CHAPTER 4

COMPENSATION FOR EXPROPRIATION IN INTERNATIONAL INVESTMENT LAW

4.1. Introduction

States are obliged to protect foreign investments in accordance with the international investment treaties that they have entered into and the relevant customary international laws that have evolved. In the light of this, no foreign investment can be expropriated unless certain requirements are met. Host states are not permitted to expropriate except for public purposes, according to the due process of law, in a non-discriminatory manner, and with prompt, adequate, and effective compensation. In addition to the expropriation clauses, many international investment treaties included compensation payments as a result of the expropriation or other measures having an equivalent effect of expropriation.[476] This development ended the previous controversies between major capital-exporting states, newly independent states, and communist states concerning the issue of paying compensation to foreign investors on various legal basis.[477] Controversies remain as to what states should pay in lawful and lawful expropriation and what really constitutes compensation in terms of its adequacy, fairness or appropriateness. Generally, lawful expropriation is considered to be an acceptable legitimate act, but the state is still obliged to pay compensation to the owners. On the other hand, unlawful expropriation is a wrong act and is not accepted internationally, which is why many jurists tend to require reparation

[476] Article 4 UK-Malaysia BIT 1981; Article 1110 Chapter 11 of NAFTA; Article 6 US Model BIT 2012; Article 5 Jordan- Austria BIT 2001; Article 5 Jordan-Singapore BIT 2004; Article 7 Canada-Peru BIT 2006.
[477] Nikièma, S. H. (2013).

from it.[478] The basis of the discussion among the jurists is that the value of compensation cannot be equal for lawful and unlawful expropriation, and accordingly, the distinction between them is essential for the purposes of valuation, as the resulted value of compensation may differ.[479]

Internationally, the general principle concerning the State's responsibility for wrongful acts provides that compensation shall be based on restitution, compensation and satisfaction.[480] However, different approaches have emerged from the jurisprudence of the international investment tribunals in dealing with compensation, including the standards adopted, and, most importantly, for the purposes of this research, the determination and applicability of such standards in cases of indirect expropriation.[481]

[478] Christie, K. Ogut, E and Turtoi, R. In Legum, B. (2019). P 231; Dolzer, R., & Schreuer, C. (2012). p. 98; Nater-Bass, G., & Pfisterer, S. (2018). *"Calculation of Compensation and Damages in International Investment Law by Irmgard Marboe*". ICSID Review-Foreign Investment Law Journal. p. 80; Subedi, S. P. (2016). p 125.

[479] Ripinsky, S., & Williams, K. (2008). p 65; Sornarajah, M. (2017). pp 426-439; Marboe,I. (2017). P. 83; Marboe, I. (2015). P 1062.

[480] Article 34, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the work of its 53rd session; see Christie, K. Ogut, E and Turtoi, R. In Legum, B. (2019).

[481] These are among the questions that contribute to the controversy on compensation in the context of expropriation. See Norton, p. M. (1991). p. 474; Newcombe, A. P., & Paradell, L. (2009). p. 377; Dolzer, R., & Schreuer, C. (2012). p. 100.

As a continuation of the previous chapter, this chapter seeks to address the above questions in the context of indirect expropriation and the impact thereof on the state's responsibility in compensating foreign investors. It will involve an analysis of the existing jurisprudence on expropriation and additional challenges to indirect expropriation due to its indirect nature, its valuation and the determination of compensation.

4.2. The Concept of Compensation

It has become clear that the compensation paid for expropriation is a means of protecting the property rights of foreign investors and, at the same time, acts as a deterrent for states to minimise expropriation unless it is justified on lawful basis and in accordance with international obligations. The different methods for determining compensation can be seen in the different terminologies used in the treaties and arbitral tribunal decisions, such as 'full compensation,' 'just compensation,' 'fair compensation,' 'indemnification' and 'appropriate compensation.'[482]

In dealing with the issue of compensation, there are two conflicting theories, either to put the owner whose property is expropriated in a pecuniary position, as it would have been if his property had not been taken, known as the 'owner's loss' theory, or to compensate the owner only for what the taker gets, known as the 'taker's gain' theory.[483] It is obviously difficult to apply the taker's gain theory to indirect expropriation because in such cases the

[482] Different countries use phrases like just compensation, fair compensation, indemnification, appropriate compensation and so on. Article (42) of the Jordanian Investment Law provides, for its part, the term fair compensation in a currency which may be exchanged without delay, without further explanation about what fair compensation means.

[483] Kratovil, R., & Harrison Jr, F. J. (1954). "*Eminent Domain--Policy and Concept"*. Calif. L. Rev., 42. p. 615.

state does not take ownership directly as they usually do not benefit from the investment that has been subjected to indirect expropriation. Due to this, it is observed that the owner's loss theory has received predominance recognition over the latter.

It should be noted that the concept of compensation for expropriation in all its forms has become recognised in international law as being justified in economic, social and international political terms. Compensation ensures states to take proper decisions and make rational regulatory actions. Compensation also provides assurance to the investors and banks, in which without, the investors will not be willing to expose their investments to the risk of takings while the bank will refuse lending unless the laws provide adequate protection.

The other justification is based on the principle of distributing the burden of public improvements. In a case where the investors' properties are taken for public benefit without any compensation, the investors are deemed to be unfairly burdened for the public good. It is illogical to oblige the investors to bear all the costs the society requires to satisfy its needs of development.[484] Thus, compensation is considered a very important method to maintain social justice. States must take its share in the losses resulting from expropriation. Along this line of argument, no single investment should be left alone bearing states' actions that are intended to achieve public interest or for the general society.[485]

[484] Marcus, p. (1941). p. 508.
[485] Epstein, R. A. (1995). "*Bargaining with the State".* Princeton University Press. pp. 3-12

4.3. Compensation in the Context of Indirect Expropriation

Although direct expropriation has become rare, foreign investors are still subject to possible indirect deprivation of their right to enjoy their property under state regulations. Such deprivation may be in the form of preventing an investor from acting on his right to invest, use, exploit and dispose of his investment. This can reduce the value of the investment, despite the absence of transfer of the investment property from the investor to the state. The key question to be discussed in the context of indirect expropriation is what standard should be applied and, in the search for a solution, can standards applied for direct expropriation cases be applied for indirect expropriation?

There is an ongoing discussion about the compensation for indirect expropriation,[486] and some writers such as Sloane & Reisman[487] focused on the relevant time for calculating compensation,[488] and other writers such as Merrill suggested that the taken regulatory action should not result to full compensation similar to that in direct expropriation.[489] Regrettably, the expropriation clauses in BITs do not distinguish between the standards of determining the compensation either direct or indirect expropriation, despite that both forms of expropriation are included in the BITs. They do not take into account the peculiarities and other challenges inherent in indirect expropriation,[490] and it would be

[486] Muchlinski, P. Ortino, F., & Schreuer, C. (Eds.). (2008). p 1785.
[487] Sloane, R. D., & Reisman, W. M. (2004). p. 141.
[488] Is it the date of the legislative or regulatory decision that affected the investment, the date of the occurrence of the effect, or the date of the arbitration tribunal's decision that the regulatory measures constituted an indirect expropriation?
[489] Merrill, T. W. (2002). p. 116.
[490] Nikièma, S. H. (2013). p. 4

preferable to allocate dedicated articles for compensation of the indirect expropriation, for lesser compensation.

It is not appropriate to impose excessive compensation on states in order to legislate for public interests, such as to implement its international obligations toward human rights, or for maintaining the health and environment.[491] It must be differentiated in some circumstances if the host states acquire enrichment from transferring private investments properties ownership to the states. In such circumstances, the state must pay the appropriate loss incurred. Whatever the case, in situations of indirect expropriation due to general regulatory measures, the governments normally will not profit financially, and in most cases, this action may result to tax revenue losses due to the closure of a business or a decrease in the product consumption, making the standard of full compensation becomes difficult to justify.[492]

In the case of indirect expropriation, the investors retain their properties and ownership, albeit with diminishing value, whereas in the case of direct expropriation, the investors transfer their property and its related legal annexures to the government, along with the element for the value of residual property rights.[493] This complicates the issue of compensation in the case of indirect expropriation, as it is difficult to determine the amount of compensation without exceeding the "regulatory measures" threshold, [494] and to avoid

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[491] Ibid. p. 5

[492] Bachand, R., Gallie, M., & Rousseau, S. (2003*). "Investment Law and Human Rights in the Americas"*. French Directory of International Law, 49 (1). pp. 601-602.

[493] Muchlinski, P., Ortino, F., & Schreuer, C. (Eds.). (2008). p 1785. See generally Rubins, N. D. (2003). *"Must the Victorious Investor-Claimant Relinquish Title to Expropriated Property?"*. *The Journal of World Investment & Trade*, 4(3). p. 481

[494] Muchlinski, P., Ortino, F., & Schreuer, C. (Eds.). (2008). p 1786.

overcompensation by providing full compensation. Over compensation will potentially limit states' ability to perform legally below the threshold portion. [495] Such circumstances will deprive the states from acting its sovereignty to achieve public interests. In order to avoid paying huge and unexpected compensation for the foreign investors, this shall force the governments to be less inclined towards public interests' regulatory plans.[496]

In order to treat this issue, it is important that states shall specify in their BITs specific categories of regulatory actions that are exempted from being classified as indirect expropriation, to reduce full compensation value (or encouraging partial compensation) by taking into account the relative legitimacy of the state's regulation. This includes intention, good faith, legitimate purposes pursued and the proportionality of measure and purpose. Consideration must also be given to the hardship that investors face such as the disappointment of legitimate expectation on the property, time and trouble to find a replacement purpose for the property; or the inconvenience of restarting or realignment of business operation.[497]

4.4. Reparation as Compensation for Unlawful Expropriation in International Law

In general, expropriation can be lawful or unlawful. Unlawful expropriation is a wrong act and is not accepted internationally, in which many legal scholars are of the view that host states shall adopt the principle of reparation.[498] In order for an expropriation to be

[495] Ibid.
[496] Nikièma, S. H. (2013). p.5
[497] Harris, O. (1995). *"Boyle and Warbrick"* in Law of the European Convention on Human Rights. (Vol. 358. p. 532; Muchlinski, P., Ortino, F., & Schreuer, C. (Eds.). (2008). p 1786.
[498] Christie, K. Ogut, E and Turtoi, R. (2019). P 231; Dolzer, R., & Schreuer, C. (2012). p. 98; Nater-Bass, G., & Pfisterer, S. (2018). p. 80; Subedi, S. P. (2016). p 125.

legal, it must fulfill the basic rules stipulated in international law,[499] that it must be for the purpose of public interest, on a non-discriminatory basis, and in accordance to the due process of law. The state must also not breach any prior contractual obligations without compensation, and if the state fails to comply with such rules, the expropriation becomes unlawful and the state incurs international legal responsibility.[500]

As seen in the previous chapter, the different approaches taken by the tribunals could further complicate the matter as it will result to different consequences in compensation. The police power approach for instance will possibly lead to a conclusion that all indirect expropriation cases are considered unlawful expropriation, while the sole effect doctrine approach will likely extend the direct expropriation effect, even if it was done to achieve the public interest and within the conditions of the state regulatory actions.

Reparation is the compensation that must be paid in the case that the state acts illegally. It must, as far as possible, wipe out all the consequences of its illegal act and re-establish the situation the same as the original state in case that act had not been committed. This must be done through restitution in kind, and if the restitution is not applicable, the state must pay a sum corresponding to the value which restitution in kind would bear.

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[499] Reinisch, A. (Ed.). (2008). "*Standards of Investment Protection"*. Oxford University Press. pp. 171-204; Marboe, I. (2006). *"Compensation and Damages in International Law: The Limits of Fair Market Value".* The Journal of World Investment & Trade, 7(5). p. 725; Dolzer, R., & Schreuer, C. (2012). pp.91-98; Sloane, R. D., & Reisman, W. M. (2004). p. 134.

[500] International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in the Yearbook of the International Law Commission, 2001, Vol. II, Part Two, p. 31

In international law, the obligation to compensate for damages caused by unlawful acts is an essential obligation established as early as in 1928.[501] The Permanent Court of International Justice in *Chorzów*[502] distinguished between legal and illegal expropriation and its various financial consequences,[503] and the decision is widely recognized as a global reference for compensation within the framework of international law.[504] The court held that:

> *"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, wipeout all the consequences of an illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation for an act contrary to international law."* [505]

[501] Christie, K. Ogut, E and Turtoi, R. In Legum, B. (2019). P 231; Nater-Bass, G., & Pfisterer, S. (2018). p.80.
[502] *Chorzow Factory Case (Germany v Poland), PCIJ Rep (1928), Series A, No 17 (PCIJ). 13 Sept 1928 (Chorzow Factory Case 1928).*
[503] UNCTAD. (2012). *"Expropriation"*. UNCTAD Series on Issues in International Investment Agreements II. p.111.
[504] Subedi, S. P. (2016). p 125.
[505] *Chorzow Factory Case* 1928 *paras* 46-47.

International investment tribunals referred to the standard of compensation applied in the *Chorzów* factory case to compensate the investors. In *ADC v. Hungary,* the tribunal highlighted that the BIT only stipulates compensation payable in the case of a lawful expropriation, further emphasizing the differences between lawful and unlawful expropriation, and stated that without differentiating the two, it would confuse the compensation for a lawful expropriation with damages for an unlawful expropriation.[506] Since the BIT generally does not contain any standard of compensation for unlawful expropriation, the default standards contained in customary international law should apply, and accordingly in *ADC v Hungary*, the tribunal applied the *Chorzów Factory* standard to compensate the claimants.[507]

The tribunal in *Amoco v. Iran* reaffirmed the distinction in consequences between lawful and unlawful expropriations. [508] The tribunal held that such a distinction was required because the rules governing the compensation to be paid by the expropriating state differed depending on the legal characterization of the taking.[509] Similar approaches were

[506] *ADC v. Hungary* 2006 para 481.
[507] Legum, B. (2019) p. 235.
[508] *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited*, IUSCT Case No. 56. 14 July 1987 (*Amoco v Iran* 1987).
[509] Ibid. para 192

followed by arbitral tribunals in *ConocoPhillips v Venezuela,*[510] *Siemens v Argentina,*[511] *Tidewater v Venezuela,*[512] *Yukos Universal v Russia,*[513] *and Caratube v Kazakhstan.*[514]

The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles) represented a successful attempt in highlighting the main principles of international law on reparation and compensations.[515] It aimed to establish the so-called secondary rules of state responsibility, i.e. the general conditions under international law for the state to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom.[516]

Article 31 of the ILC Articles stated:

> *"1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State".* [517]

The ILC commentary remarked that reparation has a broad definition that covers both restitution and compensation.[518] It is observed here that Article 31 of ILC is consistent with

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[510] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela.* ICSID Case No. ARB/07/30. Award, 8, March, 2019 *(ConocoPhillips v Venezuela 2019)* paras 342- 343.
[511] *Siemens v argentina* 2007 para 352.
[512] *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela.* ICSID Case No. ARB/10/5. Award, 13 March 2015 *(Tidewater v Venezuela 2015)* paras 141- 142.
[513] *Yukos Universal v Russia* 2014 paras 1763-1769.
[514] *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (II),* ICSID Case No. ARB/13/13. Award - 12 Dec 2019 *(Caratube v. Kazakhstan (II).* 2019) para 1082.
[515] International Law Commission (2001*). "Draft Articles on Responsibility of States for Internationally Wrongful Acts"* (with commentaries) (ILC Draft Articles). Yearbook of the International Law Commission, 2(2), 49.
[516] Ibid. Article 31.
[517] Ibid
[518] Ibid. p. 91-94

the position in the *Chorzów Factory* case in that the reparation is meant to 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.[519] The ILC referred to the forms of reparation in Article 34 which establishes that the states shall provide full reparation through restitution, compensation, and satisfaction.[520]

Under the provisions of the ILC Articles, restitution is the primary remedy for the acts contrary to international law and it comes as the first choice among the forms of reparation, so as to re-create the situation which existed before the wrongful acts were committed. However, if the restitution is not materially possible or if it involves a burden out of all proportion to the benefits deriving from restitution instead of compensation, the states shall pay compensation for the damage caused.[521] This is akin to the position in customary international law, where if restitution is unavailable or inadequate, or if the properties in question have been destroyed and the situation cannot be restored for any reason, the most appropriate remedy is compensation.[522] Compensation in such cases shall cover financially the assessable damages including loss of profits insofar as it is established.[523]

[519] Ripinsky, S., & Williams, K. (2008) p. 53
[520] Article 34 ILC Draft Articles 2001.
[521] Article 35 ILC Draft Articles 2001; Legum, B. (2019). P 232; Friedman, M W, and Lavaud, F. (2018). "*Damages Principles in Investment Arbitration"* in Trenor, J. A. (Ed.). (2018). "*Guide to Damages in International Arbitration*". Law Business Research Ltd. p. 97.
[522] Legum, B. (2019). p 232.
[523] Article 36 ILC Draft Articles 2001 provides that: *"1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."*

When it comes to the expropriation of foreign investment, whether direct or indirect, lawful or unlawful, compensation of damages is preferred over restitution.[524] This is due to several reasons, among them is the impossibility of performance due to material impossibility[525] or legal impossibility.[526] Restitution may not always wipe out all the illegal acts or loss due to expropriation,[527] and often the claimants themselves do not regard restitution as the best or the most desirable remedy.[528] Moreover, restitution presupposes the cancellation of the expropriation action at issue and is considered against the respect due for the sovereignty of the expropriating states.[529]

This can also be seen in *Tecmed v Mexico*, where the tribunal took into account the claimant's claim for monetary damages, and the arbitral tribunal did not and said that it will not consider the admissibility or inadmissibility of the restitution in kind in the case.[530] Moreover, in the case of *BP v Libya*,[531] the arbitrator ruled that restitution was not an available remedy, and stated that the claimant was *"entitled to damages arising from the wrongful act of the respondent, to be assessed by this Tribunal in subsequent*

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[524] *Walter Fletcher Smith Claim (U.S. v. Cuba)*, Award, 2 May 1929 pp. 913-918; *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic, AD HOC AWARD OF JANUARY 19, 1977. (Texaco v. Libya. 1977.)*, para 177; *Antoine Goetz and others v. Republic of Burundi (I), ICSID Case No. ARB/95/3. Award, 10 Feb 1999 (Goetz v. Burundi (I) 1999) paras 134-137.*

[525] Higgins, R. (1982). pp 315-316. An example is where the expropriated property is already passed into the hands of a third party, or is destroyed.

[526] Zouhair, K. (1972). "*Protection of Foreign Investment: A Study in International Law".* New York: Sijthoff & Noorhoff Publishers. p. 98; Higgins, R. (1982). p. 316.

[527] Zouhair, K. (1972). p.99.

[528] Higgins, R. (1982). p. 316; Marboe, I. (2006). p. 728; Ripinsky, S., & Williams, K. (2008). pp. 57-59.

[529] *Libyan American Oil Co. (LIAMCO) v The Libyan Arab Republic, 17 I.L.M. 3 (1978), 4 Y.B. COM. ARB. 177 (1979) (LIAMCO v Libya. 1979) p. 217*; Christie, K. Ogut, E and Turtoi, R. (2019) p. 231; Zouhair, K. (1972). p. 98.

[530] *Tecmed S.A. v Mexico 2003* paras 183, 201(2) and 183*; Azurix v. Argentina (I)* 2006, para 352.

[531] *BP Exploration Company (Libya) Limited v The Government of the Libyan Arab Republic,* Award, 10 October 1973 (*BP v Libya* 1973).

proceedings".[532] *In LIAMCO v Libya*,[533] the arbitrator Mahmassani declined to grant restitution in the case because of its impossibility of performance in the international field. [534] However, in *Texaco v Libya*,[535] the arbitrator, Dupuy ordered *restitution in integrum* for the expropriated oil concessions.[536] It should be noted, particularly in cases of indirect expropriation, that restitution in-kind is impossible because the title to the property is not transferred.

In terms of treaty practice, some treaties explicitly mention restitution as a relief.[537] Article 22 (1) Jordan-Austria BIT allows the tribunal to explore different forms of reliefs, including restitution in kind to an investor.[538] The U.S Model BIT 2012 provides flexibility in the execution of the relief, in that if the arbitral tribunal decides for restitution, the award shall provide that the respondent may pay monetary damages in lieu of restitution.*[539]* It is observed that treaties give the parties the freedom to choose between restitution and compensation in the terms 'in lieu of restitution."[540]

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[532] Ibid para 357.
[533] *LIAMCO v. Libya* 1979.
[534] Ibid para 124*;* Von Mehren, R. B., & Kourides, P. N. (1981). *"International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases".* American Journal of International Law, 75(3). pp. 533- 545.
[535] *Texaco v Libya* 1977.
[536] Ibid. para 109.
[537] Article 34 of U.S. Model BIT 2012 stipulated that *"where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution"*; Articles 6, 17 (1) and 22 (1) Jordan-Austria BIT 2001; Article 4 Jordan-U.S BIT 2003; Article 44 Jordan-Canada BIT 2009; Article 10.13 India-Korea BIT 2009 provides that the *"state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution."*
[538] Article 22 (1) Jordan-Austria BIT 2001.
[539] Article 34 U.S. Model BIT 2012; Article 44 Jordan-Canada BIT 2009; Article 1135 (1) NAFTA.
[540] Dugan, C., Wallace, D., Rubins, N., & Sabahi, B. (2011). *"Investor-State Arbitration".* Oxford University Paras. pp. 568–569; Legum, B. (2019). p 232.

It is understood that the original or main reparation for unlawful expropriation is restitution rather than compensation, but in many cases, compensation is given due to the impossibility of execution. Compensation is calculated from the standpoint of the affected investor, taking into account the difference between the harmed investor's actual financial situation and the financial situation that would have existed if the unlawful expropriation had not occurred.[541] If the value of the expropriated properties has increased between the date of expropriation and the date of the arbitral decision, the highest value shall be awarded to the investor. In an unlawful expropriation case, the investor gets reparation including all incidental, expenses, and other consequential damages. Reparation for unlawful expropriation can be equal to or greater than compensation, but it can never be less than compensation for lawful expropriation. This is based on the concept of reparation, which seeks to eliminate all of the consequences of the illegal act and restore the situation that would have existed if the act had not been committed.[542]

4.5. Method of Estimating the Value of Reparation for Unlawful Expropriation

The fair market value (FMV) of the expropriated investments represents the keystone of the estimating process in both lawful and unlawful expropriation. The difference is that, whereas compensation in lawful expropriation is limited at the time of taking, [543] in

[541] Marboe, I. (2006). p. 733.
[542] UNCTAD. (2012). p. 115.
[543] There are some exceptions to this principle, see *SPP v Egypt* 1992, para 198*; American Independent Oil Company (Aminoil) v The Government of Kuwait*, Award of 24 March 1982 *(Aminoil v Kuwait* 1982), International *Law Reports*, Vol. 66, p. 519.

unlawful expropriation, the fair market value represents the reparation to be paid.[544] The arbitrator's consideration in unlawful expropriation is to wipe out all the consequences of the unlawful expropriation and re-establish the situations that would have existed if the action had not been committed.[545]

The additional factors are explained below, including the loss of future profits, the increase in the value of the investments after the taking until the date of the award, and the claimant's legal expenses.

4.5.1. The Loss of Profit

We can argue that the difference between compensation for lawful expropriation and reparation for unlawful expropriation lies in the payment of lost profits *(lucrum cessans)* in unlawful expropriations, whereas in cases of lawful expropriation, the host country may only pay the property owners what they have lost *(damnum emergens)*.[546]

Reparation normally includes the investor's lost of opportunity to make profit,[547] in contrast to lawful expropriations, where hypothetical buyers in market transactions would not be willing to pay for expectations of future profit.[548] Loss of profits is considered as

[544] *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009 *(Funnekotter v Zimbabwe* 2009) para.111*; (Amoco v. Iran.* 1987) paras. 248-249.
[545] Sabahi, B. (2011). "*Compensation and Restitution in Investor-State Arbitration: Principles and Practice"*. OUP Oxford. pp. 94-95.
[546] Marboe, I. (2006). P. 727; Brownlie, I. (1999). "*Principles of Public International Law*". Oxford: Clarendon Press. p. 515; Bernhardt, R. (1992). "*Encyclopedia of Public International Law*" in Bernhardt, R. (1992). Pp. 929 – 931.
[547] Article 36 ILC Draft Articles 2001.
[548] Brower, C. H. (2004*).* "SD Myers, Inc. v. Canada, and Attorney General of Canada v. SD Myers, Inc., [2004] FC 38". *American Journal of International Law*, 98(2). p. 345.

consequential damages, which explains its inclusion in the damages payable for unlawful expropriations and excluded from the compensations due for lawful expropriations.[549]

4.5.2. The Fair Market Value of the Lost Investments at the Relevant Date

The chosen date by arbitrators to calculate the fair market value of the lost investments help to draw the line between compensation for lawful expropriation and reparation for unlawful expropriation.[550] Some of the arbitrators have awarded additional indemnities for the increase in the value of the investments post-taking in the case of unlawful expropriation,[551] while in the cases of the lawful expropriation arbitrators may usually award compensation only for the fair market value of the investment on the date of the taking.[552] If the value of the investment increases after the date of the taking, arbitrators assesses the fair market value on the date of the award, but if the value of the investments declines after the expropriation, arbitrators would assess the fair market value of the investments at the date of the taking.[553]

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[549] Amerasinghe, C. F. (1993). "*Some Aspects of the Quantum of Compensation Payable upon Expropriation"* in Proceedings of the ASIL Annual Meeting (Vol. 87, pp. 477-483). Cambridge University Press. p. 478.
[550] *Phillips Petroleum Co. Iran v Iran* 1989, para 111.
[551] *ADC v. Hungary* 2006, para 497; see also the ECIHR case law, the case of *Papamichalopoulos and others v. Greece (Articale50) (Application no. 14556/89),* Judgment (Merits) 24 June 1993 *(Papamichalopoulos v Greece* 1993*)* para 36.
[552] Spiller, P. T., Abdala, M. A., & Zuccon, S. (2007) "*Chorzów's Compensation Standard as Applied in ADC v. Hungary".* Oil, Gas & Energy Law Journal (OGEL), 5(3). p. 5.
[553] Marboe, I. (2006). p. 727; Sabahi, B. (2010). "*Comparative Compensation for Expropriation"*. In Schill, S. W. (Ed.) (2010). "*International Investment Law and Comparative Public Law*". Oxford University Press. pp. 768-771.

4.5.3. Expenses Incurred as Consequence of the Unlawful Expropriation

In some cases, tribunals have been keen to recognize payment of a sum to cover the expenses incurred by the claimant investor, as an additional consequence for the unlawful expropriation. In the case of *Siag v Egypt*, the tribunal calculated the damages due by the government of Egypt, for the unlawful expropriation of the investment, by adding the values of the expropriated asset immediately before the date of expropriation and adding the sum of USD (1,000,000) for the legal expenses incurred by the claimants in their claims in the domestic court for more than seven years.[554] It should be noted that tribunals generally do not adopt this trend, and to award additional sums to cover the legal expenses. It is argued that the *Chorzów Factory* case and the principles derived from it, should be purely compensatory.[555]

However, the case is different in the situations of consequential expenses deriving from the early termination of employment contracts or the liability to subcontractors. These are considered as main consequential loss provided that the claimants could bring sufficient proof of the values of such liabilities.[556]

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[554] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt,* ICSID Case No. ARB/05/15. Award, 1 June 2009 *(Waguih v Egypt* 2009*)* at 593.

[555] *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7) Award, 30 June 2009 *(Saipem v Bangladesh 2009)* para 205.

[556] *Siemens v. Argentina* 2007, para. 352*; Watkins-Johnson Company, Watkins-Johnson Limited v. The Islamic Republic of Iran, Bank Saderat Iran* IUSCT Case No. 370.429-370. Award, 28 July 1989 *(Watkins-Johnsons Co., et al. v. Iran et al.* 1989) paras*. 114-117; Uiterwyk Corporation, Jan C. Uiterwyk, Maria Uiterwyk, Robert Uiterwyk, Hendrik Uiterwyk, Jan D. Uiterwyks v. The Government of the Islamic Republic of Iran, the Ministry of Roads and Transportation, Ports and Shipping Organization, Iran Express Lines, Sea-Man-Pak,* IUSCT Case No. 381.375-381. Award 6 July 1988 *(Uiterwyk Corporation v. Iran. 1988)* para.117*; Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11. Award, 5 October 2012 *(Occidental v. Ecuador (II). 2012) 792*. See also Marboe, I. (2009). *"Calculation of Compensation and Damages in International Investment Law".* OUP Catalogue. pp 504-507.

4.5.4. Moral Damage and Punitive Damage

The obligation for reparation in the *Chorzów Factory* case recognises moral damage. This is also reflected in the ILC Draft Articles in that it requires reparation for the material and moral damages.[557] The investment tribunals however have rarely awarded for moral damages,[558] except in some case such as in *Benvenuti & Bonfant v. Congo*,[559] and *Funnekotter v Zimbabwe*.[560]

In the case of *Funnekotter v Zimbabwe*, the tribunal ordered Zimbabwe to pay besides the fair market value of the investments indirectly taken, an additional reparation for the moral damages imposed to the investors. The tribunal held that:

> *"The Claimants must obtain reparation for the disturbances resulting from the taking over of their farms and for the necessity for them to start a new life often in another country. It evaluates the damages suffered in this respect for each Claimant at 20,000 Euros".*[561]

As for punitive purposes, some authors have suggested that such exemplary damages should be introduced to distinguish between the legal consequences deriving from lawful

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[557] Article 31 ILC Draft Articles 2001.

[558] Sabahi, B. (2011) p. 137 states that "there is some overlap between harms that fall under the term 'moral damage and those that may be characterized as material or physical damage …. This overlap, hence, calls for a cautious approach to awarding compensation for moral harms". See *Europe Cement Investment and Trade S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/07/2) Award, 13 August 2009 *(Europe Cement v. Turkey 2009) paras 117, 181; Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2. Award, 17 September 2009 *(Cementownia v. Turkey (I) 2009) paras.159-171.*

[559] *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2. Award, 8 Aug 1980 *(Benvenuti & Bonfant v Congo* 1980*).*

[560] *Funnekotter v Zimbabwe* 2009*.*

[561] *Ibid.* paras 137-138. See also, *Joseph Charles Lemire v. Ukraine (*ICSID Case No. ARB/06/18). Award, 28 March 2011 (*Lemire v Ukraine (II)* 2011*)* para 333.

and unlawful expropriation. Punitive damages will control unlawful actions of the states and make them more committed to international law. [562]

Despite these scholarly considerations, the tribunals have been reluctant to award punitive damages for unlawful expropriations, based on the fact that the nature of punitive damages is not compensatory, while the relief for investors, even in the cases of unlawful expropriation should be purely on the compensatory basis.[563]

4.5.5. Non-Payment of Compensation

Traditionally, expropriation is considered as a lawful act only if it is followed by compensation paid by the state to the owner.[564] However, due to the evolution of international investment law and the proliferation of BITs, expropriation may now be considered lawful despite the lack of payment of compensation, particularly in the case of indirect expropriation.[565] In such cases, the expropriation nature of the actions are established only in retrospect at the time of the arbitral tribunals' decision.[566]

In practice, if states are required to pay compensation, claims of indirect expropriation are likely to be declared unlawful in the vast majority of cases, because compensation is rarely paid prior to the tribunals' decision to consider the lawfulness of the regulatory action as indirect expropriation.[567] States usually adopt regulatory actions

[562] Marboe, I. (2009). pp. 74-75; Sloane, R. D., & Reisman, W. M. (2004). pp. 115-150
[563] *Waguih v Egypt* 2009 at. 545.
[564] Marboe, I. (2017). p. 55.
[565] *Ibid.* pp. 63–65; Legum, B. (2019). p 233.
[566] UNCTAD. (2012). pp. 47- 48.
[567] Sloane, R. D., & Reisman, W. M. (2004). p. 137; Marboe, I. (2009). p. 61

without paying or offering compensation to the foreign investors as the host states may not know yet whether it is obliged to pay compensation or not depending on the legality of the regulatory measure and the degree of impact towards the investment. In these cases, the finding of indirect expropriation will most probably lead to a declaration of unlawful expropriation.

There is obviously uncertainty because the expropriation nature of the action is established in retrospect at the time of the award, and the obligation to pay compensation should be regarded as arising only from the time of such finding.[568] Indirect expropriation without compensation, on the other hand, will fall under the general rules of state responsibility, and reparation is required to restore the situation that would have existed had the unlawful act not been committed.[569]

Illustrating this complexity, several decisions provide useful examples. In the case of *Mobil and Others v Venezuela*, [570] Venezuela held negotiations with the investors and offered proposals during the negotiation, but did not pay any amount for the investors. The tribunal decided that the compensation not being paid was insufficient as the expropriation was unlawful. Similar to that, in the case of *Tidewater v Venezuela*,[571] the tribunal found that the expropriation was considered provisionally a lawful expropriation, until the determination of the compensation is done in accordance with the BIT.[572]

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[568] UNCTAD. (2012). pp. 47- 48
[569] Dolzer, R., & Schreuer, C. (2012). pp.100- 101
[570] *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v Bolivarian Republic of Venezuela*. (ICSID Case No. ARB/07/27). Award, 9 October 2014 *(Mobil and others v. Venezuela.* 2014).
[571] *Tidewater v Venezuela* 2015.
[572] *Ibid.* paras 141, 145-146.

However, in the case of *Rusoro Mining v Venezuela*,[573] Venezuela offered the investors to provide compensation limited to the "net worth" of the expropriated investment, but the unsuccessful negotiations that exceeded six months was not sufficient to consider the expropriation as a lawful expropriation. The tribunal found that although Venezuela offered compensation to the investors in Rusoro, this offer was even below the cap provided for in the "Nationalization Decree", and was insufficient to render the expropriation lawful, especially when the offered amount was not paid or deposited.[574] While in the case of *Koch Minerals v Venezuela*,[575] the tribunal agreed that the lack of compensation payment does not render the expropriation as unlawful. However, the tribunal declared the expropriation to be unlawful, and noted that Venezuela did not offer "any meaningful offer of compensation" or "any meaningful procedure for compensation" that would satisfy the "effective and adequate compensation" requirement of BIT.[576] The cases indicate that the non-payment of compensation, nature, timing of the offers made by the state to the investor and the negotiations period, is important in distinguishing between lawful and unlawful expropriation. If expropriation is deemed unlawful, the tribunal applies the rules of customary international law to determine the value of compensation, but if it is deemed lawful, the tribunal applies the BIT provisions.[577] In *Metalclad v. Mexico*, the

[573] *Rusoro Mining Ltd v. Bolivarian Republic of Venezuela*. (ICSID Case No. ARB(AF)/12/5). Award 22 August 2016 (*Rusoro Mining v Venezuela* 2016).
[574] *Ibid.* para. 408.
[575] *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/19). Award dated 30 October 2017 (*Koch Minerals v Venezuela* 2017).
[576] *Ibid.* paras 7.28 – 7.29
[577] There are some cases which the arbitral tribunals applied the treaty provisions even though it found that the indirect expropriation was unlawful. In these cases, the BITs have included clear articles to determine the value of compensation for unlawful expropriation. See *CME v Czech 2003*.

tribunal found that the host country indirectly expropriated the foreign investment without paying compensation.[578] The tribunal referred to the provisions in NAFTA for lawful expropriation to set the amount of compensation, and applied fair market value of the investment before the expropriation. Similarly in the case of *Funnekotter v. Zimbabwe*, the tribunal awarded compensation for lawful expropriation in accordance the provisions of Article 6.2 of the Netherlands-Zimbabwe BIT and proceeded to assess the fair market value of the investment at the date of the expropriation.[579] In *Tecmed v. Mexico*, the tribunal found that the host state indirectly expropriated Tecmed's investment without paying compensation and decided to award compensation for lawful expropriation in accordance with the provisions of Article 5 of the Spain-Mexico BIT 2006, and awarded compensation for the fair market value of the investment.[580] Another example is *Wena v Egypt*, where the tribunal found indirect expropriation without payment of prompt, adequate and effective compensation which violated Article 5 of the UK-Egypt BIT 1975 and applied the provisions in the BIT to assess the compensation.[581]

The above cases explain how the arbitral tribunals dealt with indirect expropriation, that if there are state conducts in implementing the expropriation without public purpose, discriminatory, or breached the due process of law, arbitral tribunals tend to apply customary law standard of reparation. While in cases of indirect expropriation without paying compensation, arbitral tribunals more often tend to apply other standards of lawful

[578] *Metalclad v Mexico* 2000 para. 112
[579] *Funnekotter v Zimbabwe* 2009, paras 120 -131.
[580] *Tecmed S.A. v Mexico* 2003 paras. 187, 194 – 195.
[581] *Wena Hotels v Egypt* 2000 para. 118.; See also *Vivendi v. Argentina* 2007 paras. 8.2.3, 8.3.13 – 8.3.20.

compensation. The arbitral tribunals refrained applying reparation for unlawful expropriation. Moreover, the bilateral investment treaties do not contain dedicated provisions regulating compensation for unlawful expropriations.

4.6. Compensation for Lawful Expropriation

Even within the context of lawful expropriation, covered by investment treaties, there is an extensive debate as to what compensation standard to be applied. In the past, the capital exporting countries sought to apply the full compensation standard that guarantees the highest possible protection for its citizens' investments, while the capital-importing countries sought to apply standards less than full compensation. The standards of compensation mostly discussed for lawful expropriation are as follows:

4.6.1. The Full Compensation Standard

Full compensation refers to all the damages that foreign investment has suffered as a result of a lawful indirect expropriation. This includes the fair market value of the investment, loss of profits, interest, and any other damages. The extensive coverage of full compensation standard makes it very close to reparation for unlawful expropriation, differing from it in two things, firstly the date of determining the value of the investment is

limited to the time of taking,[582] and secondly, that it does not give the investor the right to restoration.[583]

The capital-exporting countries in the past advocated 'full' or 'adequate' compensation, arguing that there is an international law obligation for it. These countries expressed for full compensation formulated in the 'prompt, adequate, and effective compensation', called as the Hull formula or the traditional standard.[584] The Hull formula was introduced by the United States minister Cordell Hull during the Mexican expropriations. It is observed that the approach of full or adequate compensation was popular prior to World War II,[585] and was the standard of compensation in all cases of expropriation of foreign property.[586] Although there is no specific definition of full or adequate compensation, it generally includes compensation for the fair market value of the investment, lost profits, interest, and any other damages. 'Prompt' means that the compensation should be paid at the time of the expropriation, or before the expropriation, such as the date of the decision to confiscate,[587] while 'effective' means that the compensation should be paid in effectively realizable form, as it must be paid in cash or in

[582] The value of the investment is determined according to the best interest of the investor. If the investment value increases or decreases in the period between the date of the announcement of the desire to expropriation the investment and the date of determining the compensation value, the higher value is given. While in lawful expropriation, the investment value is determined on the date of expropriation or knowledge of the state's intention of expropriation.

[583] In the case of unlawful expropriation, the investor has the right to restoration, or compensation, while in the lawful expropriation, the investor has the right to compensation only.

[584] Zhao, S. (2015). p 91; Muchlinski, P., Ortino, F., & Schreuer, C. (Eds.). (2008). p 1776.

[585] The terms full and adequate are often used interchangeably. Schwarzenberger, G., & Sutton, A. M. (1969). "*Foreign Investments and International Law".* (No. 68). London: Stevens. p. ;1 See also (*INA Corporation v. Iran. 1985)* para 378; Seidl-Hohenveldern, I. (1999). "*International Economic Law"*. Kluwer Law International BV. p. 144.

[586] Ghassemi, A. (1999). p.302

[587] Sadiq, H. (2001). p. 67

a form that is convertible into cash, such as checks, and it must be paid in a convertible currency. Whereas 'adequate' generally means that the compensation should be reflecting full compensation, which includes the present market value of the property as well as the loss of profits. Although this formula received much support, there was also a lot of criticism especially from Latin American countries which tried to reject it from the beginning.[588]

There are some examples of international court decisions and tribunals awards which supported the application of full compensation, one of these awards is the *Norwegian Ship Owners' Claims*.[589] The case dealt with the requisitioning of alien property by the United States for war-time purposes. The tribunal stated that just compensation should be determined by the fair actual value at the time and place and taking into account the surrounding circumstances.[590] Supporters of the full compensation standard argued that just, full, and fair compensation are virtually interchangeable notions, and that just compensation cannot be less than full compensation.[591] On the contrary, some writers, such as Schachter was of the view that although the US actions in this specific award were found to be lawful as "the exercises of the rights of eminent domain", the case itself was concerned with specific war-time circumstances. [592]

[588] Ghassemi, A. (1999). p. 302.
[589] *Norwegian Shipowners' Claims, Norway v United States, Award,* (1922) I RIAA 307, ICGJ 393 (PCA 1922), 13th October 1922, Permanent Court of Arbitration [PCA] *(Norway v. United States.* 1922). Reports of International Arbitral Awards. 13 October 1922.VOLUME I pp. 307-346
[590] Ibid. p. 339-341.
[591] Mendelson, M. H. (1985). "*Compensation for Expropriation: The Case law"*. American Journal of International Law, 79(2). P. 416; Norton, P. M. (1991). *"A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation".* American Journal of International Law, 85(3). p. 47.
[592] Schachter, O. (1984). "*Compensation for expropriation".* American Journal of International Law, 78(1). p. 123; Schachter, O. (1985). "*Compensation Cases—Leading and Misleading"*. American Journal of

It was argued that the full compensation standard as applied in the *Chorzow* Factory case[593] was the minimum pecuniary obligation in all cases both lawful and unlawful expropriations and was the payment of full value of the property taken."[594] However, this opinion is unacceptable, as the *Chorzow Factory* case was related to unlawful expropriation,[595] so its use to support the norm of full compensation in all cases of expropriations is unjustified, and it also clearly distinguished between compensation for lawful and unlawful expropriation.[596]

From the above, we can note that the previous cases cannot be relied upon as a basis for supporting full compensation for lawful expropriation, as the previous cases included breaches of contracts and concessions granted, and the expropriation was unlawful in most of them. This view is consistent with the view that full compensation was not the standard applied in many cases before World War II. [597] Neither the court's decisions nor the arbitral awards before World War II, firmly support full compensation, except in the unlawful expropriation of the property cases. As for the position on full compensation after World

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International Law, 79(2). p. 420; Schachter, O. (1989). "*The Question of Expropriation/Compensation in the Light of Recent State Policy and Practice".* Paper Presented at the Symposium on the Outstanding Issues in the United Nations Code of Conduct on Transnational Corporations (Peace Palace, The Hague, 15-16 September 1989). p 16 - 19; Schachter, O. (1991). pp. 321-324; Schrijver, N. (1997). pp. 354-355.

[593] *Chorzow Factory* Case. 1928.

[594] Mendelson, M. H. (1985). p. 416

[595] Lauterpacht, E. (1990). "*Issues of Compensation and Nationality in the Taking of Energy Investments"*. Journal of Energy & Natural Resources Law, 8(1-4). p. 243; Sornarajah. M. (2010). pp. 425-426, the author commented that the Charzow Factory case used to support full compensation is not justified because the case was a breach of a treaty and that "the propositions in that case are concerned with illegal takings and not with expropriations which are considered lawful in modern international law." For more see, Schachter, O. (1984). p. 123.; Schrijver, N. (1997) pp. 354-355.

[596] *Chorzow Factory* Case 1928, para. 46.

[597] Amador, F. G. (1984). "*The Changing Law of International Claims".* (Vol. 1). Oceana Publications. p. 301; White, G. (1961). "*Nationalisation of Foreign Property".* (No. 57). Stevens. pp 13-15; Lauterpacht, E. (1990) p. 243; Sornarajah. M. (2010) pp. 425-439; Schrijver, N. (1997) pp. 354-355.

War II, there is a shift towards rejecting full compensation for lawful expropriation, as can be seen in post-World War II state practice, arbitral tribunal awards and investment treaties.

State Practice

Many expropriations took place after World War II in Latin America, Asia, Europe (East and West), and Africa. This has led to many compensation agreements. These compensation agreements refer to the change in the position of the states on the compensation for expropriation, where a new concept of compensation emerged called partial compensation lump-sum agreements,[598] or *en block* or global settlements.[599] This agreement can be summarized in simple words as an agreement between the expropriating state and the state of the nationality of the aliens affected by the expropriation, under which the first state pays a lump-sum to the second state, then the second state through "a national claims commission" which is established in accordance with the domestic legislation adjudicates the separate claims and allocates a share of the fund to each successful claimant.[600]

It is noticeable that the compensation value in the lump-sum compensation agreements were less than full compensation, and this deviates from the traditional standard

[598] Amador, F. G. (1984). pp. 306- 307.

[599] See Carlston, K. S. (1959). "*Review of Nationalization: A Study in the Protection of Alien Property in International Law"* by Isi Foighel. Washington University Law Review, (1). p. 97; The United States, for example, accepted less than full compensation in the Marcona nationalisation. See Gantz, D. A. (1977). *"The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property"*. American Journal of International Law, 71(3). pp. 485 -487.

[600] Carlston, K. S. (1959). p 97; Wortley, B. A. (1960). p. 146; Lillich, R. B., & Weston, B. H. (1988). "*Lump Sum Agreements: Their Continuing Contribution to the Law of International Claims"*. American Journal of International Law, 82(1). p.69.

of the Hull formula.[601] It was acknowledged that the amount of compensation in most of the lump sum agreements was not representative of the full value of the expropriated property.[602] This argument may not be agreed by those who claim that full compensation is established in customary international law, and thus were of the view that the lump-sum agreements did not deviate from the standard of full compensation.[603]

Awards of Arbitral Tribunals

In the post-second World War arbitrations, some arbitral tribunals continued to adopt full compensation in their decisions,[604] while some kept away from adopting this approach.[605] In *Biloune v Ghana*,[606] it was opined that the Hull formula was part of customary international law, prescribed by prompt, adequate, and effective compensation.[607] The tribunal based in its decision many awards of international arbitral

[601] Chowdhury, S. R. (1984). "*Permanent Sovereignty and its Impact on Stabilization Clauses, Standards of Compensation and Patterns of Development Co-operation"* in Hossain and Chowdhury. p. 60; Amador, F. G. (1984). p. 311.

[602] Jain, S. C. (1983). "*Nationalization of Foreign Property: A Study in North-South Dialogue"*. Deep and Deep Publications. New Delhi. p. 156; Sornarajah, M. (Ed.). (1986). "*The Pursuit of Nationalized Property".* (Vol. 8). Martinus Nijhoff Publishers. pp. 214–217. Sornarajah pointed that "The overwhelming majority of writers support the view that partial compensation was the basis of these agreements." For more see Zouhair, K. (1972). "*Protection of Foreign Investment: A Study in International Law".* New York: Sijthoff & Noorhoff Publishers. pp. 111 - 118; Carlston, K. S. (1959). Pp. 97 -101; Amador, F. G. (1984). p. 312; Pechota, V. (1982). "*The 1981 US-Czechoslovak Claims Settlement Agreement: An Epilogue to Postwar Nationalization and Expropriation Disputes".* American Journal of International Law, 76(3). p. 639; Amerasinghe, C. F. (1992). "*Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice"*. International & Comparative Law Quarterly, 41(1). p. 28; Dolzer, R. (1981). "*New Foundations of the Law of Expropriation of Alien Property".* American Journal of International Law, 75(3). p. 560.

[603] Lillich, R. B., & Weston, B. H. (1975). "*International Claims: Their Settlement by Lump Sum Agreements".* (Vol. 12). University Press of Virginia. p 35; Lillich, R. B., & Weston, B. H. (1988). p. 76.

[604] *Biloune v Ghana* 1990*; Texaco v Libya* 1977; *BP v Libya* 1973.

[605] *LIAMCO v Libya* 1979; *Aminoil v Kuwait 1982*.

[606] *Biloune v Ghana* 1990.

[607] Lauterpacht, E. Greenwood, C. J. (2007). "*International Law Reports".* Volume 95. Cambridge University Pres. pp. 210 -211.

tribunals and indicated that this standard is also reflected in hundreds of bilateral investment treaties.[608] The tribunal accepts, in general, the validity of the principle that lost profits should be compensated but found no basis on which it could calculate the loss of profit in the circumstances of the case.[609]

In *Metalclad v. Mexico*,[610] the tribunal did not differentiate between lawful and unlawful expropriation in terms of compensation and applied the sole effect doctrine looking only at the way the actions of the host state deprived the investor of the use of his investment.[611] The tribunal was of the view that environmental reasons were not strong enough to exonerate the respondent of the duty of compensation,[612] and believes that enforcing the Ecological Decree would be equal to expropriation in and of itself.[613] The tribunal granted full compensation to the investor, but it did not grant compensation for the loss profit, as the claimants were unable to offer a realistic estimate of them.[614]

In *Texaco v. Libya*,[615] there was a reference to full value in the case of Libyan nationalizations that occurred following the Arab–Israeli war. It was said to be retaliatory measures against the US for supporting Israel, but the arbitrators determined that the takings were illegal by the state in both cases.[616] The tribunal found that the Libyan expropriation of Texaco was unlawful, and accordingly, the tribunal decided for restitution

[608] *Biloune v Ghana* 1990 para. 92*;* See. Lauterpacht, E. Greenwood, C. J. (2007). p. 228.
[609] *Biloune v Ghana.* 1990 paras. 94 - 97.
[610] *Metalclad v Mexico* 2000.
[611] Muir, A. T. (2015). p11.
[612] *Dodge, W. S. (2001). p 919; Metalclad v Mexico 2000 paras. 103-104.*
[613] *Ibid. para. 111.*
[614] *Ibid. para. 122.*
[615] *Texaco v Libya 1977; BP v Libya 1973.*
[616] Sornarajah. M. (2010). p. 430.

of the property. Referring to Resolution 1803 of the General Assembly, the tribunal acknowledged that it represented customary international law on expropriation,[617] and functions as a generally applicable standard.[618] Similarly, in *BP v Libya*, after it became clear for the arbitrator that expropriation was unlawful due to reprisal, the claimant was entitled to damages arising from the wrongful act of the respondent.[619]

Unlike in *Texaco v Libya and BP v Libya*, the arbitrator in *LIAMCO v Libya*, found that the nationalization was lawful and did not accept full compensation.[620] He stated that in the light of contemporary developments the inclusion of lost profits *(lucrum cessans)* in the compensation payable could not be sustained in the following:

> *"This classical doctrine [the Hull doctrine] was not always accepted neither in the inter-war period nor after World War II. Adequate compensation as including loss of profits, such as was awarded in the old above mentioned arbitral decisions (e.g. in Delagoa and Shufeldt cases), was no more acceptable as an imperative general rule."* [621]

He argued that these awards were not appropriate precedents for modern law because they were made in cases involving unlawful expropriations, and that while the Hull formula may have been valid prior to the Second World War, it had now been replaced by the requirement to pay convenient and equitable compensation.[622] Finally, arbitrator

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[617] *Texaco v Libya.* 1977 para 87.
[618] *Ibid.* p. 430.
[619] *BP v Libya* 1973 paras 205 – 206.
[620] *LIAMCO v Libya* 1979.
[621] *Ibid.* para 143.
[622] Sornarajah. M. (2010). pp. 430 – 431.

Mahmassani applied the formula of equitable compensation as a standard for the estimation of compensation.[623]

In *Aminoil v Kuwait*,[624] which involved the nationalization of rights under oil concession agreements by the host state, the arbitral tribunal did not refer to the prompt, adequate and effective standard of compensation but used the argument of permanent sovereignty over natural resources under the United Nations Resolutions Resolution 1803 that calls for appropriate compensation in cases of expropriation.[625] It may therefore be difficult to conclude that the tribunal has applied the full compensation standard,[626] when it was clear that the tribunal applied appropriate compensation standard utilizing an inquiry into all the circumstances relevant to case.[627]

Another reference that is worth study is the Iran-US claims tribunals, established in The Hague in 1981 to deal with claims arising from the hostage crisis in Tehran, affecting property rights. It was observed that while the American and neutral arbitrators supported full compensation, the Iranian arbitrators were trying to prevent the application of this standard.[628] The tribunal was inconsistent in applying the standard of compensation either

[623] *LIAMCO v Libya* 1979 para 145
[624] *Aminoil v Kuwait* 1982.
[625] *Ibid.* para. 143.
[626] Sornarajah. M. (2010). p. 431
[627] *Aminoil v Kuwait* 1982 paras. 144 – 145.
[628] Pellonpää, M., & Fitzmaurice, M. (1988). "*Taking of Property in the Practice of the Iran-United States Claims Tribunal".* Netherlands Yearbook of International Law, 19Pp. 53-178; Khan, R. (1990). "*The Iran-United States Claims Tribunal: Controversies, Cases, and Contribution".* Brill; Westberg, J. A. (1990). "*Compensation in Cases of Expropriation and Nationalization: Awards of the Iran-United States Claims Tribunal"*. ICSID Review, 5(2), Pp. 256-291; Westberg, J. A. (1993). "*Applicable Law, Expropriatory Takings and Compensation in Cases of Expropriation*; ICSID and Iran-United States Claims Tribunal Case Law Compared". ICSID Review, 8(1), 1-28.

from the 1955 Treaty of Amity between Iran and the United States,[629] or customary international law,[630] which has led to diminishing the utility of this tribunal awards as evidentiary sources of customary law. [631] Jurists differed regarding the importance of the tribunal's contribution to international law in general, and expropriation law specifically, with a view that it was weak and limited, and because of the special circumstances in which it was created and the wide nature of powers given to it.[632] While others argued that these awards have great importance, as a *'rich storehouse from which principles on international business transactions could be quarried."* [633] In terms of compensation, Mangard considered the tribunal's awards as a victory for the full compensation standard, while others such as Asante [634] and Sornarajah[635] adopts the contrary view.

[629] The 1955 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States. (entered into force on 16 June 1957) reprinted in V.N.T.S. Vol. 284. at 93, and U.S.T.S., Vol. 8, at 899. Article 4 (2) of the Treaty provides that, "taking must be accompanied by provision for the payment of just compensation. Such compensation is to represent the 'full equivalent of the property taken"; See, *INA Corporation v Iran* 1985*; Phillips Petroleum Co. Iran v Iran* 1989*; Amoco v. Iran* 1987*; Sedco, Inc. v. National Iranian Oil Company* 1986*).*

[630] *American International Group, Inc. and American Life Insurance Company v. Islamic Republic of Iran and Central Insurance of Iran (Bimeh Markazi Iran),* IUSCT Case No. 2. Award (Award No. 93-2-3) - 7 Dec 1983*. (American International Group, Inc. v Iran* 1983); *Sola Tiles, Inc. v. The Government of the Islamic Republic of Iran*, IUSCT Case No. 317. Award (Award No. 298-317-1) - 22 avr. 1987 *(Sola Tiles, Inc. v Iran* 1987*); Shahin Shaine Ebrahimi and others v. The Government of the Islamic Republic of Iran,* IUSCT Case Nos. 44, 46 and 47. Final Award (Award No. 560-44/46/47-3) - 12 Oct 1994 *(Ebrahimi v. Iran* 1994*).*

[631] Sornarajah. M. (2010). p. 432.

[632]Higgins, R. (1982). p. 329; Schrijver, N. (1997). p.195. He states that: "It is not easy to identify common trends in the awards of the often deeply divided Chambers and to assess their impact on international law and expropriation law."; Mouri, A. (1994). "*The International Law of Expropriation as Reflected in the Work of the Iran-US claims Tribunals".* (Vol. 17). Martinus Nijhoff Publishers. p. 351.

[633] Sornarajah. M. (2010). p. 432; Schachter, O. (1989). p.4. he observes that," the number of expropriation cases submitted to the Tribunal, the large amount claimed, extensive pleadings and involvement of many lawyers have given the Tribunal prominence as a source of international law."; Amerasinghe, C. F. (1992). Pp. 41 -42. states that: "the awards of the Tribunal are decided by inter-State arbitrations and have particular value as precedents in a subsidiary source of law."

[634] Asante, S. K. (1988). "*International law and foreign investment: a reappraisal".* International & Comparative Law Quarterly, 37(3). p. 603.

[635] Sornarajah. M. (1994: 395). See also, Westberg, J. A. (1990. p. 291) and (1993. p 27)

In the *Ebrahimi* award, the tribunal applied customary international law and granted the claimants appropriate compensation, the tribunal stated that:

> *"International law theory and practice do not support the conclusion that the 'prompt, adequate and effective' standard represents the prevailing standard of compensation. Rather, customary international law favors an 'appropriate' compensation standard ... the gradual emergence of this rule aims at ensuring that the amount of compensation is determined in a flexible manner, that is, taking into account the specific circumstances of each case."* [636]

Investment Conventions and Treaties

There is no uniformed standard on compensation for expropriation across international investment treaties, and attempts towards it was unsuccessful. [637] Although the BITs sometimes provide for just compensation or adequate compensation,[638] many

[636] *Ebrahimi v. Iran. 1994* para. 88. the tribunal continues in paragraph 95 and stated that: "Considering the scholarly opinions, arbitral practice and Tribunal precedents noted above, the Tribunal finds that once the full value of the property has been properly evaluated the compensation to be awarded must be appropriate to reflect the pertinent facts and circumstances of each case." In paragraph 96, the Tribunal awarded the *claimants (damnum emergens)* only, but not *(lucrum cessans)* lost profits; See also *Sola Tiles, Inc. v. Iran* 1987 paras. 43 -44

[637] Sornarajah. M. (2010). Pp. 415 – 416; see World Bank Group. (1992). "Legal Framework for the Treatment of Foreign Investment". vol. 1, p. 88. The World Bank Group in its survey of several guidelines and draft conventions found that: "the Hull formula 'is contained in only one of the multilateral documents reviewed."; see "United Parcel Service of America, Inc. (UPS) v. Government of Canada. (ICSID Case No. UNCT/02/1)". para. 97. the tribunal stated that: "The failure of efforts to establish a multilateral agreement on investment provides further evjdence of that lack of a sense of obligation."

[638] Jordan has adopted the appropriate and fair or just compensation standards in some of the bilateral and multilateral investment treaties which concluded with some other states. For example, Article 10 of Jordan-Saudi Arabia BIT 2017; and Article 5 (2) Jordan-Algeria 1996; Italian BITs also used the word "adequate compensation" in Italy-Albania BIT 1991; See also Italy-Bosnia and Herzegovina BIT 2000; and the use of an equivalent formula referring to the fair market value of the investment in Bahrain- Italy BIT 2006. In France, bilateral treaties traditionally provided for *"une indémnité juste",* but 1990s treaties use the word "adéquate". In the treaties to which Singapore is a party, there are wide variations in the statements relating to compensation. The prompt, adequate and effective formula is referred to in the treaties with the UK and

BITs employ Hull formula (full compensation) which requires the payment of prompt, adequate, and effective compensations or any formulas that have the same effect.[639] Proponents of full compensation argue that BITs create customary international law,[640] and this is due to the existence of large numbers of BITs, and the fact that many states which rejected the Hull formula in the past have admitted them by the conclusion of the BITs recently, shows its reinforcement in the treaties.[641]

However, there are a considerable number of writers such as Dolzer and Francioni,[642] who took the opposite position and criticized the view that BITs create customary international law. This is largely due to the fact that the states generally do not have equal bargaining powers in determining the contents of the BITs as it is on a "take it or leave it" basis. [643] Moreover, since BITs have implications for the states parties only, it is closer to private law where states seek to attract foreign investment need, while the other seeks to provide the greatest possible protection for the investments of its citizens. It must also be

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Switzerland, but the alternative formula of 'just' compensation is used in the treaties with the Netherlands and Germany. In most Dutch treaties, there is a reference to 'just' compensation.

[639] Jordan-Oman BIT 2007; Jordan- Canada BIT 2009; Jordan-Estonia. BIT 2010; Malaysia-Lebanon BIT 1998; U.K- Chile BIT 1996; US. Model. 2012 Article 6; U.S -Argentine. BIT 1991; Germany- Bolivia BIT 1987, Article 4; U.K- Mexico BIT 2006 Article 7.

[640] Schrijver and P. J. I. M. De Waart, *"Foreign Investment and State Practice*", in Hossain, K., & Chowdhury, S. R. (Eds.). (1984). Permanent Sovereignty Over Natural Resources in International Law: Principle and Practice. Pinter. p.88.

[641] *Ibid.* p 176; Akehurst, M. (1975). *"Custom as a Source of International Law"*. British Yearbook of International Law, 47(1). Pp. 42 -52; Mann, F. A. (1981). "*British Treaties for the Promotion and Protection of Investments"*. British Yearbook of International Law, 52(1). pp. 249 -250; Robinson, D. R. (1984). "*Expropriation in the Restatement (Revised)".* American Journal of International Law, 78(1). p. 178.

[642] Dolzer, R. (1981). p. 566; Francioni, F. (1975). "*Compensation for Nationalisation of Foreign Property: The Borderland between Law and Equity".* International & Comparative Law Quarterly, 24(2). p.264; Asante, S. K. (1988). p. 607-608; Schachter. (1984: 126-127) and (1991: 323); Bowett, D. W. (1988). p. 65; Amerasinghe, C. F. (1992). P. 30; G. Abi-Saab, *"Permanent Sovereignty over Natural Resources and Economic Activities"*, in Bedjaoui, M. (Ed.). (1991). International Law: Achievements and Prospects. Martinus Nijhoff Publishers. p. 612-613; Sornarajah. M. (1994); Chowdhury, S. R. (1984). p. 35 and 39; Shaw, M. N. (1997). International Law 4th Ed. Cambridge University Press. p. 583.

[643] Chowdhury, S. R. (1984). pp. 35 and 39.

noted that although many BITs included reference to the formula, there are others that referred to other standards, and thus it cannot be said that the BITs reflect customary international law relating the standard of compensation.[644]

4.6.2. Fair or Just Compensation Standard

Fair market value of the investment refers to the equivalent of the value of the taken investment that reflects the most probable price the hypothetical willing and able buyer would pay to the hypothetical willing and able seller, in a free transaction, open and unrestricted market, and when both have reasonable knowledge about the relevant facts, and neither is forced to buy or sell, on the date of taking without including the lost profits.[645]

The question of fair or just compensation involves whether it includes loss of profit. Bowet observed that loss profits may be a legitimate head of damages for an unlawful act, but it is not an appropriate head of compensation for a lawful expropriation.[646] Many scholars have taken a point of view that distinguishes between compensation for lawful and unlawful expropriation and indicated that compensation for lawful expropriation must not

[644] See *Sedco, Inc. v. National Iranian Oil Company.* 1986, para 14.
[645] Zhao, S. (2015). p 147; *CMS v Argentina. May, 2005, para. 402; National Grid P.L.C V. The Argentine Republic, UNCITRAL Award, 3 November 2008 (National Grid v. Argentina. 2008) para. 263; (Starrett Housing Corporation v. Iran. 1987.). para.277;* Sabah, B, N. J. (2010). p. 764; Marboe, I. (2006). 732. Marboe defined the Fair market value as: "... the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under an obligation to buy or sell and when both have reasonable knowledge of the relevant facts."; see also Appraisal Institute the Appraisal of Real Estate (2001), Appraisal Institute, Chicago, Illinois, 12th ed, p.22; Gabriel, D. (1991). *"Compensation During Expropriation."* Land law and Policy in Ethiopia pp. 203-204.
[646] Bowett, D. W. (1988). p. 63.

include loss of profit.[647] In the case of *Amoco v. Iran,* the tribunal held that a clear distinction must be made between lawful and unlawful expropriation since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking.[648] The tribunal drew that the compensation to be paid in the case of a lawful expropriation (or for the taking which lacks fair compensation payment to be lawful) is limited to the value of the taking property at the moment of the dispossession, and it is not possible to award loss of future profits *(lucrum cessans)* in respect of lawful expropriations. This shows that there is no uniform requirement of full compensation for all expropriations and contradicts the wide belief that the principle in *Chorzow Factory* case applies the restitution remedy to all types of nationalisation..[649]

In the case of *INA Corporation v. Iran,* expropriation was described by the tribunal as a classic example of a formal and systematic expropriation by decree of an entire category of enterprises deemed vital to the country's economy. The tribunal tried to distinguish between compensation for lawful and unlawful expropriation, however, it did not have to apply these distinctions, as it found an alternative basis on which to peg the standard of compensation in the Treaty of Amity between the United States and Iran, the

[647] Murphy, J. (1993) "*Compensation for Nationalization in International Law"* S. African LJ, 110. pp. 88-96; Dolzer, R. (1981). p. 599; Vig, Z., & Gajinov, T. (2016). "*The Development of Compensation Theories in International Expropriation Law".* Hungarian Journal of Legal Studies, 57(4). pp. 447-461; Francioni, F. (1975). p. 276; Piran, H. (1992) pp. 333-338 and 351-353; Kronfol, Z. A. (1965) "*Protection of Foreign Investment a Study in International Law."* American University of Beirut (Lebanon) pp. 95-100; Bring, O. (1980). "*The Impact of Developing States on International Customary Law Concerning Protection of Foreign Property."* Almqvist & Wiksell International. pp. 106- 107; Jain, S. C. (1983). "*Nationalization of Foreign Property - A Study in North-South Dialogue."* Deep & Deep Publications, New Delhi. p. 163; Marks, S. (1989). "*Expropriation: Compensation and Asset Valuation"*. The Cambridge Law Journal, 48(2). pp.170-173; Mouri, A. (1994) pp. 320-347; Brownlie, I. (1999) p 541; Bowett, D. W. (1988). p. 63.

[648]*Amoco v Iran.* 1987 para 192.

[649] *Amoco v Iran* 1987 paras 192 -197.

treaty required to prompt payment of just compensation and defined such compensation as representing the full value of the property taken, and the tribunal considered such value as involving the fair market value of the shares.[650]

In *LIAMCO v. Libya*, arbitrator Mahmassani found that the nationalization was lawful and did not accept full compensation. In his opinion, the inclusion of lost profits *(lucrum cessans)* in the compensation payable could not be sustained, and "no more acceptable as a imperative general rule" in the light of contemporary developments.[651] In *Ebrahimi v. Iran* the Iran-United States Claims Tribunal followed the decision in the case of Amoco and confirmed the distinction between *(damnum emergens)* and *(lucrum cessans).*[652]

We can note from the above that many tribunals awards support the fair compensation standard and decided that compensation should differ in the case of lawful expropriation from compensation in the unlawful expropriation so that the compensation in the first case should be limited to the fair market value without including compensation for the lost profit.

Many bilateral and multilateral investment treaties have also adopted the fair or just compensation standard.[653]

The Jordan- French BIT 1978, Article 4 (2) provides that:

> *"The measures of dispossession (expropriation, nationalization, or any other measures) that may be taken must cause the payment of a fair compensation equal to*

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[650] *INA Corporation v Iran* 1985 para 22.
[651] *LIAMCO v Libya* 1979 para. 143.
[652] *Ebrahimi v Iran 1994* para 170 and 96; *Sedco, Inc. v. National Iranian Oil* Company 1986 para.180; Marboe, I. (2006). 727; Bowett, D. W. (1988). p. 61.
[653] Examples of Jordanian BITs taking the same approach are Jordan-France BIT 1978; Jordan-Kuwait BIT 1986; Jordan- Netherlands BIT 1997; Jordan- Bahrain BIT 2000; Jordan-Syria BIT 2001; Jordan-India BIT 2006; Jordan-Qatar BIT 2009; Jordan- Saudi Arabia BIT 2017.

the real value of the investment concerned in a day dispossession. This compensation, its amount and the terms of its payment must be determined not later than the day of dispossession, unless the two parties concerned exchange agreement otherwise... ''[654]

It also interesting to note that although the United States was one of the most supportive countries of the full compensation standard, but went to apply the fair compensation standard internally.[655] In the local context, the concept of "just compensation" is used in the Fifth Amendment of the United States Constitution, which states that private property shall not be taken for public use without just compensation. According to this standard, the owner ordinarily receives nothing for lost profits, inconvenience, and sentiment.[656] It can be inferred that the United States does not recognize that the full compensation standard is the best approach for host states but would be best in achieving its interest as a capital exporting country and its investors.

If we try to reconcile the position of the Fifth Amendment of the United States Constitution from the expropriation of property on the expropriation of investment, we can notice that the concept of fair market value from two points. Firstly, in what is termed as the willing buyer-willing seller test, according to the amount that the investment would be reasonably worth on the markets in a cash sale to a willing buyer if offered for sale by

[654] Article 4 (2) Jordan- France BIT 1978.
[655] Bauman, C. P. (1987). "*An International Standard of Partial Compensation upon the Expropriation of an Alien's Property"*. Case W. Res. J. Int'l L., 19. p. 105; "Restatement (Revised) Foreign Relations Law of the United States. (Tent. Draft No. 7, 1986); see Rafat, A. (1969). pp. 252-253.
[656] Kitay, M. G. (1985). "*Land Acquisition in Developing Countries: Policies and Procedures of the Public Sector with Surveys and Case Studies from Korea, India, Thailand and Ecuador*". p.50; Yates, H. (1974). "*Condemnation in the United States and Expropriation in Venezuela:* A Comparative Legal Study". Law. Am., 6. p. 264.

prudent and willing sellers.[657] Secondly, the price proposed must be what some reasonable buyers would pay for the investment's highest and best use, according to the (highest and best use) rule.[658]

Therefore, it is possible to draw the conclusion that since World War II, the inter-State practice has been profoundly changed concerning expropriation, and especially compensation. Neither treaty law, nor customary practice or tribunals awards supports the standard of full compensation, on the contrary, it has become inclined to apply the fair or appropriate compensation standard that we will be explained in the next part.

The main reason for this compensation standard is that the expropriating states cannot afford full compensation, and "imposing such a requirement on the state would deprive it of exercising its sovereign right to take control of its essential economic activities."[659] State sovereignty should not be subordinated to the ability of a state to pay full compensation.[660]

4.6.3. The Appropriate Compensation Standard

The term appropriate compensation resonates the demands of the developing states as opposed to the Hull formula during the 1960s and 1970s. The developing states argued that expropriated investors should have received only appropriate compensation determined by the host state, taking into account relevant laws and the circumstances that are considered pertinent. It is often the case that, the appropriate compensation of the

[657] Gabriel, D. (1991). p. 204; Kratovil, R., & Harrison Jr, F. J. (1954). p. 616
[658] Robert R. Wright, & Morton Gitelman. (2000). p. 157; Kratovil, R, & Harrison Jr, F. J. (1954). p. 616.
[659] Dawson, F. G., & Weston, B. H. (1961). p. 735.
[660] De Arechaga, E. J. (1978). "*State Responsibility for the Nationalization of Foreign Owned Property".* NYUJ Int'l L. & Pol., 11. p. 180; Bauman, C. P. (1987). p. 107.

property taken resulted to a much lower value than the fair market value.[661] Generally, this approach has received support, in the well-accepted General Assembly Resolution 1803 (XVII) on the Permanent Sovereignty over Natural Resources, which states that in reference to expropriation:

> *"....the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law."*[662]

The Charter of Economic Rights and Duties of States (CERDS) reaffirms this approach, requiring that the standard of compensation to be paid by the state adopting such measure is appropriate compensation. This must be done by taking into account the laws and rules and relevant circumstances that the state considers pertinent.[663] Similar wordings is found in the 1986 International Law Association (ILA) Seoul Declaration.[664]

There are some differences of wordings in some investment agreement which combines both elements of the Hull formula and restrict it to be made in accordance with the laws and regulations of the host state. The element of appropriateness is included in this nature. An example of this can be seen in Article 10 (2- A) of the Organization of Islamic Conference Investment Agreement. [665]

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[661] Muchlinski, P., Ortino, F., & Schreuer, C. (Eds.). (2008). p. 1776; Sornarajah. M. (2010). pp. 208-209.

[662] Resolution 1803 (n 91), art I, para 4. General Assembly Resolution 1803 (XVII) Permanent Sovereignty over Natural Resources explicitly points out that 'agreements freely entered into by or between sovereign States shall be faithfully observed'. For more information, see De Arechaga, E. J. (1978). p.305

[663] Charter of Economic Rights and Duties of States. (CERDS), art 2, para (c). CERDS United Nations General Assembly Resolution 3281 (XXIX).

[664] Section 5.7 of the "ILA Seoul Declaration". reprinted in 33 N.I.L.R. (1986). p. 326.

[665] Article 10(2-A) of the "Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference. (1981)". It states that: "It will, however, be permissible to: (a) Expropriate the investment in the public interest in accordance with the law, without

The General Assembly Resolution 1803 (XVII), which was adopted almost unanimously, provides appropriate compensation, was a result of a compromise of the capital exporting states as to the standard of compensation, as long as there is a reference to international law on the matter.[666] In relation to this, there has been some effort to explain the use of appropriate compensation to mean full compensation.[667] Be that as it may, appropriate compensation cannot be interpreted as full compensation because 'appropriate' in its term must "take into account the relevant laws and regulations and all circumstances that the state considers pertinent" as mentioned clearly in the resolution.[668]

The argument of full compensation arise largely from the west, with very limited relevant literatures on the subject from developing nations. However, since the recognition of the New International Economic Law in the mid-1970s, more views came from developing nations and later have created a considerable body of publications on the subject, advocating criteria other than full compensation. A considerable number of writers believe that the 'appropriate compensation' formula is the universally acknowledged standard in international law.

In terms of appropriate compensation, it provides flexibility of evaluation and liberates the tribunals from the "inflexible and one-sided standard of full compensation".[669]

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discrimination and on prompt payment of adequate and effective compensation to the investor in accordance with the laws of the host state regulating such compensation……."

[666] General Assembly Resolution No. 1803 (XVII); Sornarajah.M. (1994. p.405.), (2010. p. 445.).

[667] Schwebel, S. M. (1963). p. 465.

[668] Article 2(2)(c) of the "Charter of Economic Rights and Duties of States".

[669] Mouri, A. (1994). p.365.

Scholars began to refer to the appropriate compensation standard as in the General Assembly Resolution 1803 (XVII) the governing principle. [670]

The replacement of full compensation to a more flexible standard is by far the most appropriate approach to address the wide range of circumstances of indirect expropriation that may vary from a case to another. It will also give room for to assess the various interests in a particular case, including the aggrieved investors. Even though there is no definition of appropriate compensation, it should not be construed as full compensation. Imposing full compensation will not be a sustainable move for the future of international investment law, as it will likely result in overcompensation and will place a heavy burden on states that cannot afford the full compensation in many cases. It will also deprive states of their sovereign right to control their essential economic activities.[671]

The appropriate compensation standard was applied in several awards. Judge Lagergen described appropriate compensation in the *INA Corporation v Iran* case as an exception to Hull's doctrine that still exists, though it is becoming less popular, while acknowledging the more general trend towards a displacement of that doctrine.[672] He further elaborated on the flexibility of the appropriate compensation formula that would allow states to undergo radical economic structuring, with a possible discount of the fair market value, but never to a point that will lead to unjust enrichment by the host state. This case has set a limit to the range of flexibility offered in the appropriate compensation

[670] Murphy, C. F. *"Limitations over the Power of a State to Determine the Amount of Compensation Payable to an Alien upon Nationalization".* In Lillich, R. (Ed.). (1975). *"The Valuation of Nationalised Property in International Law"*. Vol 3. University of Virginia Press. p. 52; Dolzer. (1986). p. 599; Francioni, F. (1975). p. 276.
[671] Muchlinski, P., Ortino, F., & Schreuer, C. (Eds.). (2008). p. 1776.
[672] *The Separate Opinion of Lagergren in (INA Corporation v. Iran. 1985.), at 387.*

approach so as to avoid misuse by the host state.[673] Similarly, Judge Ameli agreed with the separate opinion of Judge Lagergren that current international law requires "appropriate compensation" as opposed to prompt, adequate and effective compensation. [674]

In *Texaco v. Libya*, the arbitrator Dupuy stated that the Libyan nationalization of Texaco was unlawful, and accordingly ordered restitution, however, having found that Resolution 1803 of the General Assembly represented customary international law on expropriation,[675] the arbitrator acknowledged by "appropriate compensation", which was outlined in the resolution as a generally applicable standard.[676]

In *Aminoil v Kuwait* case, which involved the nationalization of rights under oil concession agreements by the host state, the tribunal when considering the relevant standard of compensation under customary international law, interestingly, did not refer to "prompt, adequate and effective" compensation, but referred to the General Assembly Resolution 1803 (XVII) which "codifies positive principles".[677] It was emphasized in the case that the best way to determine the amount of an award under the appropriate compensation approach is to take cognizance of all the relevant circumstances of the case.[678]

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[673] *Ibid*, at 390.
[674] *Ibid*, at 415.
[675] *Texaco v Libya* 1977 para. 87.
[676] *Ibid.*
[677] *Aminoil v Kuwait* 1982 para. 143.
[678] *Ibid.* para. 144

In *Ebrahimi v. Iran*, it was emphasized that "appropriate compensation" standard represents the prevailing standard of compensation.[679] The tribunal adopted determining appropriateness of the compensation after the full value of the property has been properly evaluated. This must be in the light of pertinent facts and circumstances of each case.[680]

By analyzing these awards, it is notable that many awards support the appropriate compensation standard as the generally applicable standard, and considered customary international law preferring to apply this flexible standard which takes into account the specific circumstances of each case. It calls for a flexible standard which may consider from the payment of full compensation, that includes the fair market value of the investment, profits loss, interest, and any other damages, to the payment of no compensation at all,[681] taking into account the specific circumstances of each case, and laws that are considered pertinent.[682]

We can clearly notice that the opinions of jurists, international agreements, the inter-governmental declarations altogether, and arbitration awards prefer in the case of lawful expropriation apply the appropriate compensation standard, which may have less value than the full compensation value, full compensation was replaced by flexible standards such as

[679] *Ebrahimi v Iran* 1994 para. 88; Similarly, although the tribunal in the Amoco case, did not apply the 'appropriate compensation' standard, it treated the standard as reflecting the current rule of international law. *Amoco v Iran* 1987 Award. para. 226

[680] *Ebrahimi v Iran* 1994 para. 95.

[681] Sornarajah. M. (2004. p.480.) (2010. p. 447) ; Higgins, R. (1982). p. 277 ; Mouri, A. (1994). p.365.

[682] Ripinsky, S., & Williams, K. (2008). *Damages in international investment law*. BIICL. p.76; Paragraph 4 of the General Assembly Resolution No. 1803 (XVII), adopted on 14 December, 1962, reprinted in 2 I.L.M. (1963) 223; Paragraph 3 of the General Assembly Resolution 3171 (XXVIII) of 17 December 1973, reprinted in 68 AJ.I.L. (1974) 381; Article 2(2)(c) of the Charter of Economic Rights and Duties of States (General Assembly Resolution 3281 (XXIX), reprinted in 14 I.L.M. (1975) 251.

(appropriate compensation) which reached to a status that may be considered as a universally accepted standard, this formula is flexible enough to take into account various interests at each particular case, where it takes into account the relative legitimacy of the state's regulation one, and the investor's specific dimension.

4.7. Conclusion

Finally, at the end of this chapter, it has been reached that there is a big difference between the compensation for lawful expropriation and unlawful expropriation. The distinction between lawful and unlawful expropriation is important for valuation purposes since the resulting value of compensation may be different. This chapter showed the differences between these two concepts of compensation and reparation, and highlighted that most of the provisions of compensation under BITs and international investment agreements deal with lawful expropriation and usually do not contain separate provisions of compensation for unlawful expropriation. There is no consensus on the compensation standard that should be applied in cases of lawful expropriation.

Unfortunately, the expropriation clauses in bilateral investment treaties do not distinguish between the criteria for determining compensation for direct and indirect expropriation, and it seems unfair that states should provide maximum compensation in exchange for legislating for public interests or implementing their international human rights obligations, or to preserve health. In terms of environment legislations for instance, it should be noted that indirect expropriation, there is usually no financial gain for the host states from the measures in question.

This chapter also shows the co-relation between the main conditions set for the legality of expropriation in international law – which are the conditions of public purpose, non-discriminatory basis, due process of law, an obligation not to infringement any prior contractual obligation, and payment of compensation – and the determination of compensation therefrom by arbitral tribunals.

It has been found that indirect expropriation has to be considered whether it is lawful or unlawful, and traditionally shall be considered as a lawful act only if it was followed by compensation paid by the state to the owner. It also explains the evolution of international arbitral practice that regards indirect expropriation as lawful despite its lack of the payment of compensation, that shows more flexibility in understanding the complexity of the nature of indirect expropriation. In such circumstances, the expropriation nature of the actions is established only in retrospect at the time of the arbitral tribunals' decision. This chapter also highlights the rigid nature of relief in the form of reparation, to as far as possible, wipe out all the effects of the illegal act and re-establish the situation which would, in all probability have existed if the act had not been committed through restitution, and is not the ideal relief for cases of indirect expropriation. This is due to the nature of indirect expropriation cases in that ownership is not fully transferred to the host states, and other impossibilities of performance. The additional factors, including loss of future profits, the increase in the value of the investments after the taking until the date of the award, and the legal fees of the claimant should also be addressed carefully in indirect expropriation. In the background of lack of consensus in the standards of compensation for lawful expropriation ranging from full, fair or just, and appropriate compensations, this chapter highlights the

contemporary approaches from the international investment treaties and arbitral practices. It is submitted that the formulation of the Hull formula in many international investment treaties cannot be taken as concluding that full compensation has become customary international law. It must also be acknowledged that there are at the same time the existence of large numbers of BITs that adopted other standards of compensation. In this aspect, BITs are closer to the private law and have implications for the state's parties only.

The appropriate criteria of compensation should be given more flexibility by taking into account the nature of indirect expropriation which vary in its forms. This chapter upholds the approach that take into account all circumstances of the case, including the rules and laws, which the state considers pertinent in addressing the amount of compensation to be given. This is clearly provided for by applying the appropriate compensation approach, as it can potentially reassess the fair market value assessment of the expropriated property, but not to the extent of unjust enrichment of the host state. This a plausible approach taking into account the states' important role to regulate for public interest, in the exercise of its sovereignty.

Due to the uncertainty in the international treaty interpretation and standards, it would be helpful if clear standards are incorporated into the bilateral and multilateral investment treaties as guidance for the arbitral tribunals, and to increase predictability for the parties, be it the host states or the investors.