly, in *ConocoPhillips v Venezuela*, the dissenting arbitrator opined that the 'obligation to pay compensation is not a condition of the

[5] Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) (ECT).

[6] ibid art 13 (emphasis added).

[7] *Libyan American Oil Company (LIAMCO) v* the *Government of the Libyan Arab Republic*, *Ad Hoc* Tribunal Constituted under the ILC Draft Convention on Arbitral Procedure, Award (12 April 1977) 34–37, 121–22.

[8] Agreement between the Economic Union of Belgium and Luxembourg and the Government of the Republic of Burundi for the Mutual Promotion and Protection of Investments (signed 13 April 1989, entered into force 12 September 1993) (Belgium–Burundi BIT).

[9] *Antoine Goetz and others v Republic of Burundi*, ICSID Case No ARB/95/3, Award (10 February 1999) paras 130–31.

[10] *Tidewater Investment SRL and Tidewater Caribe, CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Award (13 March 2015) para 141.

legality of the act of nationalization'.[11] This approach does not seem fully coherent. First and foremost, the language of the relevant IIAs is clear in outlawing expropriation without compensation.

Second, the reasoning conflates the treaty obligation to provide compensation for a taking with the obligation to pay damages for unlawful expropriation. International law, like many domestic laws, knows the distinction between primary and secondary norms. Primary norms lay down obligations and define their scope. Secondary norms, in turn, define 'the new legal relationship that arises upon the commission by a State of an internationally wrongful act'—that is, when a primary obligation is violated.[12] The Special Rapporteur on State Responsibility highlighted this difference in the following terms: '[I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine ... what should be the consequence of the violation. Only the second aspect of the matter comes within the sphere of responsibility proper'.[13]

A treaty provision requiring compensation for a taking creates a primary obligation, while the duty to provide reparation for unlawful expropriation is a secondary obligation that only applies when a breach of a primary obligation is established. Thus, the duty to pay compensation as a modality of reparation differs from the treaty obligation to provide compensation for a taking since it stems from the secondary norms of international law of state responsibility. The jurisprudence of the Iran–US Claims Tribunal appears to be informed of this distinction. In *Amoco v Iran*, for instance, the Tribunal hinted at the different legal foundations for the duty to pay compensation and the obligation to repair the damage caused by a wrongful act:

> The legal bases of reparation of the damage caused by a wrongful expropriation and payment of compensation in case of lawful expropriation are totally different and, logically, the practical methods to be used in order to derive the amount due should also differ.[14]

The contention of the Tribunal in *Tidewater v Venezuela* that an expropriation only wanting fair compensation is provisionally lawful, 'precisely because the tribunal dealing with the case will determine and award such compensation',[15] fails to see this difference between the primary duty to provide compensation and the secondary obligation to pay damages. The mandate of the *Tidewater* Tribunal was not to determine the amount of compensation due under the treaty but, rather, to judge the legality of the expropriation and award compensation as a modality of reparation if the illegality were established. Article 8(3) of the Barbados–Venezuela BIT, from which the *Tidewater* Tribunal derived its jurisdiction, is clear on this matter:

> The arbitral award shall be limited to determining whether there is a breach by the Contracting Party concerned of its obligations under this Agreement, whether such

[11] *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Decision on Jurisdiction and the Merits (3 September 2013) para 118.
[12] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/83 (2001) 86 (ARSIWA).
[13] ILC, 'Second Report by Special Rapporteur Roberto Ago, *State Responsibility: The Origin of International Responsibility*', (20 April 1970) Doc A/CN.4/233, para 7.
[14] *Amoco International Finance v Iran*, Iran–US Claims Tribunal, Case No 56, Award (14 July 1987) para 194.
[15] *Tidewater* (n 10) para 141.

breach of obligations has caused damages to the national concerned, and, if such is the case, the amount of compensation.[16]

The Tribunal, thus, was not authorized to order the payment of compensation as a primary duty due under the non-expropriation provision of the BIT. It could only award compensation as a remedy for a violation of treaty provisions. It could not therefore declare that expropriation was lawful and, at the same time, award compensation.

Similarly, most IIAs mandate investment tribunals to decide whether the substantive standards of the IIA are breached and, if such be the case, to award compensation as a mode of reparation.[17] For instance, Article 8(1)(c) of the Belgium–Burundi BIT confined the mandate of the Tribunal in *Goetz v Burundi* to disputes concerning 'an allegation of a violation of any rights conferred or established under the present Treaty in connection with investments'.[18] If an expropriation without compensation were lawful under international law, as suggested by some of those tribunals, they would have no jurisdiction to entertain the claim founded on the lack of compensation. Such a claim would not be capable of constituting a treaty breach and would thus fall outside their subject matter jurisdiction.[19]

Even where a treaty's jurisdictional clause is broad enough to possibly encompass disputes in relation to the amount of compensation due under the treaty,[20] a tribunal's mandate is still limited to a dispute as it stands before it. In virtually all cases, claimants ask investment treaty tribunals to award damages for a breach of the treaty.[21] They do not request the tribunal to quantify the amount of compensation due under the treaty as a primary duty. There are mechanisms, such as specialized valuation commissions, charged with the latter task.[22] Hence, even in the case of a broad jurisdictional clause, it would be *ultra petita* for a tribunal to award compensation and, at the same time, to declare that the treaty was not breached.

[16] Agreement between the Government of Barbados and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (signed 15 July 1994, entered into force 31 October 1995) art 8(3).

[17] ECT (n 5) art 26(1); US Model BIT (2012) art 24(a) confines the jurisdiction to finding a breach of arts 3–10 of the treaty and awarding damages; North American Free Trade Agreement (opened for signature 17 December 1992, entered into force 1 January 1994) (NAFTA) art 1116(1) limits jurisdiction to establishing breaches of certain provisions of the treaty and awarding damages therefor. Similarly, art 9(3) of the Agreement between the Kingdom of the Netherlands and the Republic of Venezuela on the Encouragement and Reciprocal Protection of Investments (signed 22 October 1991, entered into force 1 November 1993, terminated 1 November 2008), from which the mandate of the *ConocoPhillips* Tribunal derived, vests the Tribunal with the power to render an award 'limited to determining whether there is a breach by the Contracting Party concerned of its obligations under this Agreement, whether such breach of obligations has caused damages to the national concerned, and if such is the case, the amount of compensation'.

[18] Belgium–Burundi BIT (n 8). The Treaty also makes reference to two other types of disputes. They are not, however, relevant in the context of the Award in *Goetz* (n 9).

[19] For the standard of objective assessment of subject-matter jurisdiction, see *Oil Platforms (Islamic Republic of Iran v United States of America)* (Decision on Preliminary Objections) [1996] ICJ Rep 803, para 32 (Separate Opinion of Judge Higgins); *Saipem SpA v the People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) para 91 (a partner in my law firm was involved in this arbitration).

[20] A treaty jurisdictional clause may provide for jurisdiction over any dispute relating to an investment. See eg Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Republic of Austria and the Government of the Islamic Republic of Iran (signed 21 September 2001, terminated 11 July 2004) art 11(1), which vests tribunals with the mandate to resolve 'any dispute aris[ing] between a Contracting Party and an investor of the other Contracting Party with respect to an investment'.

[21] *Goetz* (n 9) para 59.

[22] See eg Law of the Bolivarian Republic of Venezuela on Expropriation for Public and Social Utility (2002) art 40, which mandates a compensation commission composed of valuation experts to determine the amount of compensation due for the taking.

There would be an exception where a tribunal is called upon to fulfil the special mandate to determine the amount of compensation due under the treaty, as opposed to ruling over a breach of the treaty. This was the case, for instance, in *Santa Elena v Costa Rica*, where the parties mandated the international tribunal, through a special agreement, to determine the amount of compensation due under the treaty, without judging the legality of expropriation.[23] Thus, the invocation of this case by investment tribunals, including, for instance, by the Tribunal in *Tidewater v Venezuela*, is inappropriate as it fails to consider that the mandate of the *Santa Elena* Tribunal was different from that of the vast majority of investment treaty tribunals.

Similar to the one in *Santa Elena v Costa Rica* seems to be the mandate of tribunals constituted under certain IIAs involving the States of the former Eastern Bloc. The jurisdictional clauses of those IIAs do not vest tribunals with the power to declare breaches of international law or the IIA. Rather, they provide for a specific mandate to quantify the compensation due under the treaty. For instance, Article 10(2) of the Germany–Russia BIT vests the international tribunal with the authority to decide 'a dispute relating to the amount of compensation or the method of its payment'.[24] In other words, the tribunals created under those IIAs act in a capacity similar to that of domestic compensation commissions. They merely quantify the value of the property taken without adjudicating a State's compliance with international law or the treaty.

In contrast, the vast majority of modern IIAs mandate tribunals to rule on the lawfulness of the State's conduct and to award damages where a treaty breach is established.[25] Therefore, the tribunals constituted under those IIA's cannot declare that the expropriation was lawful and at the same time award compensation. They are only authorized to award compensation, as a modality of reparation, if there is a treaty breach. Instead of limiting themselves to this task, they encroach on an essentially different mandate: that of a valuation commission, which is to quantify the value of the property taken as opposed to according damages for an unlawful expropriation. This task falls outside the jurisdiction of investment tribunals as it is provided under most IIAs.

Therefore, the reasoning that the absence of compensation does not render the expropriation unlawful because the international tribunal is in charge of deciding the dispute on the amount of compensation is misconceived in the context of investor–State arbitration. This justification glosses over the fact that the mandate of investment treaty tribunals is not to quantify the amount of compensation due under the treaty as a primary obligation but, rather, to judge the lawfulness of the expropriation and award damages if it is unlawful (absent in rare cases, such as *Santa Elena v Costa Rica*). Therefore, when rendering an award, international tribunals must treat an absence or delay of compensation, or the absence of the relevant offer thereof, as a failure to fulfil the criterion for the legality of expropriation and award damages for this unlawful act.[26]

[23] *Compañía del Desarollo de Santa Elena SA v Republic of Costa Rica*, ICSID Case No ARB/96/1, Award (17 February 2000) paras 28, 34.

[24] Agreement between the Federal Republic of Germany and the Union of Soviet Socialist Republics Concerning the Promotion and Reciprocal Protection of Investments (signed 13 June 1989, entered into force 5 August 1991).

[25] See (n 13) in this article.

[26] From all the above, it also flows that when an investment tribunal is faced with a request to determine whether there has been a treaty breach, it must take into account the time expended in the international proceedings for

That being said, it is certainly sensible that an expropriation merely lacking compensation and a taking without a public purpose differ in gravity. However, this does not render the former lawful. It merely suggests that the consequences attached to different types of unlawful expropriation must differ. As the following section proposes, this difference should find its place in the analysis of reparation.

## III. SECONDARY DUTY OF COMPENSATION AS A MODALITY OF REPARATION

In *Factory at Chorzow*, the Permanent Court of International Justice (PCIJ) laid down the content of reparation as follows:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[27]

This formula has since been reflected in numerous decisions of the International Court of Justice (ICJ)[28] and other international adjudicatory bodies.[29] It is true that the rule is primarily applicable in the inter-State context and is not directly transposable to cases where an individual invokes the international responsibility of a State.[30] That being said, the international practice shows that well-established rules of State responsibility, such as the *Chorzów* formula for full reparation, are applicable in the investor–State context by analogy.[31] Indeed, while there is a debate about the prevalence of compensation over restitution as a modality of reparation in the investor–State context, the applicability of the rule of full reparation as such is not seriously questioned.[32]

Some argue that the *Chorzów* rule of full reparation is irrelevant in the context of modern investment treaty disputes due to the distinctive character of the Geneva Convention Concerning Upper Silesia (Geneva Convention), which was breached by Poland in *Chorzów*.[33] The Geneva Convention is said to differ from modern IIAs in that it contains an outright prohibition of expropriation. This distinction,

judging the promptness of compensation. This is so because the initiation of an international arbitration by the claimant does not absolve the respondent State from its primary obligation to provide prompt and adequate compensation.

[27] *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) [1928] PCIJ Rep Series A, No 17, 47.

[28] See *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 152; *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, para 76; See also *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7.

[29] See *Amoco* (n 14).

[30] See ARSIWA (n 12) art 33(2) .

[31] ibid art 31(2) applies by analogy in investor–State disputes. It is unquestioned that the key provisions of the ARSIWA such as art 31(2) are part of customary international law and are transposable from the State-to-State to the individual-to-State context. See *Vestey Group Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB/06/4, Award, (15 April 2016) para 326 (a partner in my law firm was involved in this arbitration).

[32] Abby C Smutny, 'Some Observations on the Principles Relating to Compensation in the Investment Treaty Context' (2007) 22(1) ICSID Rev—FILJ 5. In *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1, Award (20 November 1984) para 202, the Tribunal stated: 'It is obvious that this Tribunal cannot substitute itself for the Indonesian Government, in order to cancel the revocation and restore the license: such actions are not even claimed, and it is more than doubtful that this kind of restitution in integrum could be ordered against a sovereign State.'

[33] Geneva Convention Concerning Upper Silesia (opened for signature 15 May 1922).

however, is not entirely accurate. The language of non-expropriation provisions of most modern IIAs is also prohibitive, not permissive. As represented by Article 13 of the ECT, IIAs provide that investments 'shall not' be expropriated, except where the relevant cumulative criteria are met.

Likewise, Article 6 of the Geneva Convention reads as follows: 'Except as provided in these clauses [Articles 7–21 of the Geneva Convention], the property rights and interests of German nationals or of companies controlled by German nationals may not be liquidated in Polish Upper Silesia'.[34] The PCIJ interpreted this provision to prohibit expropriation absent certain grounds. It reasoned as follows:

> Any measure affecting the property rights and interests of German subjects covered by Head III of the Convention, *which is not justified on special grounds* taking precedence over the Convention, and which oversteps the limits set by the generally accepted principles of international law, is therefore incompatible with the régime established under the Convention.
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> . . .
>
> [T]he only measures prohibited are those which generally accepted international law does not sanction in respect of foreigners; expropriation for reasons of public utility, judicial liquidation and similar measures *are not affected* by the Convention.[35]

The Geneva Convention thus prohibits expropriation except for some special grounds. In this sense, its non-expropriation regime is largely comparable to that of modern IIAs. Therefore, the particularity of the Geneva Convention regime does not warrant discarding the *Chorzów* rule of full reparation in cases of breaches of modern IIAs. The currently prevailing interpretation of the rule, however, should be revisited.

Wiping out all of the consequences of the unlawful conduct logically involves re-establishing the situation that would have existed in the absence of such conduct. However, this does not mean that a party harmed by an unlawful expropriation must always be compensated by the full value of the expropriated property, irrespective of the gravity or scope of the illegality of the underlying expropriation. International tribunals only draw a distinction between an expropriation, which is lawful save the failure to provide compensation (misleadingly called 'lawful expropriation'), and an expropriation, which is otherwise unlawful ('unlawful expropriation'). Subsection A addresses the case law and doctrine drawing a distinction between the consequences of the different types of unlawful expropriations, while highlighting the relevant shortcomings in their reasoning. Subsection B in turn proposes a new approach on redressing the consequences of different types of unlawful expropriations.

## A. *The Current Approach and Its Flaws*

The current trend is to differentiate expropriations merely lacking compensation from otherwise unlawful expropriations. In cases of expropriations merely lacking compensation, tribunals award the amount due under the compensation provision of the relevant IIA, such as the fair market value (FMV) of the property on the

[34] *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits) PCIJ Rep Series A No 7, 21.
[35] ibid 22 (emphasis added).

date of the expropriation or on any earlier date when the taking became public knowledge.[36] For all other types of unlawful expropriations, the tribunals have awarded 'also ... any greater value that enterprise has gained up to the date of the Award, plus any consequential damages'.[37] This distinction has led to different valuation dates, *ex ante* and *ex post*, in cases of so-called 'lawful' and unlawful expropriations respectively.

In *Amoco v Iran*, the Iran–US Claims Tribunal found that the Revolutionary Council's decision to nationalize Iranian oil and gas industry and annul the Claimant's agreement for the extraction, production and sale of sulphur, LPG and natural gas liquids constituted expropriation. When assessing the damages due, the Tribunal highlighted the importance of distinguishing between so-called 'lawful' and unlawful expropriations in terms of the ensuing duty of reparation:

> A clear distinction must be made between lawful [merely lacking compensation] and unlawful expropriation, since the rules applicable to the compensation to be paid by the expropriator State differ according to the legal characterization of the taking.[38]

Georg Schwarzenberger also supports the distinction between compensations due for so-called 'lawful' and unlawful expropriations. While he suggests the *ex ante* date of valuation for so-called 'lawful expropriations', he also explains why the date of the award should be the proper date of valuation in cases of unlawful expropriations:

> Much is to be said in favor of the date of the judgment as the operative date. It is the judgment or award which establishes between the parties with binding force that reparation is due from one party to the other. If restitution in kind were possible, it would have to take place as soon as possible after the judgment or award. It, therefore, appears appropriate that the amount of any monetary substitute for actual restitution should be related to the same date.[39]

Other scholars also support valuation on the date of the award in cases of all types of unlawful expropriation, except for those that merely lack compensation.[40]

Investment treaty tribunals have recently followed the trend of adopting the valuation on the date of the award in cases of unlawful expropriations, while favouring the value on the date of the taking for so-called 'lawful' expropriations. The Tribunal in *ADC v Hungary* held that 'Claimants should be compensated the market value of the expropriated investments as on the date of this Award ... since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed'.[41] More recently, the *Yukos v Russia*

[36] See Derek W Bowett, 'State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach' (1988) 59 BYBIL 49, 61, cited in Irmgard Marboe, 'Compensation and Damages in International Law The Limits of "Fair Market Value"' (2007) 4(6) Transnatl Disp Mgmt 727.

[37] *Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Award (17 January 2007) para 352.

[38] *Amoco* (n 14) 192.

[39] Georg Schwarzenberger, *International Law, as Applied by International Tribunals* (Stivens and Sons 1957) 666.

[40] Marboe (n 36) 751.

[41] *ADC Affiliate* (n 4) para 497; see also *Siemens* (n 37) para 352, after finding that the assets of the Claimant were unlawfully expropriated, the Tribunal held that '[u]nder customary international law Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages'.

Tribunal vouched for the *ex post* valuation date for an unlawful expropriation. According to the Tribunal, the appropriateness of the *ex post* valuation date flows from the fact that the 'obligation of restitution applies as of the date when a decision is rendered'.[42]

While it is indeed sensible to draw a distinction between different types of unlawful expropriations when assessing damages, the reasons given for such a distinction by the currently prevailing case law are not entirely persuasive. The doctrine suggests that in cases of expropriations merely lacking compensation, the *Chorzów* rule of full reparation is pre-empted by the specific BIT standard of just compensation, which prevails as *lex specialis*.[43]

It is difficult to understand how a treaty provision of adequate compensation can set a special regime of reparation for the breach of that same provision. As explained above, a treaty provision outlawing expropriation without compensation is a primary rule, while the *Chorzów* standard of full reparation is a secondary rule. The two rules are not designed to regulate the same subject matter, and, thus, one cannot derogate from the other. If the contracting States had intended to create a *lex specialis* rule of reparation, they would have done so by clearly noting that the State's responsibility for unlawful expropriation is limited to the value of the asset on the date of the taking. A treaty obligation not to expropriate without compensation does not purport to create such a limitation of responsibility.

Since compensation provisions of IIAs do not create a special regime of reparation, the *Chorzów* rule of full reparation applies to all types of unlawful expropriations, including the ones merely lacking compensation. However, this does not mean that the amount of compensation for all types of unlawful expropriations should be the same. There exists a coherent explanation why the application of the rule of full reparation can yield different results based on the scope of the illegality of the expropriation in each given case. This explanation, as suggested in the following section, lies in the inherent relationship between primary and secondary norms.

### B. *The Proposed Approach: Targeting the Illegality*

The duty of reparation only arises when there is a causal connection between the wrongful act and the damage. International law has long recognized causation as a necessary element for the duty of reparation. Reparation entails the duty to eliminate the consequences of the illegal conduct and thus re-establish the situation that would have existed but for that conduct.[44] To establish causation, one must first identify the scope of the illegal conduct underlying a given unlawful act. Expropriation often consists of several different acts and omissions of the State. It involves the act of the taking of property (which can on its part be divided into multiple acts), possibly the act of offering compensation or the refusal thereof. It can also involve certain procedural conduct, such as notifications accompanying the act of the taking. Some of those constituent acts can be lawful and others unlawful. If a conduct comprises several acts out of which only some are tainted

[42] *Yukos Universal Limited v The Russian Federation*, PCA Case No AA 227, Final Award (18 July 2014) paras 1765, 1766.

[43] See *ADC Affiliate* (n 4) para 481; *Amoco* (n 14) 192; Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford International Law Library 2009) 328.

[44] *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Award (20 August 2007) para 8.2.7 (a partner in my law firm was involved in this arbitration).

by illegality, it is only logical that the reparation should target the consequences of the illegal constituent acts. Indeed, Article 31(2) of the Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) defines the reparable injury as 'any damage, whether material or moral, caused by the internationally wrongful act of a State'.[45] According to the commentaries to that provision, '[it is] clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act'.[46] This proposition is in line with the derivative character of reparation. As put by one author '[t]he obligation to compensate is the judicial reflex of an antecedent obligation not to wrong'.[47] Similarly, as the PCIJ stressed in *Chorzów*, the principle of full reparation is 'contained in the actual notion of an illegal act'.[48] Therefore, before jumping to all-encompassing conclusions on the standard of compensation for all types of unlawful expropriation it is worth analysing where the illegality lies in each case.

As explained above, an expropriation lacking compensation, as well as one conducted without a public purpose or in breach of due process, are all unlawful under virtually all IIAs. However, this does not mean that all of these wrongs cause the same damage—that is to say, the damage in the amount of the full value of the property in question. Such a conclusion is warranted only where the illegality in question is found in the very act of the taking. If, however, the act of the taking itself is legitimate and the illegality stems from a certain procedural conduct or a mere lack of compensation, the reparation should not be based on a counter-factual scenario in which no taking had occurred. Rather, the injured party must be re-established to the situation where it would have found itself had the asset been taken lawfully.

In order to better illustrate this approach, practical examples may be of help. Let us take as an example an expropriation of an oil concession. A State grants a foreign investor a 20-year oil concession. In the fifth year, the State cancels the license by a presidential decree. The investor initiated arbitration under the applicable IIA, which contains a generic non-expropriation provision similar to the one found in the ECT. The Tribunal is constituted, and after five years of proceedings, it renders an award, including a ruling on damages. The following three subsections illustrate different quantum analyses that the Tribunal ought to undertake based on the degree and scope of the unlawfulness of expropriation in each scenario.

### (i) *Illegitimate taking*

The concession was cancelled because a cousin of the president found the licensed area to be strategically important for the development of his new oil business. The State cancelled the investor's license immediately and without any compensation. Within a few days, the cousin of the president obtained the license with similar terms over the same area. In this scenario, the cancellation had no public purpose and, thus, should not have taken place. The illegality is therefore not separable from the very act of the taking. Hence, the *Chorzów* rule will call for re-establishing the situation that the investor would have been in had the license not

[45] ARSIWA (n 12).
[46] ibid 92.
[47] Ernest Weinrib, 'The Special Morality of Tort Law' (1989) 34(3) McGill LJ 409.
[48] *Factory at Chorzów* (n 27) 47.

been cancelled. In the words of the PCIJ, if the State had 'no right to expropriate', the reparation will involve 'the obligation to restore the undertaking and, if this be not possible, to pay its value *at the time of the indemnification*, which value is designed to take the place of restitution which has become impossible'.[49]

Thus, in order to wipe out all of the consequences of the unlawful taking without public purpose, the indemnity will in principle consist of the following points. First, the FMV of the license on the date of the Award (*ex post* FMV), which acts as the closest proxy to the date of the actual indemnification. This value will be used only where it is greater than the *ex ante* (on the date of the taking) value of the investment. Thus, any decrease in the value of the expropriated asset between the date of the taking and the date of the Award should not affect the amount payable to the injured Claimant. According to the *Yukos* Tribunal, 'the risk of unanticipated events leading to a change in the value of the expropriated asset between the time of the expropriatory actions and the rendering of an award' must be borne by the wrongdoer State and not by the innocent investor'.[50]

Indeed, this conclusion is in line with the principle of international law that a State responsible for an internationally wrongful act, besides restitution, is under a continued duty of performance of the breached obligation.[51] Thus, if the taking is in and of itself unlawful—for example, when it lacks a public purpose—the State is under the continuous duty to return the asset at all times beginning from the date of the taking. And, by not doing so, it deprives the injured party of the opportunity to dispose of its asset at any time between the date of the taking and the date of the indemnification. If, during this period, unanticipated events negatively affect the value of the asset, this should not be reflected in the amount of the indemnity, given that the injured party was deprived of the possibility to dispose of its asset before such events took place, precisely because of the State's non-compliance with its continued duty of performance. Thus, in cases where the illegality consists in the act of the taking itself, the *ex post* value of the asset is determinative, with the *ex ante* value acts as a bottom-line below which the compensation may not fall.

Another component of reparation for the expropriation with no public purpose is the net cash flows that the license would have generated throughout the five years during which the investor was unduly deprived of the enjoyment of the license—that is, the foregone cash flows from the fifth year (year of the cancellation) to the tenth year (year of the Award) (foregone cash flows [FCF]).[52]

Moreover, in order to account for the time value of money, the FCF must be brought forward to the date of the Award by appropriate interest. In other words, if the discounted cash flow (DCF) method is used to calculate the *ex post* FMV, the projected net cash flows from the date of the Award to the terminal year of the cancelled license will be discounted to the date of the Award, while the FCF from

[49] ibid 48 (emphasis added).

[49] *Yukos* (n 42) para 1766.

[51] ARSIWA (n 12) art 29 reads as follows: 'The legal consequences of an internationally wrongful act under this Part [Part II: Content of the International Responsibility of a State] do not affect the continued duty of the responsible State to perform the obligation breached.'

[52] As the commentaries to the ARSIWA (n 12) 94, clarify, the payment of the value of the property 'may not be sufficient for full reparation because the wrongful act has caused additional material damage (*eg* injury flowing from the loss of the use of property wrongfully seized)'.

the date of the taking to the date of the Award will be brought forward to the date of the Award by interest accounting for the time value of money.

(ii) *Uncompensated taking*

The State cancelled the oil concession as it discovered an ancient cultural heritage in the licensed area. However, it failed to compensate the investor or to engage in negotiations to establish the amount of compensation. In this scenario, the State's unlawful act consists of the failure to provide prompt, adequate and effective compensation as required by the applicable IIA. The investor's loss that was directly caused as a result of this unlawful act is the fact of the absence of the amount of compensation. It would not be appropriate to restore the investor to the position he or she would have been in if the cancellation had not taken place at all. The cancellation had a public purpose, and it was due for it to take place. There is no need to eliminate consequences of the legitimate act of the taking itself. Rather, only the consequences directly caused by the lack of compensation must be targeted. To use the words of the commentaries to the ILC Articles, reparation 'should not give the injured [party] more than it would have been entitled to *if the obligation had been performed*'.[53] In this case, the obligation would have been performed if the State had paid compensation for the taking. Thus, there is no need to imagine the counterfactual scenario under which the license would continue to exist.

This point becomes obvious when one remembers that full compensation as a modality of reparation acts as a substitute for restitution. The Tribunal would not, as a measure of restitution, order the State, which has cancelled the license due to the legitimate concerns of the protection of cultural heritage, to undo the cancellation. There is thus no reason why the Tribunal should base the amount of the compensation (which is a substitute for restitution) on the 'but-for' premise that the license exists and has certain value on the date of the Award. This nuance is well seen in the case law of the European Court of Human Rights (ECtHR). In *King of Greece v Greece*, for instance, the Court stressed that because the wrongful act of Greece 'was an expropriation that would have been legitimate "but for" the failure to pay any compensation ... the nature of the breach found ... does not allow the Court to proceed on the basis of the principle of *restitutio in integrum*'.[54] Thus, when the wrongful act is the failure to pay compensation, and not the act of the taking itself, the compensation may not be based on the premise that the taking never happened.

Rather, the adverse party must be re-established in the situation where it would have found itself had the license been duly cancelled and the adequate compensation paid immediately after the cancellation, considering a certain grace period that States are reasonably afforded for making a transfer of such compensation. This will require the payment of the FMV of the license immediately after the date of the cancellation (*ex ante* FMV), plus the interest accrued on this amount until the date of the payment. This approach is fully in line with the reasoning of the PCIJ in *Chorzów*. When analysing the reparation due, the Court clearly distinguished an expropriation unlawful due to a mere lack

[53] Commentaries to the ARSIWA (n 12) 96, para 3 (emphasis added).
[54] *Former King of Greece v Greece* App no 25701/94 (ECtHR, 28 November 2002) paras 74, 77.

of compensation from an expropriation where the act of the taking is itself unlawful:

> The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation—to render which lawful only the payment of fair compensation is wanting.
> ...
> It follows that the compensation ... is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if [the] wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated.[55]

It follows that had the Court been faced with an expropriation where the 'wrongful act consisted merely in not having paid ... the just price of what was expropriated', the full reparation would have been 'limited to the value of the undertaking at the moment of dispossession, plus interest'. The Court does not mischaracterize an uncompensated taking as lawful. Rather, it clearly refers to the lack of compensation as a 'wrongful act'. However, at the level of analysing the full reparation, the Court is clear in drawing a distinction between the consequences of such expropriation and the expropriation, where the State 'had no right to expropriate'—that is, where the illegitimacy taints the very act of the taking.

In its analysis of reparation for violations of Article 1 of Protocol no. 1 of the European Convention on Human Rights (ECHR),[56] the ECtHR has also drawn distinction between 'inherently unlawful dispossession'—that is, expropriation where an act of the taking is itself illegitimate[57]—and dispossession 'that would have been legitimate but for the failure to pay any compensation'.[58] In *Scordino v Italy*, for instance, the Court found that although the mere failure to pay adequate compensation did result in a violation of Article 1 of Protocol no. 1, the reparation was limited to the *ex ante* value of the property taken:

> [T]he compensation to be determined in the present case will not have to reflect the idea of a total elimination of the consequences of the impugned interference. Indeed, in the present case it is the lack of adequate compensation and not the inherent unlawfulness of the taking of the land that was at the origin of the violation found under Article 1 of Protocol No. 1.
> ...
>
> [Thus], the Grand Chamber considers it appropriate to base itself on the value of the property at the time of the expropriation.[59]

In contrast, in *Belvedere v Italy*, the ECtHR found that it was the 'inherent unlawfulness' of the expropriation that was at the origin of the breach. Thus, it did not limit the assessment of reparation to the *ex ante* value of the property: '[T]he Court therefore holds that the compensation to be awarded to the applicant is not limited to the value of the property when it was occupied. For that reason, it requested the expert to estimate also the current value of the land in issue and the other heads of damage.'[60] Thus, it is not foreign to international adjudicatory

[55] *Factory at Chorzów* (n 27) 47.
[56] ECHR (n 3); Protocol no 1 (n 3).
[57] *Scordino v Italy* App no 36813/97 (ECtHR, 29 March 2006) para 254.
[58] *Former King of Greece* (n 54) para 74.
[59] *Scordino* (n 57) paras 255, 258.
[60] *Belvedere Alberghiera Srl v Italy* App no 31524/96 (ECtHR, 30 October 2003) paras 34–36.

bodies to achieve different remedial results when applying the principle of full reparation to inherently unlawful expropriations as opposed to expropriations where the taking is itself legitimate, but the wrong consists of the failure to pay compensation. To redress this latter wrong, it suffices to re-establish the injured party in the situation in which it would have found itself had the compensation been paid at the time of the taking (*ex ante* FMV) plus to award interest.

What is more, in calculating the *ex ante* FMV of the concession in our original scenario, the Tribunal may not ignore the fact that the cultural heritage site had been discovered in the mining area. No willing buyer would have ignored such a fact and its financial implications. In particular, any willing buyer would have accounted for the increased risk of legitimate governmental interference, be it by expropriation or at least by increased regulation. The increased future expenses associated with the relocation of artefacts, the risks of their destruction, and the associated fines must also be factored in when projecting the future cash flows that the business would have generated.[61]

In other words, if the DCF method is used to value the FMV, the projected net cash flows would be less than in the scenario of illegitimate taking (subsection (i)), since they would account for the increased costs associated with the appropriate handling of the cultural heritage site. Such cash flows from the fifth year (year of the cancellation) to the twentieth year (terminal year) will be discounted to the fifth year with the discount rate higher than in the scenario of illegitimate taking, factoring in the increased regulatory risk. The resulting amount will then be brought forward to the date of the award by interest in order to account for the time value of money. Therefore, in case of an expropriation merely lacking compensation it is not only the valuation date that changes but also the assumptions on which the FMV is calculated.

As seen, the outcome of the proper application of the *Chorzów* rule to an expropriation merely lacking compensation yields a result that accounts for the difference in gravity and the scope of illegality of unlawful and so-called 'lawful' expropriations. However, the result is not reached by mischaracterizing such expropriation as lawful. Nor does it revolve on the questionable theory of the treaty standard of compensation acting as *lex specialis* derogating from the customary rule of full reparation. Instead, the outcome is reached by properly re-establishing the injured party in the situation it would have found itself but for the illegal conduct of the State.

### (iii) *Procedurally irregular taking*

Again, the State cancelled the oil concession because of the discovery of cultural heritage. However, the State failed to respect a three-month notice period, prescribed both by the license and by the applicable domestic law, and ordered that the investor's equipment be relocated immediately. In this scenario, the wrongful act of the State was the failure to give a three-month notice of cancellation. In other words, the expropriation was rendered unlawful by the

[61] This proposition has also been hinted at in the case law of the ECtHR. In *James and others v United Kingdom* App no 8793/79 (ECtHR, 21 February 1986) para 54, the Court noted that 'legitimate objectives of "public interest", such as [those] pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value'. To put it more precisely, the existence of legitimate public interests justifying the taking, or increased regulation of the asset in question, will in all likelihood affect the fair market value of the asset.

breach of the due process requirement.[62] The question should thus be: what is the injury caused by this breach? The direct damage caused to the investor stems from the fact that she was not allowed to restructure and relocate her investment during the three-month period provided by law and not from the fact of the cancellation of the license itself. This cancellation was a legitimate act and had to take place. Thus, it would not accurately account for the 'but-for' scenario if the Tribunal were to compensate the investor as if the license had not been cancelled. The investor should instead be re-established where he would have found himself had the license been cancelled in pursuance to the proper procedure—that is, with the appropriate three-month notice. Thus, the State will need to compensate for the charges the investor reasonably incurred for immediate relocation of her equipment and for any loss that the investor suffered for not having the opportunity to adequately plan the relocation ahead of time.[63]

In *Amco v Indonesia (II)*, the Tribunal found that Indonesia revoked Amco's license related to a hotel construction and operation project without proper warning and in breach of the right to a fair hearing. On quantum, Indonesia argued that there was no causal link between those procedural irregularities and any damage caused by the revocation of the license. According to Indonesia, the State enterprise (BKMP) would have in any event revoked the license due to Amco's failure to pay its fees. The Tribunal deemed it too speculative to engage in such an analysis. According to the Tribunal, it would 'misaddress causality' if it were to analyse what the 'fair BKMP' would have done.[64]

The Tribunal's reluctance to analyse the nature of the breach in question is not to be welcomed. This is not to suggest that Indonesia's argument about the appropriateness of the license revocation was correct. However, the argument should have been analysed and, if not warranted, dismissed. If the revocation of the license was substantively legitimate given Amco's shortcomings, the compensation should have targeted, as far as possible, the direct consequences of the procedural irregularities and not those of the revocation of the license. If tribunals refuse to enter into such an analysis altogether, it will be hard to identify the direct consequences of the illegality in question. It is this approach that may result in misaddressing causality.

Hence, a mere finding of a breach of due process at the time of the expropriation does not warrant mechanically awarding the full value of the asset as of the date of the Award. Rather, when applying the *Chorzów* rule, tribunals should analyse what the actual damage sustained by the injured party was as a direct consequence of the given procedural irregularity. An award on damages needs to wipe out this specific injury and not the consequences of the legitimate act of the taking. That said, in some circumstances, the procedural irregularities may taint the substantive decision of the taking itself. If the administrative proceedings leading to the taking were so flawed that they shadowed the legitimacy of the decision to engage in the taking, the Tribunal may have no choice but to

[62] In practice, such a single procedural omission might not qualify as a breach of due process. However, for illustrative purposes, this simple example is more appropriate.

[62] It goes without saying that this is in excess of the compensation due for such a cancellation as described in Scenario (ii).

[64] *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1, Award in Resubmitted Proceeding (5 June 1990) para 174, cited in Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (BIICL 2008).

order the State to wipe out the consequences of the taking itself. In such cases, the award of the full *ex post* value of the asset may be warranted.

Alternatively, where the procedural irregularity is hardly separable from the substantive decision, tribunals may also consider the appropriateness of restitution. For instance, in *LaGrand v United States*, the ICJ indicated that the United States' failure to notify Germany of the conviction and prolonged detention of German nationals in breach of the notification requirement contained in Article 36 of the Vienna Convention on Consular Relations would require reconsideration of the fairness of the conviction 'by taking account of the violation of the rights set forth in the Convention'.[65] The Court ordered the reconsideration of the conviction as a means of restitution for the breach of the notification requirement, without pronouncing on the substantive legitimacy of the conviction or penalty. Thus, the Court did not order the re-establishment of the situation that would have existed absent the conviction. Rather, it targeted the procedural irregularity in question by ordering the tainted procedure to be redone. Similarly, where a tribunal cannot pronounce on the substantive legitimacy of the decision about the taking because it may be tainted by procedural irregularities, it may be more appropriate to order the reconsideration of the decision instead of assuming that the taking was illegitimate and awarding damages on the premise that the taking should have never occurred.

(iv) *Other examples*

The three scenarios listed above are simplistic. Most expropriations occur as a result of multiple complex decisions and procedural conduct. Indeed, the above examples have been overly simplified in order to clearly demonstrate the essence of the proposed approach. However, this does not change the key takeaway that the now prevailing rigid approach portraying the rule of full reparation as a single formula of compensation in the amount of the full value of the asset is inadequate. That unlawful expropriation is a composite and complex act is all the more reason to avoid glossing over the relationship that the secondary rule of full reparation bears to the nature and content of the violation of the primary obligation of non-expropriation.

It also goes without saying that the above scenarios are not exhaustive. There are multiple other modes in which an unlawful expropriation may occur. Importantly, most expropriations are indirect and creeping, often consisting of various measures that accumulate into the indirect deprivation of property. While some of those measures may be legal, others can be tainted by illegality.[66] Again, the full reparation does not need to address the consequences of the legal conduct. For instance, a State may legitimately impose high taxes on cigarette vending machines. Additionally, however, it can arbitrarily and discriminatorily restrict the areas in which such machines can be installed. The measures in cumulation will result in the destruction of the investor's business and, thus, in an indirect taking of the property. In such a case, the full reparation will need to focus on the consequences of the unlawful measure—that is, arbitrary restrictions on the

[65] *LaGrand (Germany v the United States of America)* (Judgment) [2001] ICJ Rep 466, para 125. Vienna Convention on Consular Relations (opened for signature 24 April 1963, entered into force 19 March 1967).

[66] There also can be situations where all individual measures are legitimate, but together they result in an uncompensated taking, which is unlawful under most international investment agreements.

locations of the vending machines. The investor need not be restored in the hypothetical world without all of the measures. Rather, the taxation, as a legitimate measure, must be taken into account when projecting the cash flows and calculating the FMV of the business.

What is more, there are situations where a public purpose exists, but it only justifies a part of the expropriatory measure because the measure was disproportionate to the proclaimed public purpose. In such cases, the reparation will be concerned with wiping out the results of only those parts of the measure(s), if discernable, that were not justified by the public purpose. So, if a State expropriates commercial construction land for environmental purposes, when it could have instead rezoned the land to a recreational status, the investor need not be compensated for the value of the construction land, involving the discounted cash flows of the construction project. Nor should the investor be left without any compensation, given that the taking was not fully justified by the public purpose. Rather, what is due is the FMV that the land would have had if it had been rezoned to a recreational status. That is so because the public purpose of environmental protection justified the rezoning of the land, but not the taking.

Another situation worth analysing is that of a discriminatory taking. In most cases, the discriminatory nature of a measure will serve as evidence of the lack of a genuine public purpose.[67] Indeed, one can hardly find a legitimate justification for a taking, which is premised on ethnic-based or nationality-based discrimination. In most such cases, the discrimination is itself the real purpose of the taking. Such an illegality, being inseparable from the act of the taking itself, will call for the re-establishment of the situation that would have existed in the absence of the taking (similar to scenario (i) above).

## IV. CONCLUSION

Non-expropriation provisions of IIAs create a primary obligation to pay compensation for expropriation, which is distinct from the secondary duty of full reparation. Thus, a failure to pay compensation is a violation of a treaty standard and renders an expropriation unlawful. Contrary to the findings of some international tribunals, an expropriation merely lacking compensation cannot be said to be lawful provisionally—that is, before the tribunal resolves the given dispute. International tribunals are not mandated to resolve the dispute on the amount of compensation due as a primary duty under the applicable IIA. Instead, their mandate is to judge the compliance with the IIA and award compensation as a modality of reparation if a wrongful act is established. Therefore, they cannot declare an expropriation without compensation as lawful and, at the same time, award compensation. Instead, tribunals should treat the uncompensated taking as unlawful and award compensation as a reparation for injury suffered as a result of the internationally wrongful act.

When assessing the rules applicable to reparation, the resort is to be had to the customary international law and, in particular, the formula embodied in the *Chorzów* decision. Contrary to the currently prevailing investment jurisprudence, a

[67] See *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body, WT/DS332/AB/R (17 December 2007)

treaty standard of compensation (primary norm) cannot, and does not, purport to create a *lex specialis* rule of reparation (secondary norm). It is therefore incoherent to suggest that the treaty formula for compensation pre-empts the application of the rule of full reparation in cases of expropriations merely lacking compensation. Instead, the *Chorzów* formula for full reparation is applicable to all types of unlawful expropriation, including the one merely lacking compensation.

That being said, the application of the *Chorzów* rule to different types of unlawful expropriations will yield different results depending on the injury directly caused by the illegality in question. The law of State responsibility, properly understood, contemplates the remedial response to vary depending on the scope of the unlawfulness of a given conduct. The now prevailing rigid approach portraying the rule of full reparation as a single formula for compensation in the amount of the full value of the asset is thus inadequate as it overlooks the complexity of the expropriatory conduct.

Expropriation is a complex act often consisting of multiple actions. It is usually the case that only a part of these actions are illegal. Full reparation must wipe out the consequences directly caused by the illegal conduct and avoid compensating the injured party for the consequences of the legitimate acts. Where the illegality in question is not the act of the taking in its entirety but, rather, a particular irregularity separable from that act, reparation must be targeted at the direct consequences of that irregularity. Thus, for instance, when the unlawfulness of an expropriation stems from the State's failure to pay compensation, but the taking itself is legitimate, reparation should be aimed at the consequences of the absence of compensation and not at those of the taking. Similarly, when an expropriation is tainted by certain procedural irregularities, the reparation must, as far as possible, target the fallout of such irregularities and not that of the taking itself.

It is not realistic to list all scenarios of how an unlawful expropriation may take place. Nor is it possible to offer one formula for the quantification of compensation for strictly defined categories of unlawful expropriation. Rather, it is a duty of investment tribunals to determine on a case-by-case basis the consequences that the unlawful conduct in question caused. This approach properly accounts for the difference in gravity between different types of unlawful expropriations without mischaracterizing as lawful the expropriation that merely lacks compensation. It also eschews the conflation between the primary obligation to provide compensation for a taking and the secondary norm of full reparation.