Standards of Investment Protection

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Legality of Expropriations

August Reinisch

A. Introduction

Over the last decades, the focus of expropriation law has shifted from direct to indirect expropriations and to ascertaining at what stage a governmental measure constitutes an indirect, *de facto*, or creeping expropriation.[1] Declining figures of outright takings of property inversely correspond to an increase of various legislative and regulatory measures that *de facto* or indirectly deprive investors of their property. Thus, most recent investment arbitrations address the issue of indirect expropriation at length.[2] The question of the legality of an expropriation,

[1] See A. Hoffmann at Chapter 8 above. R. Doak Bishop, J. Crawford, and W. M. Reisman, *Foreign Investment Disputes* (2005) 837 *et seq*.; R. Dolzer, 'Indirect Expropriation of Alien Property', 1 *ICSID Review—Foreign Investment Law Journal* (1986) 41; R. Dolzer, 'Indirect Expropriations: New Developments?' 11 *NYU Environmental Law Journal* (2002) 64; Y.L. Fortier and S.L. Drymer, 'Indirect Expropriation in the Law of International Investment: I know It When I See It, or *Caveat Investor*', 19 *ICSID Review—Foreign Investment Law Journal* (2004) 293; R. Higgins, 'The Taking of Foreign Property by the State', 176 *Recueil des Cours* (1982-III) 259; U. Kriebaum and A. Reinisch, 'Property, Right to, International Protection', in *Encyclopedia of Public International Law* (forthcoming); V. Lowe, 'Regulation or Expropriation?', 55 *Current Legal Problems* (2002) 447; A. Lowenfeld, *International Economic Law* (2002) 392 *et seq*.; P. Muchlinski, *Multinational Enterprises and the Law* (2nd edn, 2007) 588 *et seq*.; A. Newcombe, 'The Boundaries of Regulatory Expropriation in International Law', 20 *ICSID Review—Foreign Investment Law Journal* (2005) 1; Y. Nouvel, 'Les mesures équivalent à une expropriation dans la pratique récente des tribunaux arbitraux' 106 *RGDIP* (2002) 79; A. Reinisch, 'Expropriation', in P. Muchlinski, F. Ortino, and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (forthcoming 2008); N. Rubins and N.S. Kinsella, *International Investment, Political Risk and Dispute Resolution. A Practitioner's Guide* (2005) 155 *et seq*.; T. Waelde and A. Kolo, 'Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law' 50 *International and Comparative Law Quarterly* (2001) 811; C. Yannaca-Small, ' "Indirect Expropriation" and the "Right to Regulate" in International Investment Law', in OECD (ed.), *International Investment Law. A Changing Landscape* (2005) 43; UNCTAD, *Taking of Property* (2000) 11 *et seq*.

[2] See *Azurix v Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006; *CME Czech Republic B.V. v Czech Republic*, UNCITRAL, Partial Award, 13 September 2001; *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007; *EnCana Corporation v Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, 3 February 2006; *Enron Corporation and Ponderosa*

however, which had figured prominently in traditional international law,[3] seems to have become less important.[4]

In spite of these developments, there is a considerable tradition of investment cases which deal with the aspects of the lawfulness of expropriations both under customary international law[5] and according to applicable treaty standards.[6]

Assets, L.P. v Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007; *Eureko B.V. v Republic of Poland*, Partial Award, 19 August, 2005; *Feldman v Mexico*, ARB(AF)/99/1, Award, 16 December 2002; *GAMI Investments, Inc. v United Mexican States*, Award, 15 November 2004; *Ronald S. Lauder v Czech Republic*, UNCITRAL, Award, 3 September 2001; *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006; *MCI Power Group L.C. and New Turbine, Inc v Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007; *Metalclad Corporation v Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000; *Methanex Corporation v United States of America*, NAFTA, Award, 3 August 2005; *Middle East Cement Shipping and Handling Co S.A. v Arab Republic of Egypt*, ARB/99/6, Award, 12 April 2002; *MTD Equity Sdn Bhd and MTD Chile S.A. v Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004; *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA No. UN 3467, Award, 1 July 2004; *Pope & Talbot Inc v The Government of Canada*, UNCITRAL (NAFTA), Interim Award, 26 June 2000; *PSEG Global et al. v Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007; *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006; *S.D. Myers, Inc v Canada*, UNCITRAL (NAFTA), Award (Merits), 13 November 2000; *Siemens A.G. v Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007; *Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, ARB (AF)/00/2, Award, 29 May 2003; *Telenor Mobile Communications A.S. v Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006; *International Thunderbird Gaming Corporation v Mexico*, UNCITRAL (NAFTA), Award, 26 January 2006; *Waste Management, Inc v United Mexican States*, ARB(AF)/00/3, Award, 30 April 2004.

[3] According to Muchlinski, '[t]he legality of expropriation has been one of the most contentious problems in international law'. Muchlinski, *Multinational Enterprises*, above n. 1, 597.

[4] This may also explain why some recent treatises on international investment law deal almost exclusively with different forms of expropriations, but hardly address the issue of their legality. Cf. C. McLachlan, L. Shore, and M. Weiniger, *International Investment Arbitration. Substantive Principles* (2007) 265 *et seq*.

[5] A number of ad hoc arbitrations such as the Libyan Oil Concession cases, *British Petroleum v Libya*, Award, 10 October 1973 and 1 August 1974; *Texaco Overseas Petroleum Company (Topco)/ California Asiatic (Calasiatic) Oil Company v Libya*, Award, 19 January 1977; *Libyan American Oil Company (Liamco) v Libya*, 12 April 1977, which were based on agreements containing internationalization clauses, were decided on the basis of international law rules on expropriation. In a similar way, many of the early ICSID awards in cases which were brought on the basis of direct contracts between investors and host States decided expropriation issues on the basis of international law. See, eg, *Amco Asia Corporation v Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984; *Benvenuti & Bonfant v People's Republic of the Congo*, Award, 15 August 1980; *Adriano Gardella v Ivory Coast*, Award, 29 August 1977; *Kaiser Bauxite v Jamaica*, Award, 6 July 1975; *AGIP v Congo*, Award, 30 November 1979; *Klöckner v Cameroon*, Award, 21 October 1983; *SOABI v Senegal*, Award, 25 February 1988; *LETCO v Liberia*, Award, 31 March 1986; *Atlantic Triton v Guinea*, Award, 21 April 1986; *Vacuum Salt v Ghana*, Award, 16 February 1994; *Mobil Oil v New Zealand*, Findings on Liability, Interpretation and Allied Issues, 4 May 1989.

[6] Many recent expropriation claims based on international investment agreements, so-called treaty claims, are decided on the basis of the specifically applicable BIT or other IIA. Cf. Article 1131(1) NAFTA: 'A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.'

Moreover, recent ICSID cases like *ADC v Hungary*[7] have demonstrated that the question of an expropriation's legality is alive and well. This chapter will briefly discuss the general international law on the legality of expropriation; it will then portray the situation under international investment agreements (IIAs);[8] but in the main it will analyse the relevant case law of investment tribunals in detail, trying to ascertain the relevant criteria for assessing the legality of expropriations. Particular emphasis will be put on the judicial and arbitral practice with regard to the determination of a 'public purpose', of 'non-discrimination', 'due process', and the level of 'compensation'.

Legality Requirements under General International Law

The protection of private property has been a traditional part of international law, in particular, of the law on the treatment of aliens. Thus, statements like the one uttered by the US-Panama Claims Commission in the *de Sabla* case that 'acts of a government in depriving an alien of his property without compensation impose international responsibility'[9] reflected the prevailing view of the 1930s. For a long time the protection of the property of foreigners against expropriation has played such a dominant role that the initial attempt of the International Law Commission (ILC) to codify the law of State responsibility was largely dominated by the issue of State responsibility for injury to the person or property of aliens.[10] It is thus not surprising that in the course of his reports, the first Special Rapporteur of the ILC on State Responsibility concluded that the expropriation of foreigners may lead to international responsibility of the expropriating State unless carried out in conformity with certain internationally required preconditions, such as 'public utility' or 'public interest', non-discrimination, and 'lack of arbitrariness'.[11] These considerations clearly reflect the traditional legality requirements which can also be found in some of the United Nations General Assembly (UNGA) resolutions confirming the

[7] *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006.

[8] The term 'IIAs' refers to bi- and multilateral investment agreements between States; it encompasses the more than 2500 bilateral investment treaties (BITs), free trade agreements with investment chapters as well as multilateral investment relevant treaties such as NAFTA, North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America (NAFTA), or the Energy Charter Treaty, Annex 1 to the Final Act of the European Energy Charter Treaty Conference.

[9] *de Sabla Claim (US v Panama)*, Award, 29 June 1933, 6 *UNRIAA* 358, 366.

[10] See, in particular, the Special Rapporteur's Fourth Report on State Responsibility, F.V. García Amador, 'Responsibility of the State for injuries caused in its territory to the person or property of aliens—measures affecting acquired rights', UN Doc. A/CN.4/119, Yearbook of the International Law Commission (1959-II). See also L.B. Sohn and R.R. Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens', 55 *American Journal of International Law* (1961) 545; F.V. Garcia-Amador, L.B. Sohn, and R.R. Baxter, 'Recent Codification of the Law of State Responsibility for Injuries to Aliens' (1974).

[11] García Amador, *Fourth Report on State Responsibility*, above n. 10, paras 42 *et seq*.

right to expropriate as an expression of the permanent sovereignty over natural resources. For instance, paragraph 4 of the well-known 1962 UNGA Resolution on Permanent Sovereignty over Natural Resources 1803 provided:

> Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases 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.[12]

While this text was, of course, the result of intense negotiations and remained partly ambiguous,[13] it clearly expressed a consensus that expropriation had to be (1) in the public interest, and (2) accompanied by compensation. Subsequent UNGA resolutions attempting to establish a New International Economic Order,[14] of course, retracted from that position and merely affirmed the right to expropriate without any firm (international) obligation to compensate foreign owners or to respect the requirement of 'public utility' or the like. Thus, the 1973 UNGA Resolution on Permanent Sovereignty over Natural Resources 3171 affirmed

> [...] that the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures.[15]

Similarly, Article 2(2) of the 1974 Charter of Economic Rights and Duties of States stated:

> Each State has the right [...] (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the

[12] GA Res. 1803 (XVII), UN GAOR, 17th Session, Agenda Item 39 para. 4, UN Doc. A/RES/1803 (XVII) (1962).

[13] See, Lowenfeld, above n. 1, 407 *et seq*. See also N. Schrijver, *Sovereignty Over Natural Resources* (1997) 37 *et seq*.

[14] See G. Varges, 'The New International Economic Order Legal Debate' (1983); Th. Oppermann and E.U. Petersmann (eds), Reforming the International Economic Order (1987); J. Bhagwati (ed.), 'The New International Economic Order: The North-South Debate' (1977); R. Rothstein, 'Global Bargaining: UNCTAD and the Quest for a New International Economic Order' (1979); C. Murphy, 'Emergence of the NIEO Ideology' (1984); K. Sauvant and H. Hasenpflug (eds), 'The New International Economic Order: Confrontation or Cooperation between North and South' (1977); R.-J. Dupuy (ed.), 'Le nouvel ordre économique international: aspects commerciaux, technologiques et culturels' (1981).

[15] UNGA Res. 3171 (XXVIII), UN GAOR, 287th Session, para. 3, UN Doc. A/RES/3171 (XXVIII) (1973).

nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.[16]

The political controversy surrounding the adoption of the latter two resolutions is well known as is the doctrinal controversy about the legal relevance of these texts.[17] Suffice it to re-state the majority view which acknowledges that the resolutions may have cast doubt on the traditional expropriation standard, while they have not created new customary international law.

Nevertheless, the traditional legality requirements are still upheld by many commentators[18] and in a number of textbooks. For instance, the Restatement (Third) of the Foreign Relations Law of the United States provides as follows:

A state is responsible under international law for injury resulting from:

(1) a taking by the state of the property of a national of another state that
  (a) is not for a public purpose, or
  (b) is discriminatory, or
  (c) not accompanied by provisions for just compensation.[19]

More cautiously, UNCTAD has summarized the state of the law by saying that

[i]n customary international law, there is authority for a number of limitations or conditions that relate to:

the requirement of a public purpose for the taking;
the requirement that there should be no discrimination;
the requirement that the taking should be accompanied by payment of compensation; and,
the requirement of due process.[20]

In a 2004 UNCTAD publication, however, it is asserted more broadly that

[u]nder customary international law and typical international investment agreements, three principal requirements need to be satisfied before a taking can be considered to be lawful: it should be for a public purpose; it should not be discriminatory; and compensation should be paid.[21]

While it characterized the first two requirements as 'generally accepted', it noted that, though the third was also 'widely accepted in principle', there was no universal agreement relating to the manner of assessment of the compensation

[16] UNGA Res. 3281 (XXIX), UN GAOR, 29th Session, UN Doc. A/9631 (1974).

[17] See Lowenfeld, above n. 1, 410 *et seq*.; Rubins and Kinsella, above n. 1, 162 *et seq*.

[18] See C. Schreuer, 'The Concept of Expropriation under the ECT and other Investment Protection Treaties', in C. Ribeiro (ed.), *Investment Arbitration and the Energy Charter Treaty* (2006) 108, 109; A. Sheppard, 'The Distinction between Lawful and Unlawful Expropriation', in C. Ribeiro (ed.), *Investment Arbitration and the Energy Charter Treaty* (2006) 169. More cautiously Muchlinski, *Multinational Enterprises*, above n. 1, 598 *et seq*.

[19] American Law Institute (ed.), Restatement (Third) of the Foreign Relations Law of the United States, § 712 (1987).

[20] UNCTAD, above n. [??], 12.

[21] UNCTAD, International Investment Agreements: Key Issues (2004) 235.

due.[22] In a similar fashion, a critic of the traditional 'Western' approach to the law of expropriation like *Sornarajah* maintains that '[w]ithin the context of the rules on expropriation, the issue of whether full compensation represents international law had remained a contested proposition'.[23] He does acknowledge, however, that '[t]here is general agreement that a taking which lacks a public purpose and a discriminatory taking are illegal in international law'.[24]

Legality Requirements in International Investment Agreements

As opposed to the uncertain state of the customary international law on the conditions under which a state may lawfully expropriate the property of foreigners, treaty-based investment law contains fairly clear rules on the legality requirements for expropriation. These largely correspond to the traditional 'Western' views demanding a public purpose, non-discrimination as well as compensation often among the lines of the *Hull* formula demanding 'prompt, adequate and effective'[25] compensation.[26] Thus, numerous BITs and other IIAs[27] contain provisions that are based on the assumption that expropriations of the property of nationals of the other contracting party or parties are, in principle, permissible. This permissibility is regularly made conditional upon the requirement that such takings are made for a public purpose, non-discriminatory, and accompanied by compensation.[28] The precise level of compensation expressly demanded varies from treaty to treaty. Also a fourth requirement, that the taking is made in accordance with due process, is not always included and, if included, may vary.[29]

A straightforward and typical listing of the traditional legality requirements can be found in the 2004 US Model BIT which provides:

> 1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:
>
> (a) for a public purpose;
> (b) in a non-discriminatory manner;
> (c) on payment of prompt, adequate, and effective compensation; and
> (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3).[30]

[22] Ibid.
[23] M. Sornarajah, *The International Law on Foreign Investment* (2nd edn, 2004) 149.
[24] Ibid., 395.
[25] On the so-called *Hull* formula see below text at n. 160.
[26] Cf. UNCTAD, *Taking Bilateral Investment Treaties 1999–2006: Trends in Investment Rule-Making* (2007) 44.
[27] Eg Article 1110 NAFTA; Article 13 ECT.
[28] Cf. Muchlinski, *Multinational Enterprises*, above n. 1, 692; UNCTAD, above n. [??], 24.
[29] See below text at n. 139.
[30] Article 6(1) US Model BIT (2004).

Almost identical language is included in Article 13(1) of the 2004 Canadian Model BIT,[31] in Article 1110(1) NAFTA[32] and in Article 13(1) of the Energy Charter Treaty.[33]

Textual variations can be found in many BITs. For instance, the 1998 China/Poland BIT provides:

> Either Contracting Party may for security reasons or a public purpose, nationalize, expropriate or take similar measures (hereinafter referred to as 'expropriatory measures') against investments investors of the other Contracting Party in its territory. Such expropriatory measures shall be non-discriminatory and shall be taken under due process of national law and against compensation.[34]

The 1991 Czechoslovakia/Netherlands BIT provides:

> Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:
>
> (a) the measures are taken in the public interest and under due process of law;
> (b) the measures are not discriminatory;
> (c) the measures are accompanied by provision for the payment of just compensation.[35]

Even BITs, where the express language differs markedly from the straightforward listing of the traditional legality requirements, often provide the same standard in substance. Good examples of this are the German BITs. Their expropriation provisions are still strongly influenced by the wording of the first modern BIT, the Germany/Pakistan BIT (1959), which provided:

> Nationals or companies of either party shall not be subjected to expropriation of their investments in the territory of the other party except for public benefit and against compensation, which shall represent the equivalent of the investments affected. [. . .][36]

[31] Article 13(1) Canadian Model BIT (2004).

[32] Article 1110(1) NAFTA provides: 'No party shall directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: for a public purpose; on a non-discriminatory basis; in accordance with due process of law and Article 1105; and on payment of compensation in accordance with paragraphs 2 through 6.'

Article 1105(1) NAFTA requires treatment 'in accordance with international law, including fair and equitable treatment and full protection and security'.

[33] Article 13(1) ECT provides: 'Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.'

[34] Article 4(1) China/Poland BIT (1998).

[35] Article 5 Czechoslovakia/Netherlands BIT (1991).

[36] Article 3(2) Germany/Pakistan BIT (1959).

The current 2004 German Model BIT provides:

> Investments by investors of either Contracting State shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting State except for the public benefit and against compensation.[37]

While this language does not list due process and non-discrimination in the usual way, these requirements are included in the German Model BIT by the express provisions that '[t]he legality of any such expropriation, nationalization or comparable measure and the amount of compensation shall be subject to review by due process of law'[38] and that '[i]nvestors of either Contracting State shall enjoy most-favoured-nation treatment in the territory of the other Contracting State in respect of the matters provided for in this Article'.[39]

B. The Interpretation Given to the Legality Requirements in the Practice of Investment Arbitration

Public Purpose

The need of a public purpose or public interest in order to legitimize an expropriation has long been considered part of customary international law.[40] The public purpose requirement was also reaffirmed in Article 4 of the 1962 General Assembly Resolution No. 1803 on Permanent Sovereignty over Natural Resources which referred to 'grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests'.[41] In the 1974 Charter of Economic Rights and Duties of States,[42] however, the public purpose criterion no longer appears.

Today the requirement of a 'public purpose' or 'public interest' for an expropriation to be considered lawful can be found in almost all IIAs.[43] Many BITs and other treaties require that measures must be taken in the 'public interest'[44] or for a 'public purpose'[45] or 'public benefit'[46] sometimes for a 'public purpose

[37] Article 4(2) German Model BIT (2004).
[38] Article 4(2) last sentence German Model BIT (2004).
[39] Article 4(4) German Model BIT (2004).
[40] P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, 1997) 235; Garcia Amador, Fourth Report on State Responsibility, above n. 10, para. 58; K. Hobér, *Investment Arbitration in Eastern Europe: In Search of a Definition of Expropriation* (2007) 38.
[41] UNGA Resolution 1803 (XVII), above n. 12.
[42] UNGA Resolution 3281 (XXIX), above n. 16.
[43] Cf. UNCTAD, above n. [??], 24 *et seq*.
[44] Article 5 Czechoslovakia/Netherlands BIT (1991).
[45] Eg Article 6(1)(a) US Model BIT (2004); Article 13(1) Canadian Model BIT (2004).
[46] Article XI Netherlands/Sudan BIT (1970); Article 4(2) German Model BIT 2004.

related to the internal needs'[47] or that the measure must be for 'a purpose which is in the public interest'.[48] Writers largely concur on the need for this legality requirements; though they usually do not seem to regard it as a very high hurdle for states. Thus, legal commentators have stressed that 'the requirement of public purpose for a taking to be lawful is not much of a limitation in modern times'[49] and that '[. . .] it is very easy for an expropriating state to couch any taking in terms of some "public purpose" '.[50] Indeed, investment tribunals in general have been rather reluctant to second-guess the sovereign determination of a public purpose '[. . .] perhaps because the concept of public purpose is broad and not subject to effective re-examination by other states'.[51] Nevertheless, as recent cases have proven, the test is not wholly irrelevant and may be used by tribunals not only in cases of blatant misuse, such as expropriations for the private gain of a ruling elite[52] or expropriations carried out in the context of the commission of serious human rights violations, crimes against humanity, or genocide.[53]

The case law has been rather consistent in acknowledging the existence of a 'public purpose' requirement. Thus, most arbitral and judicial pronouncements addressing the legality requirements for expropriations reaffirm the public purpose requirement—though some of them may have given rise to conflicting interpretation. A good example is the well-known statement by the arbitrator in the *Shufeldt Claim* that '[. . .] it [was] perfectly competent for the Government of Guatemala to enact any decree they like and for any reasons they see fit, and such reasons are no concern of this tribunal'.[54] Some critics take this as evidence of an arbitral award which 'questioned the need for the requirement of public purpose,'[55] while one may also rely on this statement as an affirmation of the public purpose principle which merely indicates that tribunals would be reluctant to question the expropriating State's assessment of a public purpose.

In the 1921 *Norwegian Shipowners' Claims* case,[56] the arbitral tribunal examined whether the taking of foreign property was 'justified by public needs'.[57] Though it expressly tested the legality of the United States taking of contractual rights of Norwegian citizens on the basis of US law, ie the takings clause

[47] UK/Costa Rica BIT (1982); Article 5(1) France/Hong Kong BIT (1995).
[48] Article 13(1)(a) ECT.
[49] Sornarajah, above n. 23, 395.
[50] Rubins and Kinsella, above n. 1, 177. See also Muchlinski, *Multinational Enterprises*, above n. 1, 599.
[51] *Restatement (Third) of the Foreign Relations Law of the United States*, above n. 19, Comment (e).
[52] Cf. the Restatement's suggestion that 'a seizure by a dictator or oligarchy for private use could be challenged under this rule'. *Restatement (Third) of the Foreign Relations Law of the United States*, above n. 19, Comment (e).
[53] Muchlinski, *Multinational Enterprises*, above n. 1, 600.
[54] *Shufeldt Claim (US v Guatemala)*, Award, 24 July 1930, 2 *UNRIAA* 1079, 1095.
[55] Sornarajah, above n. 23, 396.
[56] *Norwegian Shipowners' Claims (Norway v US)*, Award, 30 June 1921, 1 *UNRIAA* 307, 332.
[57] Ibid.

enshrined in the Constitution's Fifth Amendment, it emphasized that the public law of the parties was '[...] in complete accord with the international public law of all civilised countries'.[58] Thus, the tribunal's reference to the 'power of a sovereign state to expropriate, take or authorize the taking of any property within its jurisdiction which may be required for the "public good" or for the "general welfare" '[59] may be regarded as a requirement of US constitutional law as well as of international law.

Also, in the *German Interests in Polish Upper Silesia* case[60] before the Permanent Court of International Justice (PCIJ) public purpose was referred to as an expropriation requirement. In this case, the PCIJ primarily addressed the right of Poland to expropriate German property pursuant to the Geneva Convention Concerning Upper Silesia[61] which it characterized as a '[...] derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights'.[62] In passing, the Permanent Court also referred to 'generally accepted international law' and found that 'expropriation for reasons of public utility, judicial liquidation and similar measures' were not prohibited by the Geneva Convention.[63] One may thus conclude that 'public utility' was regarded by the PCIJ to constitute one of the legality requirements for an expropriation.

One of the rare exceptions from the older case law where a tribunal not only examined but actually rejected the assertion that an expropriation served a public purpose is the *Walter Fletcher Smith Claim* case[64] in which the arbitrator found '[...] that the expropriation proceedings were not, in good faith, for the purpose of public utility'.[65] In the arbitrator's view, the violent taking of a piece of land belonging to a US national in order to serve for the enlargement of an urbanization project did not conform to the public purpose test. He held that

> [...] the properties seized were turned over immediately to the defendant company, ostensibly for public purposes, but, in fact, to be used by the defendant for purposes of amusement and private profit, without any reference to public utility.[66]

[58] Ibid.
[59] Ibid.
[60] *Case concerning certain German interests in Polish Upper Silesia (Germany v Poland)*, Judgment, 25 May 1926.
[61] Article 6 provided: 'Poland may expropriate in Polish Upper Silesia, in conformity with the provisions of Articles 7 to 23, undertakings belonging to the category of major industries including mineral deposits and rural estates. Except as provided in these clauses, the property, rights and interests of German nationals may not be liquidated in Polish Upper Silesia.' 1922 Geneva Convention concerning Upper Silesia, Martens, XVI *Nouveau Recueil Général de traites* No. 80, 645; English version of Article 6 cited in *Case concerning certain German interests in Polish Upper Silesia*, above n. 60, at 21.
[62] Ibid., 22.
[63] Ibid.
[64] *Walter Fletcher Smith Claim (US v Cuba)*, Award, 2 May 1929.
[65] *Walter Fletcher Smith Claim (US v Cuba)*, Award, 2 May 1929, 2 *UNRIAA* 913, 915.
[66] Ibid., 913, 917 *et seq*.

It should be noted that the award in this case was based on Cuban law and that the arbitrator did not make any explicit statements on international law concerning expropriation. Nevertheless, the ruling seems to reflect the prevailing view on international law as well.

In the 1970s, arbitral tribunals in the Libyan oil concessions arbitrations have expressed different views with regard to the freedom of host States to determine the public purpose of their measures. At one end of the spectrum, the arbitrator in the *LIAMCO* case expressed the view that States were almost totally free to decide on the public purpose of takings by stating that '[m]otives are indifferent to international law, each State being free to judge for itself what it considers useful or necessary for the public good'.[67] He even concluded that '[...] the public utility principle is not a necessary requisite for the legality of a nationalization'.[68] Nevertheless, the arbitrator found that the language of the nationalization law '[...] was drafted in a general non-discriminatory language, which clearly indicated that Libya's motive for nationalization was its desire to preserve the ownership of its oil'.[69] Though he stressed the non-discrimination obligation[70] to the point of declaring the public purpose requirement irrelevant, this language would clearly also satisfy a public purpose test.

In another Libyan oil concessions case, in *British Petroleum v Libya*, the *ad hoc* arbitrator explicitly assessed the public purpose requirement and found that the expropriation was unlawful because it was politically motivated as an act of retaliation for a British foreign policy decision. In the words of the tribunal, the measures had been adopted '[...] for purely extraneous political reasons and [...] arbitrary and discriminatory in character'.[71]

More recent cases also reaffirm the relevance of the 'public purpose' test. In the jurisprudence of the Iran-US Claims Tribunal the 'public purpose' requirement figures quite prominently. For instance, in *American International Group*, the tribunal held that a nationalization was not unlawful because there was '[...] not sufficient evidence before the tribunal to show that the nationalization was not carried out for a public purpose'.[72] In the *INA Corp* case, the Iran-US Claims Tribunal even more broadly asserted that '[...] it has long been acknowledged that expropriations for a public purpose [...] are not per se unlawful.'[73] In the *Amoco* case, the same tribunal stated:

A precise definition of the 'public purpose' for which an expropriation may be lawfully decided has neither been agreed upon in international law nor even suggested. It is clear

[67] *Libyan American Oil Company (Liamco) v Libya*, 12 April 1977, 62 *ILR* 140, 194.
[68] Ibid. [69] Ibid., 195.
[70] See below text at n. 119.
[71] *British Petroleum v Libya*, Award, 10 October 1973 and 1 August 1974, 53 *ILR* 297, 329.
[72] *American International Group Inc, et al. v Islamic Republic of Iran, et al*, Award No. 93-2-3, 19 December 1983, 4 Iran-US CTR (1983) 96, 105.
[73] *INA Corp v Government of the Islamic Republic of Iran*, Award No. 184-161-1, 13 August 1985, 8 *Iran-US CTR* (1985) 373, 378.

that, as a result of the modern acceptance of the right to nationalize, this term is broadly interpreted, and the States, in practice, are granted extensive discretion. An expropriation, the only purpose of which would have been to avoid contractual obligations of the State or of an entity controlled by it, could not, nevertheless be considered as lawful under international law.[74]

In the specific case, however, the tribunal had no difficulty to find that the expropriatory '[...] act was adopted for a clear public purpose, namely to complete the nationalization of the oil industry in Iran'.[75]

Also the European Court of Human Rights affirmed that, as a general principle, it would not question a State's view that a taking was in the public interest.[76] The concept of a broad discretion of States to determine for themselves what is in their 'public interest' corresponds to the Court's doctrine of a 'margin of appreciation' left to Member States.[77] However, there are also cases where the Strasbourg Court has stated the absence of a 'public interest' demanded by Article 1 of the First Additional Protocol.[78]

Also, ICSID tribunals have generally endorsed the 'public purpose' requirement. For instance, the tribunal in the *AMCO v Indonesia* case considered that, as a matter of general international law,

> [...] the right to nationalize supposes that the act by which the State purports to have exercised it, is a true nationalization, namely a taking of property or contractual rights which aims to protect or to promote the public interest.[79]

Similarly, the tribunal in the *Santa Elena* case clearly stated that '[i]nternational law permits the Government of Costa Rica to expropriate foreign-owned property within its territory for a public purpose [...]'.[80]

Also in the so-called *Pyramids* case, an ICSID tribunal endorsed the public purpose requirement, finding that 'as a matter of international law, the Respondent was entitled to cancel a tourist development project situated on its own territory for the purpose of protecting antiquities'.[81] Thus, the cancellation of a contract to build hotels in the vicinity of the ancient pyramids of Gizeh

[74] *Amoco International Finance Corp v Iran*, 15 Iran-US CTR (1987) 189, 233, para. 145.

[75] Ibid., para. 146.

[76] See *James v United Kingdom*, 8 *EHRR* 123 (1986).

[77] See H.C. Yourow, 'The Margin of Appreciation Doctrine in the Dynamics of the European Court of Human Rights Jurisprudence' (1996); E. Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards', 31 *NYU Journal of International Law and Policy* (1999), 843.

[78] See *Brumărescu v Romania*, Appl. No. 28342/95, ECtHR, 28 October 1999, [1999] ECHR 105, para. 79, where the ECtHR held that neither the 'Supreme Court of Justice itself nor the Government have sought to justify the deprivation of property on substantive grounds as being "in the public interest".'

[79] *Amco Asia Corporation v Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984, 1 *ICSID Reports* 413, 466.

[80] *Compañía del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, para. 71.

[81] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, para. 158.

was considered a 'lawful exercise of the right of eminent domain' because it was '[. . .] exercised for a public purpose, namely, the preservation and protection of antiquities in the area'.[82]

At the same time, ICSID tribunals have generally shared the reluctance of other international courts and tribunals to question the determination of host States of what they considered to be in their public interest. The tribunal in the *Goetz* case very aptly summarized this approach by stating that

> [. . .] [i]n the absence of an error of fact or law, of an abuse of power or of a clear misunderstanding of the issue, it is not the Tribunal's role to substitute its own judgement for the discretion of the government of Burundi of what are 'imperatives of public need [. . .] or of national interest'.[83]

Also in the NAFTA case of *Feldman v Mexico*, an ICSID Additional Facility tribunal referred to the public purpose requirement as one of the 'conditions (other than the requirement for compensation)' as being 'not of major importance'.[84] The tribunal used the public purpose as well as the due process requirements as elements in order to determine whether an expropriation had taken place at all—foreshadowing the *Methanex* and *Saluka* doctrine.[85] Its considerations on public purpose are still relevant because they confirm the willingness, albeit reluctant, to scrutinize a State's decision on measures in the public interest. The tribunal considered that the change in Mexico's tax refund system was a measure for which there were '[. . .] rational public purposes'.[86]

In spite of the general deference of investment tribunals to governmental policy choices, ICSID as well as Iran-US Claims Tribunal awards have sometimes come to the conclusion that expropriatory acts had been unlawful because they did not serve a public purpose.

For instance, in the *LETCO* case,[87] an ICSID tribunal found that the revocation of a concession '[. . .] was not for a *bona fide* public purpose, was discriminatory and was not accompanied by an offer of appropriate compensation'.[88] The case concerned the unilateral abrogation of a concession for the exploitation of timber reserves in Liberia. With regard to the public policy requirement, the tribunal stated that

> [t]here was no legislative enactment by the Government of Liberia. There was no evidence of any stated policy on the part of the Liberian Government to take concessions of this kind into public ownership for the public good. On the contrary, evidence was given to

[82] Ibid.

[83] *Goetz and Others v Republic of Burundi*, ICSID Case No. ARB/95/3, Decision on Liability, 2 September 1998, para. 126.

[84] *Marvin Feldman v Mexico*, ARB(AF)/99/1, 16 December 2002, para. 99.

[85] See A. Hoffmann, 'Indirect Expropriation' at Chapter 8 above.

[86] *Feldman v Mexico*, above n. 84, para. 136.

[87] *Liberian Eastern Timber Corporation (LETCO) v Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986.

[88] *LETCO v Liberia*, above n. 87, 2 *ICSID Reports* 343, 367.

the Tribunal that areas of the concession taken away from LETCO were granted to other foreign-owned companies [. . .].[89]

Most recently, the legality of an expropriation was a central issue in the ICSID case of *ADC v Hungary*.[90] The case concerned a contract to renovate, to build and to operate terminals at the Budapest Airport entered into in 1995 between ADC and ADCM, two Cypriot companies, and ATAA, a Hungarian State entity responsible for the operation of the airport, after a lengthy tender procedure. In 2001, the Hungarian government transformed the ATAA into two successor entities, one responsible for air traffic control, the other for the operation of the airport. In a letter to the investors it informed them that the restructuring of the airport operations also required the termination of the agreements with claimants as of 1 January 2002 because the applicable governmental decree prohibited the cession or transfer of any airport operations to third parties. As a result of these acts the investor had to leave the airport premises and no longer received any revenues as originally agreed upon.

In 2005, the Hungarian government privatized the airport operations entity through a sale of a 75 per cent majority interest which was awarded to BAA, a British Airways-affiliated airport operator, after a tendering process.

The tribunal found that the government decree and the subsequent take-over of all activities of the investor at the airport by the Hungarian airport operations entity constituted an expropriation of the claimants' investments. Then, the arbitral tribunal addressed at length the question of the legality of the taking and came to the conclusion that the expropriation

[. . .] was unlawful as: (a) the taking was not in the public interest; (b) it did not comply with due process [. . .]; (c) the taking was discriminatory and (d) the taking was not accompanied by the payment of just compensation to the expropriated parties.[91]

The traditional legality requirements were assessed on the basis of the applicable Cyprus/Hungary BIT which provided as follows:

Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:

(a) The measures are taken in the public interest and under due process of law;
(b) The measures are not discriminatory;
(c) The measures are accompanied by provision for the payment of just compensation.[92]

With regard to the public purpose requirement, the *ADC* tribunal found that

[. . .] a treaty requirement for '*public interest*' requires some genuine interest of the public. If mere reference to '*public interest*' can magically put such interest into existence

[89] Ibid., 366. [90] *ADC v Hungary*, above n. 7.
[91] *ADC v Hungary*, above n. 7, para. 476.
[92] Article 4(1) Hungary/Caprus BIT (1989).

and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.[93]

Thus, the *ADC* tribunal clearly rejected the view, espoused by some arbitral awards, that States are basically free to determine whatever they wish to consider as public purpose or interest. Instead, it demanded a 'genuine interest of the public' and *de facto* reversed the burden of proof by requiring the expropriating State to demonstrate such genuine public interest. With regard to the Hungarian argument that its action was necessary for the harmonization of the Hungarian government's transport strategy, laws and regulations with EU law, the tribunal laconically remarked that Hungary '[...] failed to substantiate such a claim with convincing facts or legal reasoning'.[94] Similarly, the tribunal concluded that with regard to the claimed '[...] *strategic interest of the State* [...] Respondent never furnished it with a substantive answer'.[95] As a result, '[w]ith the claimed "*public interest*" unproved and the tribunal's curiosity thereon unsatisfied', the tribunal rejected the arguments made by the Respondent.[96]

However, these final remarks on the unmet burden of proof by an expropriating State should not be overestimated since, in the particular case, it was the specific circumstances of the taking leading to a subsequent privatization which made the lack of a genuine public interest particularly obvious.[97]

Also, the recent award in *Siemens v Argentina*[98] demonstrates that ICSID tribunals are willing to examine the legality of expropriations. The tribunal found that the fulfilment of the public interest requirement contained in the applicable Argentina/Germany BIT'[99] was questionable. In its view, the abrogation of the contract

> [...] was an exercise of public authority to reduce the costs to Argentina of the Contract recently awarded through public competitive bidding, and as part of a change of policy by a new Administration eager to distance itself from its predecessor.[100]

It was this aspect of the facts that overshadowed the otherwise legitimate public interest of the respondent State to take measures against the fiscal crisis.[101]

[93] *ADC v Hungary*, above n. 7, para. 432.
[94] Ibid., para. 430.
[95] Ibid., para. 431.
[96] Ibid., para. 433.
[97] Cf. the tribunal's remarks that 'the subsequent privatization and the agreement with BAA render[ed] this whole debate somewhat unnecessary'. *ADC v Hungary*, above n. 7, para. 433.
[98] *Siemens A.G. v Argentina*, above n. [??].
[99] Article 4(2) Argentina/Germany BIT (1991).
[100] *Siemens A.G. v Argentina*, above n. 98, para. 273.
[101] The tribunal found that the response of the 2000 Emergency Law to the fiscal crisis was 'a legitimate concern of Argentina and the Tribunal defers to Argentina in the determination of its public interest'. Ibid.

However, the tribunal concluded that specific application of the emergency measures through

> Decree 669/01 became a convenient device to continue the process started more than a year earlier long before the onset of the fiscal crisis. From this perspective, while the public purpose of the 2000 Emergency Law is evident, its application through Decree 669/01 to the specific case of Siemens' investment and the public purpose of same are questionable.[102]

The tribunal did not make any final determination on the public purpose requirement since it held that the lack of any compensation had rendered the expropriation unlawful 'in any case'.[103]

On the basis of the existing case law there can be no doubt that 'public purpose' must be considered a legality requirement both under investment treaty and unwritten international law standards. The practice of international courts and tribunals also demonstrates that—in spite of a broad deference to expropriating States—they are willing to assess whether such public purpose has been genuinely pursued.

Non-Discrimination

The non-discrimination requirement is a standard element both in customary international law and in most treaty provisions addressing the legality of expropriations.[104] The precise content of this non-discrimination requirement, however, remains unclear. It is said that a '[...] discriminatory taking is one that singles out a particular person or group of people without a reasonable basis'.[105] Thus, an expropriation or programme of expropriations '[...] that singles out aliens generally, or aliens of a particular nationality, or particular aliens, would violate international law'.[106] Since 'discrimination' is regarded as 'unreasonable distinction', expropriations of certain persons may not be unlawful if such distinction is '[...] rationally related to the state's security or economic policies might not be unreasonable'.[107] Sometimes, it is even asserted that 'the non-discrimination requirement demands that governmental measures, procedures and practices be non-discriminatory even in the treatment of members of the same group of aliens'.[108]

Racially motivated expropriations are usually regarded as evident examples of illegal takings.[109] Thus, the Aryanization policy of Nazi-Germany involving

[102] Ibid. [103] Ibid.

[104] A.F.M. Maniruzzaman, 'Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview', 8 *Journal of Transnational Law and Policy* (1998) 57.

[105] Rubins and Kinsella, above n. 1, 177.

[106] *Restatement (Third) of the Foreign Relations Law of the United States*, above n. 19, Comment (f).

[107] Ibid.

[108] UNCTAD, above n. [??], 13.

[109] Ibid.; Sornarajah, above n. 23, 399.

the systematic taking of Jewish property is regarded as discriminatory expropriation,[110] as is the taking of property belonging to ethnic Indians by the Idi Amin regime in Uganda. These extreme forms of discrimination are usually also regarded as lacking a legitimate public purpose.[111]

In practice, it was often the singling out of particular nationals, often as a result of political retaliation, which was considered to constitute a discriminatory taking. For instance, US courts considered the initial wave of expropriations after the Cuban revolution which was exclusively directed against US nationals to be unlawful under international law.[112]

Many BITs and IIAs provide that expropriations or expropriatory measures must be 'not discriminatory', 'non-discriminatory',[113] taken 'on a non-discriminatory basis',[114] 'in a non-discriminatory manner',[115] or use comparable language. Multilateral IIAs also make non-discrimination a requirement for the expropriation of foreign investors.[116]

The case law of international tribunals has equally affirmed the existence of a non-discrimination requirement for expropriations in general.

In some of the Libyan Oil Concession cases, a discriminatory character of the expropriatory acts was found. For instance, in *British Petroleum v Libya*, the sole arbitrator regarded the expropriation as unlawful because it was politically motivated. He found that

> [...] the taking of the property by the Respondent of the property [...] clearly violates public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character.[117]

Also, the arbitrator in the *LIAMCO* case[118] reaffirmed the principle that a discriminatory expropriation would be unlawful as such.[119] He held that it was

> [...] clear and undisputed that non-discrimination is a requisite for the validity of a lawful nationalization. This is a rule well-established in international legal theory and practice [...]. Therefore, a purely discriminatory nationalization is illegal and wrongful.[120]

[110] *Oppenheimer v Inland Revenue Commissioner* [1975] 1 All ER 538.
[111] See above text at n. 53.
[112] *Banco Nacional de Cuba v Sabbatino*, 307 F.2d 845, at 868 (1962), 'Since the Cuban decree of expropriation not only failed to provide adequate compensation but also involved a retaliatory purpose and a discrimination against United States nationals, we hold that the decree was in violation of international law', reversed on act of State grounds 376 US 398 (1964); *Banco Nacional de Cuba v Farr*, 243 F.Supp. 957 (SDNY 1965), affirmed, 383 F.2d 166 (2d Cir. 1967), cert. denied 390 US 956 (1968). See also *Restatement (Third) of the Foreign Relations Law of the United States*, above n. 19, Reporters' Note 5.
[113] Article 4(1) China/Poland BIT (1998).
[114] Article 5(1) France/Hong Kong BIT (1995).
[115] Article 6(1) US Model BIT (2004); Article 13(1) Canadian Model BIT (2004).
[116] UNCTAD, above n. [??], 13.
[117] *British Petroleum v Libya*, Award, 10 October 1973 and 1 August 1974, 53 *ILR* 297, 329.
[118] *Libyan American Oil Company (Liamco) v Libya*, above n. [??].
[119] Ibid., 62 *ILR* 140, 194.
[120] Ibid.

He concluded, however, that there was no actual discrimination involved. According to the arbitrator's findings

> [...] LIAMCO was not the first company to be nationalized, nor was it the only oil company nor the only American company to be nationalized [...]. Other companies were nationalized before it, other American and non-American companies were nationalized with it and after it, and other American companies are still operating in Libya. Thus, it may be concluded from the above that the political motive was not the predominant motive for nationalization, and that such motive *per se* does not constitute a sufficient proof of a purely discriminatory measure.[121]

On the other hand, even the fact that one foreign investor is expropriated while another one is not does not necessarily imply a discriminatory taking if there were 'adequate reasons' for distinguishing. Thus, the tribunal in the *Aminoil* case[122] did not find an unlawful discrimination although the US claimant had been expropriated while a non-US oil company (Arabian Oil) was not. According to the tribunal, the

> [...] nationalisation of Aminoil was not thereby tainted with discrimination [...]. First of all, it has never for a single moment been suggested that it was because of the American nationality of the Company that the Decree Law was applied to Aminoil's Concession. Next, and above all, there were adequate reasons for not nationalising Arabian Oil.[123]

This reasoning was also adopted by the Iran-US Claims Tribunal in the *Amoco* case. The tribunal said that

> [it] finds it difficult, in the absence of any other evidence, to draw the conclusion that the expropriation of a concern was discriminatory only from the fact that another concern in the same economic branch was not expropriated. Reasons specific to the non-expropriated enterprise, or to the expropriated one, or to both, may justify such a difference in treatment.[124]

On a more general level, however, the tribunal clearly reaffirmed that '[d]iscrimination is widely held as prohibited by customary international law in the field of expropriation'.[125]

A discriminatory expropriation was found in *Eureko* where an UNCITRAL tribunal concluded that the challenged Polish measures were aimed at excluding foreign investors from the Polish insurance business and thus discriminatory. It therefore found a violation of the expropriation provision of the applicable BIT. According to the tribunal, the challenged measures, ie the refusal to conduct a public offering, 'proclaimed by successive Ministers of the State Treasury as being pursued in order to keep [an insurance business] under majority Polish control

[121] Ibid., 195.
[122] *Kuwait v American Independent Oil Company (Aminoil)*, Award, 24 March 1982.
[123] Ibid., para. 87.
[124] *Amoco International Finance Corp v Iran*, above n. [??], para. 142.
[125] Ibid., para. 140.

and to exclude foreign control such as Eureko' were 'clearly discriminatory'.[126] What is interesting in this case is the fact that the discrimination was not one between different groups of foreigners but rather one between foreigners and nationals of the host State.

ICSID cases equally confirmed the relevance of the non-discrimination requirement. In *LETCO* the tribunal stressed that '[...] even if the Government had sought to justify its action as an act of nationalization, it would have had to [...] show that its action [...] was non-discriminatory'.[127] Since the tribunal found evidence that '[...] areas of the concession taken away from LETCO were granted to other foreign-owned companies [...] run by people who were "good friends" of the Liberian authorities'[128] it concluded, inter alia, that 'the taking of LETCO's property was [...] discriminatory'.[129]

Also in the recent ICSID case of *ADC v Hungary*, actions taken by the host State against the investor were considered discriminatory.[130] The tribunal found '[...] that in order for a discrimination to exist, particularly in an expropriation scenario, there must be different treatments to different parties'.[131] The investor had argued that the regulatory framework prohibiting the operation of the airport by any third party other than the Hungarian airport operator entity was specifically aimed at it since it was the only operator of the airport. Hungary had argued that the new framework applied to all persons and business entities other than the statutorily appointed operator and was thus not discriminatory.

The tribunal expressly rejected '[...] the Respondent's argument that as the only foreign parties involved in the operation of the Airport, the Claimants [were] not in a position to raise any claims of being treated discriminately'.[132] In a rather short and almost cryptic reasoning the tribunal held that 'the comparison of different treatments is made here between that received by the Respondent-appointed operator and that received by foreign investors as a whole'[133] in order to add that it '[...] therefore reject[ed] the contentions made by the Respondent and conclud[ed] that the actions taken by the Respondent against the Claimants [were] discriminatory'.[134]

Apparently, the *ADC* tribunal was not impressed by the argument that since the foreign investor was the only foreign airport operator affected a measure which affects all airport operators, whether foreign or domestic, could not be discriminatory. Rather, it compared the treatment 'received by foreign investors as a whole', which probably means by foreign investors in general, with that received by the investor in the specific case. Since the regulatory measure was very

[126] *Eureko B.V. v Republic of Poland*, above n. [??], para. 242.
[127] *LETCO v Liberia*, above n. 87, 2 *ICSID Reports* 343, 366.
[128] Ibid., at 366.
[129] Ibid., at 367.
[130] *ADC v Hungary*, above n. 7, para. 443.
[131] Ibid., para. 442.
[132] Ibid., para. 441.
[133] Ibid., para. 442.
[134] Ibid., para. 443.

specific—a general prohibition of airport operations by parties other than certain State entities—it could affect only a very limited number of investors, in the *ADC* case, apparently only the claimant. Thus, it is correct that the Hungarian measures did in fact single out the investment of the claimant.

However, it remains questionable whether this in itself is sufficient to constitute an illegal discriminatory taking. Any expropriation—short of a general nationalization—will target specific groups of property owners or investors, whether airport operators, oil exploring companies, or highway construction entities. The fact that there may be only one affected entity, and that this one entity may be a foreign investor, is usually not enough to constitute a discriminatory taking which singles out particular persons without a reasonable basis.[135] The fact that only foreigners are affected by an expropriatory measure as such may be incidental.[136] Illegal discrimination usually requires the targeting of foreign investors as a result of unreasonable policies or motives such as racism or political retaliation against nationals of certain States. There is no indication in the *ADC* case that the Hungarian government expropriated the foreign airport operator because of its Cypriot nationality—as opposed to any other nationality—nor even that the foreign ownership of the investor was a decisive ground for the expropriation. Whether justified by a public purpose or not, the intention of Hungary obviously was to bring the airport operation again under State control. In that sense one may recognize a similarity to the *Eureko* case.[137] However, the fact that airport operations were subsequently handed over to a privatized company majority-owned by foreigners demonstrates that foreign versus domestic ownership apparently did not play a major role in this context. Rather, the subsequent privatization may indicate that the expropriation was motivated by the expectation of higher profits than under the arrangements with ADC.

In general, the practice of international investment tribunals strongly endorses the non-discrimination requirement as a condition for the legality of an expropriation both under customary international law as well as under the specifically applicable IIA provisions. While tribunals tend to qualify politically motivated or other egregious forms of discrimination as unlawful, they do apply a more nuanced approach to expropriations which affect only some foreigners if such discrimination may be the result of legitimate government policies. A major factor for the assessment of discrimination issues in the course of expropriations is the burden of proof required by tribunals. While most tribunals require the complaining investors to demonstrate that they have been discriminated against, some appear to shift the burden of proof to the expropriating State. In addition, there is case law demonstrating that not only discrimination among foreign investors but also between foreigners and nationals of the expropriating State

[135] Rubins and Kinsella, above n. 1, 177.
[136] Cf. Brownlie, *Principles of Public International Law* (6th edn, 2003) 515.
[137] See above text at n. 126.

are relevant. Some of these cases actually indicate that protectionist purposes leading to the discriminatory treatment may be particularly prone to being held unlawful.

Due Process

The requirement that an expropriation must be made under 'due process of law' is often referred to as a typical legality requirement for an expropriation. Whether it can be seen as a customary international law requirement remains, however, less certain.[138]

In treaty-based investment law, 'due process' is often provided for in BITs and other IIAs. The requirement that any expropriation must be made or accomplished 'under due process of law' or 'in accordance with due process of law'[139] is a provision that can be found in many but not in all investment treaties. However, while many IIAs list 'due process' as one of the legality requirements, they usually do not define its meaning. The due process prerequisite is usually understood as a requirement to provide for a possibility to have the expropriation and, in particular, the determination of the amount of compensation reviewed before an independent body.[140] In some BITs, the due process provision seems to require primarily that the expropriation is accomplished pursuant to domestic law.[141]

While due process is usually just mentioned as a legality requirement, some BITs contain explanatory language with regard to the due process requirement as a possibility to have the expropriation and, in particular, the determination of the amount of compensation reviewed. For instance, the 1991 UK Model BIT provides that

> [t]he national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.[142]

Some Austrian BITs are even more explicit in providing that

> [d]ue process of law includes the right of an investor of a Contracting Party which claims to be affected by expropriation by the other Contracting Party to prompt review of its case, including the valuation of its investment and the payment of compensation in accordance with the provisions of this Article by a judicial authority or another competent and independent authority of the latter Contracting Party.[143]

[138] It is not included in *Restatement (Third) of the Foreign Relations Law of the United States*, above n. 19.

[139] Article 6(1) US Model BIT (2004); Article 13(1) Canadian Model BIT (2004).

[140] UNCTAD, above n. [??], 31.

[141] Cf. UNCTAD, above n. [??], 47.

[142] Article 5(1) UK Model BIT (1991). Similar language can be found in Article 13(4) Canadian Model BIT (2004).

[143] Article 5(3) Austria/Georgia BIT (2001).

A similar technique is followed in the 2004 Canadian Model BIT[144] as well as in the Energy Charter Treaty. The latter provides:

> The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).[145]

An example of a BIT focusing on the legality of the domestic expropriation procedure can be found in the 2002 Russian Federation/Thailand BIT according to which an expropriation must be made '[...] for public interests in accordance with the procedure established by the laws of the Contracting Party [...]'.[146] Similarly, the 1998 China/Poland BIT provides that '[...] expropriatory measures [...] shall be taken under due process of national law [...]'.[147] At the same time this BIT provides:

> If an investor considers the expropriation mentioned in Paragraph 1 of this article incompatible with the laws of the Contracting Party taking the expropriatory measures, the competent court of the Contracting Parties taking the expropriatory measures may, upon the request of the investor, review the said expropriation.[148]

Some BITs actually set the due process prerequisite somewhat apart from the public purpose, non-discrimination, and compensation requirements. Indeed, since the due process prerequisite is not so much a substantive requirement but rather a procedural obligation in order to guarantee compliance with the substantive requirements it appears sensible to differentiate in this context. This differentiation is clearly expressed in BITs which provide that investments shall not be expropriated 'except for the public benefit and against compensation' and that in case of expropriation '[t]he legality of any such expropriation, nationalization or comparable measure and the amount of compensation shall be subject to review by due process of law'.[149]

Arbitral case law on the due process requirement is limited. One of these rare cases is *Goetz v Burundi*[150] where an ICSID tribunal was faced with the issue whether an expropriatory measure complied with the legality requirements laid down in the applicable BIT. Article 4(1) of the 1989 Belgium/Burundi BIT conditioned the lawfulness of an expropriation on the requirement that 'the measures are taken in a legal manner'.[151] In its examination, the tribunal broadly

[144] Article 13(4) Canadian Model BIT (2004).
[145] Article 13(2) ECT.
[146] Article 4(1) Russian Federation/Thailand BIT (2002).
[147] Article 4(1) China/Poland BIT (1998).
[148] Article 4(3) China/Poland BIT (1998).
[149] Article 4(2) Afghanistan/Germany BIT (2005).
[150] *Goetz v Burundi*, above n. 83.
[151] Article 4(1) Belgium/Burundi BIT (1989).

characterized this condition as follows: '[. . .] to be internationally lawful, the measure must not only be supported by valid reasons, it must also have been taken in accordance with a lawful procedure'.[152]

In the tribunal's view this requirement was fulfilled.

The recent ICSID case of *ADC v Hungary*[153] also briefly addressed the 'due process' requirement provided for in the applicable BIT.[154] With regard to the more specific content of such a requirement, the *ADC* tribunal held that

> [s]ome basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that '*the actions are taken under due process of law*' rings hollow.[155]

Since these conditions as well as the two other requirements of a public purpose and non-discrimination were not fulfilled in the specific case, the tribunal held that the expropriation was unlawful.[156] What is interesting in the *ADC* award is the fact that the tribunal had no problem at all to conclude that the unqualified 'due process' requirement of the Cyprus/Hungary BIT should be read in the more expansive fashion of other BITs expressly requiring the possibility of judicial or quasi-judicial review of expropriation decisions.

General conclusions on the 'due process' requirement must remain tentative. As opposed to the public purpose and the non-discrimination prerequisite, the due process requirement seems to be less certainly established in customary international law. It is, however, very widely used in IIAs where it appears in different forms. Sometimes, the due process condition is phrased as a mere legality requirement according to which the expropriation has to be effectuated in conformity with national law and procedure, whereas in a number of IIAs due process expressly requires a right to have the expropriation and, in particular, the compensation decision reviewed. The limited case law suggests that a fair procedure offering the possibility of judicial review is crucial.

[152] *Goetz v Burundi*, above n. 83, 43, para. 127.

[153] *ADC v Hungary*, above n. 7.

[154] Article 4(1)(a) Cyprus/Hungary BIT merely requires that 'measures are taken in the public interest and under due process of law'.

[155] *ADC v Hungary*, above n. 7, para. 435.

[156] The tribunal held in a rather casual way: 'As to Respondent's argument that Hungarian law does provide methods for the Claimants to review the expropriation, the Tribunal fails to see how such claim was substantiated and in any event cannot agree in the light of the facts established in this case that there were in place any methods to satisfy the requirement of "*due process of law*" in the context of this case.' *ADC v Hungary*, above n. 7, para. 438.

Compensation

Until the first half of the 20th century the principle of 'full compensation'[157] for the expropriation of foreign property was fairly well established in international practice.[158] Tribunals like the US-Panama Claims Commission in the *de Sabla* case held that '[...] acts of a government in depriving an alien of his property without compensation impose international responsibility'.[159] Similarly, the succinctly formulated demands contained in a diplomatic note of the US Secretary of State Cordell Hull to his Mexican counterpart, stating that 'no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore'[160] have been widely regarded as an expression of customary international law standards.

In the *Norwegian Shipowners' Claims* case,[161] the tribunal referred not only to the 'right of the claimants to receive immediate and full compensation';[162] it also affirmed unequivocally that

> [i]nternational law and justice are based upon the principle of equality between States. No State can exercise towards the citizens of another civilised State the 'power of eminent domain' without respecting the property of such foreign citizens or without paying just compensation as determined by an impartial tribunal, if necessary.[163]

Today, however, the traditional consensus as found in the *Hull* formula is no longer generally accepted as an expression of customary international law. The Communist expropriations in Eastern Europe and large-scale nationalizations in many developing countries throughout the 20th century coupled with the attempts to establish a New International Economic Order[164] through a series of resolutions in the UNGA have eroded this consensus though they may have been unsuccessful in replacing it with new rules which would legitimize uncompensated expropriations.[165] Nevertheless, the opinion seems to prevail that there is

[157] *Delagoa Bay and East African Railway Co* (*US and Great Britain v Portugal)*, in Whiteman (ed.), 3 *Damages in International Law* (1943) 1694, 1648, stating that 'if the present case should be regarded as one of legal expropriation [...] the State, which is the author of the dispossession, is bound to make full reparation for the injuries done by it'.

[158] Cf. P.M. Norton, 'A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation', 85 *American Journal of International Law* (1991) 474, 477, stating that out of 60 claims tribunals dealing with injury to aliens between 1840 and 1940 none of the arbitral panels 'held that the appropriate measure of compensation was less than the full value of the property taken, and many specifically affirmed the need for full compensation'.

[159] *de Sabla Claim*, US-Panama Claims Commission, 29 June 1933, 6 UNRIAA 358, 366.

[160] Hackworth, *3 Digest of International Law* (1942) 658–659, § 288.

[161] *Norwegian Shipowners' Claims*, above n. [??].

[162] Ibid., 1 *UNRIAA* 307, 340.

[163] Ibid., 1 *UNRIAA* 307, 338.

[164] See above text at n. 14.

[165] See *Lowenfeld*, above n. 1, 414.

still a customary international law requirement to make at least some compensation in case of expropriation.[166]

Most likely as a result of the uncertain (customary) international law on the question of compensation, most international investment agreements contain fairly detailed rules on the obligation to pay compensation in case of expropriation. The precise level of compensation required varies from treaty to treaty. Many BITs and other IIAs incorporate the *Hull* formula requiring the expropriating State to pay 'prompt, adequate and effective compensation'.[167] Sometimes, they merely demand 'compensation'[168] or the payment of 'just compensation'.[169] In some cases, BIT language reminiscent of the UNGA resolutions uses the term 'appropriate compensation'.[170]

It appears, however, that the qualifying adjective of the type of compensation to be paid has lost much of its importance in view of the fact that most IIAs contain fairly uniform additional language specifying what should be understood by the required compensation. IIAs often contain provisions which clarify that 'fair market value' would be regarded as 'adequate' or 'just' compensation,[171] or that the 'real value' should be regarded as 'appropriate compensation'.[172] A typical example for the former can be found in Article 13(1) ECT which provides:

> Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment [. . .].[173]

An example of a similarly high compensation standard reminiscent of the *Hull* formula even where the treaty speaks of 'appropriate compensation' can be found in the France/Hong Kong BIT. It states:

> Compensation shall amount to the real value of the investment immediately before the deprivation or before the impending deprivation became public knowledge whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely convertible.[174]

In addition, many IIAs contain similar detailed rules on the precise method of valuation[175] which usually clarifies that the precepts of the *Hull* formula are to be

[166] M. Shaw, *International Law* (4th edn, 1997) 574; Hobér, *Investment Arbitration in Eastern Europe*, above n. 40, 38, arguing that '[. . .] the standard of compensation under international law is full compensation'.

[167] Article 13(1)(c) ECT; Article 6(1)(c) US Model BIT (2004); Article 13(1) Canadian Model BIT (2004). See also Muchlinski, *Multinational Enterprises*, above n. 1, 692; UNCTAD, above n. [??], 48.

[168] Article 4(2) German Model BIT (2004).

[169] Article 4(1)(c) Cyprus/Hungary BIT (1989).

[170] Article 5(1) France/Hong Kong BIT (1995). See also UNCTAD, above n. [??], 27.

[171] Eg Article 13(1) ECT.

[172] Eg Article 5(1) France/Hong Kong BIT (1995).

[173] Article 13(1) ECT.

[174] Article 5(1) France/Hong Kong BIT (1995).

[175] See also Doak Bishop, Crawford, and Reisman, above n. 1, 1331 *et seq*.

followed. Thus, in addition to the determination of the 'adequacy' of the compensation, 'prompt' means within a reasonable time and with interest and 'effective' requires compensation in a convertible currency.[176]

Compared to the rather intensive political and legal debate about the requirement and appropriate level of compensation, the actual arbitral practice appears rather modest. In general, tribunals have affirmed that states are obliged to pay compensation in case of expropriation—both as a matter of treaty law, enshrined in BITs or other IIAs, and of general international law.

In the *Aminoil* award the tribunal considered that, on the basis of international law, for a lawful expropriation 'appropriate compensation' as demanded in the UNGA Resolution on Permanent Sovereignty over Natural Resources 1803[177] was due.[178] It acknowledged, however, that it was difficult to find a precise meaning of this very imprecise term. Thus, it considered that

> [...] the determination of the amount of an 'appropriate' compensation is better carried out by means of an enquiry into all the circumstances relevant to the particular concrete case, than through abstract theoretical discussion.[179]

In the specific case, the tribunal had recourse to the concept of 'legitimate expectations' invoked by both parties in order to decide on compensation. In the words of the tribunal,

> [t]hat formula [was] well-advised, and justifiably brings to mind the fact that, with reference to every long-term contract, especially such as involve an important investment, there must necessarily be economic calculations, and the weighing-up of rights and obligations, of chances and risks, constituting the contractual equilibrium.[180]

Also, the practice of the Iran-US Claims Tribunal is rather uniform in requiring full or adequate compensation. In *American International Group v Iran*, one of the early cases before the tribunal, it held that

> [...] it is a general principle of public international law that even in a case of a lawful nationalization the former owner of the nationalized property is normally entitled to compensation for the value of the property taken.[181]

Nevertheless, the fierce political debate about the *Hull* formula and the various GA resolutions on the subject resonated in some of its judgments. For instance, in the *Ebrahimi* case[182] the tribunal stated:

[176] Eg Article 1110(2)–(6) NAFTA; similarly, Article 6(2)–(4) US Model BIT (2004); Article 13(2)–(3) Canadian Model BIT (2004). See also 1992 World Bank Guidelines on the Treatment of Foreign Direct, IV (3)–(8).

[177] See above text at n. 12.

[178] *Kuwait v American Independent Oil Company (Aminoil)*, Award, 24 March 1982, 21 *International Legal Materials* (1982) 976, 1032.

[179] Ibid., 1030, para. 144. [180] Ibid., 1034, para. 148.

[181] *American International Group Inc, et al. v Islamic Republic of Iran, et al.*, 4 Iran-US CTR 96, 105.

[182] *Shahin Shaine Ebrahimi v Government of the Islamic Republic of Iran*, Award No. 569-44/46/47-3, 12 October 1994, 30 Iran-US CTR (1994) 170.

The Tribunal believes that, while international law undoubtedly sets forth an obligation to provide compensation for property taken, 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 prevalence of the 'appropriate' compensation standard does not imply, however, that the compensation *quantum* should be always 'less than full' or always 'partial'.[183]

According to a separate opinion in the same case, however,

[...] there is virtual total uniformity in the Tribunal's rulings on the standard of compensation under international law. Every decision rendered by this Tribunal, whether based upon the Treaty of Amity or customary international law, or both of them, has concluded that compensation must equal the full value of the expropriated property as it stood on the date of taking.[184]

In fact, Article 4 of the applicable 1955 Treaty of Amity provided that property '[...] shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken'.[185]

The principle that also lawful expropriations require compensation was equally endorsed by ICSID tribunals. For instance, the tribunal in *Benvenuti & Bonfant*, which—in the absence of an explicit choice of law—had to decide pursuant to Article 42(1) ICSID Convention, held that

[the] principle of compensation in case of nationalization is in accordance with the Congolese constitution and constitutes one of the generally recognized principles of international law [...].[186]

In a similar situation, the tribunal in the *AMCO* case was initially more cautious: it merely referred to 'an expropriation which according to Indonesian law and to international law can give rise to a claim for compensation'.[187] Subsequently, however, it found that it was

[...] clearly admitted in international law, as well as in Indonesian law, that the State which nationalizes has to provide compensation for the property and/or contractual rights thus taken from their owner or holder.[188]

[183] *Ebrahimi v Iran*, above n. 182, para. 88.
[184] *Ebrahimi v Iran*, above n. 182, Separate Opinion by Allision, para. 36.
[185] Article 4 Treaty of Amity, Economic Relations, and Consular Rights between the Unites States of America and Iran.
[186] *Benvenuti & Bonfant v Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980, 1 *ICSID Reports* (1993) 330, 357.
[187] *Amco Asia Corporation v Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984, 1 *ICSID Reports* (1993) 413, 455.
[188] Ibid., 467.

Also, the award in the *Santa Elena* case[189] was based on the application of general international law.[190] The tribunal was of the opinion that '[i]nternational law permits the Government of Costa Rica to expropriate foreign-owned property within its territory for a public purpose and against the prompt payment of adequate and effective compensation'.[191] With regard to the required level of the 'adequate' compensation the tribunal merely noted that there was no dispute between the parties as to the applicability of the '[. . .] principle of *full compensation for the fair market value of the Property*, ie, what a willing buyer would pay to a willing seller'.[192]

A number of investment tribunals have dealt with the question whether the compensation requirement demands that compensation has been actually paid. In this context, tribunals have consistently held that an offer of compensation or other provision for compensation, in particular where the exact amount may still be in controversy, is enough to satisfy this legality requirement.

This is already implicit in the finding of the arbitrator in the *BP v Libya* case. In addition to finding that the expropriation of the oil concession was illegal because it was not made for a public purpose and in a discriminatory fashion, he further concluded that 'the fact that no offer of compensation [had] been made indicate[d] that the taking was also confiscatory'.[193]

Apparently, there need not be a specific offer as long as a possibility to obtain compensation exists. This approach was confirmed by the Iran-US Claims Tribunal which held in the *Amoco* case that the fact that there was an administrative procedure according to which former owners could claim compensation was sufficient to render an expropriation lawful even though no compensation had been actually paid. The tribunal stated

> In practice the Special Commission instituted negotiations with the companies party to the nullified contracts, in order to arrive at settlement agreements. Furthermore, in case of failure of the negotiations, the interested companies were entitled to have recourse to the procedures of settlement provided for on the contracts, usually by international arbitration. A number of settlement agreements were in fact executed and, in a few cases, arbitration procedures took place. In view of these facts, the Tribunal deems that the provisions of the Single Article Act for compensation were neither in violation of the Treaty [of Amity between Iran and the US] nor, indeed, in violation of rules of customary international law.[194]

Similar views were uttered by ICSID tribunals. For instance in the *LETCO* case, the tribunal held that the expropriating government would have to show that its action was 'accompanied by payment (or at least the offer of payment) of

[189] *Santa Elena v Costa Rica*, above n. 80.

[190] The tribunal decided that in the absence of a choice of law by the parties, '[. . .] under the second sentence of Article 42(1), the arbitration [was] governed by international law'. *Santa Elena v Costa Rica*, above n. 80, para. 65.

[191] *Santa Elena v Costa Rica*, above n. 80, para. 71.

[192] Ibid., para. 73 (emphasis in original).

[193] *British Petroleum v Libya*, Award, 10 October 1973 and 1 August 1974; 53 *ILR* 297, 329.

[194] *Amoco International Finance Corp v Iran*, above n. [??], para. 138.

appropriate compensation'.[195] Since the taking of LETCO's property was in fact 'not accompanied by an offer of appropriate compensation'[196] it was not justified.

Thus, the mere fact that compensation has not yet been paid does not render an expropriation illegal. This was endorsed by the tribunal in the *Goetz* case which held that the applicable '[t]reaty require[d] an adequate and effective indemnity; unlike certain domestic rights as regards expropriation, it does not require prior compensation'.[197]

Most recent ICSID tribunals dealing with so-called treaty claims have to decide the issue of compensation on the basis of a specific BIT. Here it is the language of the applicable IIA that will determine the assessment. For instance, in the *ADC v Hungary* case '[i]t [was] abundantly obvious to the tribunal that no just compensation was provided by the Respondent to the Claimants and [it felt] no need to expand its discussion here'.[198]

Rather, the tribunal proceeded to address the question of damages for an unlawful expropriation.[199]

A similar conclusion was reached by the ICSID tribunal in the *Siemens v Argentina* case. It found that

> [. . .] compensation has never been paid on grounds that, as already stated, the Tribunal finds that are lacking in justification. For these reasons, the expropriation did not meet the requirements of Article 4(2) and therefore was unlawful.[200]

While the precise amount of compensation due in case of expropriation may remain controversial as a matter of customary international law, the general obligation to provide for some compensation is clearly upheld by the jurisprudence of investment tribunals—both as a matter of investment treaty law and of general international law. Since treaties usually contain rather detailed rules on the appropriate level of compensation, as well as also often on the valuation methods concerning expropriated property, the issue of the amount of compensation plays a less prominent role than the highly politicized debate may suggest.

Implications of the Legality/Illegality of an Expropriation for Remedies

The principle is fairly generally accepted: compensation is due in cases of expropriation. This is widely regarded as a rule of general international law and it is usually laid down in IIAs. Where compensation is not paid, or at least offered, and/or other legality requirements are not fulfilled, an expropriation becomes

[195] *LETCO v Liberia*, above n. 87, 2 *ICSID Reports* 343, at 366.
[196] Ibid., 367.
[197] *Goetz v Burundi*, above n. 83, 44, para. 130.
[198] *ADC v Hungary*, above n. 7, para. 444.
[199] See below text at n. 221.
[200] *Siemens A.G. v Argentina*, above n. 98, para. 273.

illegal and State responsibility is triggered. The State committing an international wrong has to pay damages in order to put the victim of the unlawful act in a position he or she would have been had the act not been committed.[201] In the case of an illegal taking of property, the primary remedy would thus be restitution in kind. Only where restitution is impossible are monetary alternatives in the form of payments for 'financially assessable damage' considered.[202] Nevertheless, it is sometimes asserted that both lawful and unlawful expropriations trigger the same obligation to compensate.[203] Actual case law, however, largely adheres to the distinction between the two forms of takings.

The pre-eminence of restitution as a consequence of an unlawful expropriation was already expressed by the arbitrator in the *Walter Fletcher Smith Claim* case,[204] who—after having found that the expropriation had been unlawful—considered '[…] that, according to law, the property should be restored to the claimant'.[205]

The best-known formulation of this customary international law is still the so-called *Chorzów Factory* standard of the PCIJ according to which:

> […] reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[206]

As a consequence, the Court found that

> 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.[207]

Since the PCIJ had to state the consequences of an illegal expropriation—one prohibited by the 1922 German-Polish Convention Concerning Upper

[201] The primacy of restitution is also expressed in the 2001 ILC Articles on State Responsibility, see *Commentaries to the draft articles on Responsibility of States for internationally wrongful acts*, adopted by the International Law Commission at its 53rd session (2001), Report of the International Law Commission on the work of its 53rd session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10). Article 35 provides: 'A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) Is not materially impossible; (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.' Article 36 provides: '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.'

[202] See I. Marboe, 'Compensation and Damages in International Law, The Limits of "Fair Market Value"', 7 *The Journal of World Investment and Trade* (2006) 723, 725 *et seq*.

[203] See Sheppard, above n. 18, 196 *et seq*.

[204] *Walter Fletcher Smith Claim*, above n. [??].

[205] *Walter Fletcher Smith Claim (US v Cuba)*, Award, 2 May 1929, 2 *UNRIAA* 913, 918.

[206] *Factory at Chorzów (Claim for Indemnity) (Germany v Poland)*, Judgment (Merits), 13 September 1928, *PCIJ* Series A, No. 17 (1928), 40.

[207] Ibid.

Silesia[208]—the issue of the consequences of a lawful expropriation was not directly addressed. However, the Court remarked in a dictum that lawful expropriation does not require restitution but only payment of 'the just price of what was appropriated' based on the 'value of the undertaking at the moment of dispossession, plus interest to the day of payment'.[209]

The distinction between damages for illegal acts and compensation for legal expropriations has not always been clearly adhered to.[210] Nevertheless, a number of investment arbitration tribunals have upheld the *Chorzów Factory* standard.

The most extreme follower of the restitution approach certainly was the arbitrator in the *Texaco* case who found that '*restitutio in integrum* is, both under the principles of Libyan law and under the principles of international law, the normal sanction for non-performance of contractual obligations [. . .]'.[211]

Also in the jurisprudence of the Iran-US Claims Tribunal the 'clear distinction [. . .] between lawful and unlawful expropriations' found in the *Chorzów Factory* case was mostly endorsed.[212] In the *Amoco* case, the tribunal expressly distinguished between the Iran/US Treaty of Amity which determined the conditions that an expropriation should meet in order to be in conformity with its terms and therefore defined 'the standard of compensation only in case of a lawful expropriation' and a nationalization in breach of the treaty '[. . .] which would render applicable the rules relating to State responsibility'.[213] However, it must be acknowledged that some Iran-US Claims Tribunal decisions appear to disregard that distinction. According to the *Phillips* decision, 'Article IV, paragraph 2 [of the Iran-US Treaty of Amity],[214] provides a single standard, "just compensation" representing the "full equivalent of the property taken", which applies to all property taken, regardless of whether that taking was lawful or unlawful.'[215] Relying on the *Amoco* decision, the *Phillips* tribunal stated that this Treaty 'standard applies to takings that are "lawful" under the Treaty, but the Treaty does not say that any different standard of compensation would be applicable to an "unlawful" taking'.[216] Whether this *obiter dictum* is correct remains questionable.

ICSID jurisprudence generally adheres to the distinction between lawful and unlawful expropriation and the different consequences stemming from these different acts.

[208] For the text of Article 6 see above n. 61.

[209] *Chorzów Factory*, above n. 206, 47.

[210] See already the rather sweeping statement by the tribunal in the *Norwegian Shipowners' Claims* case that '[w]hether the action of the United States was lawful or not, just compensation is due to the claimants under the municipal law of the United States, as well as under the international law'. *Norwegian Shipowners' Claims* Award, 30 June 1921, 1 *UNRIAA* 307, 334.

[211] *Texaco Overseas Petroleum Company (Topco)/California Asiatic (Calasiatic) Oil Company v Libya*, above n. [??], para. 109.

[212] *Amoco International Finance Corporation v Iran*, above n. [??], para. 192.

[213] Ibid., para. 189.

[214] See above n. 185.

[215] *Phillips Petroleum Co v Iran*, 21 Iran-US CTR 79 (1989), para. 109.

[216] Ibid.

In the *SPP v Egypt* case, the tribunal held that

> [...] the Claimants are seeking 'compensation' for a lawful expropriation, and not 'reparation' for an injury caused by an illegal act such as a breach of contract. The cardinal point [...] in determining the appropriate compensation is that [...] Claimants are entitled to receive fair compensation for what was expropriated rather than damages for breach of contract.[217]

Similarly, the *Metalclad* tribunal found that

> [t]he award to Metalclad of the cost of its investment in the landfill is consistent with the principles set forth in Chorzów [...] namely, that where the state has acted contrary to its obligations, any award to the claimant should, as far as is possible, wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed (the status quo ante).[218]

Recently, the tribunal in the *CMS v Argentina* case relied again on the *Chorzów Factory* standard by stating the following:

> Restitution is the standard used to re-establish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation.[219]

Also the tribunal in *ADC v Hungary* clearly upheld the distinction between lawful and unlawful expropriations and the different legal consequences stemming from that distinction. It refused to apply the BIT provisions which provided that in case of expropriation '[t]he amount of compensation must correspond to the market value of the expropriated investments at the moment of the expropriation' and that '[t]he amount of this compensation may be estimated according to the laws and regulations of the country where the expropriation is made'.[220] In the tribunal's view, these were provisions governing the calculation of compensation in case of lawful expropriations which could not be relied upon in case of unlawful expropriations:

> Since the BIT does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international law in the present case.[221]

The tribunal then extensively reviewed the use of the *Chorzów Factory* standard in international adjudication and arbitration and concluded that this standard

[217] *SPP v Egypt*, above n. 81, para. 183.
[218] *Metalclad Corporation v Mexico*, above n. [??], para. 122.
[219] *CMS Gas Transmission Company v The Argentine Republic*, above n. [??], para. 400.
[220] Article 4(2) and (3) Cyprus/Hungary BIT.
[221] *ADC v Hungary*, above n. 7, para. 483.

would be applicable to an unlawful expropriation as in the case at hand. The *ADC* tribunal found that

> It is clear that actual restitution cannot take place and so it is, in the words of the *Chorzów Factory* decision, '*payment of a sum corresponding to the value which a restitution in kind would bear*', which is the matter to be decided.[222]

Since the value of the expropriated investment had considerably risen after the expropriation the tribunal found that

> [...] it must assess the compensation to be paid by the Respondent to the Claimants in accordance with the *Chorzów Factory* standard, i.e., the Claimants should be compensated the market value of the expropriated investments as at the date of this Award, which the Tribunal takes as of September 30, 2006.[223]

Also the tribunal in *Siemens A.G. v Argentina*[224] upheld the distinction between lawful and unlawful expropriations for the purpose of the legal consequences stemming from that distinction. After having found that the Argentine measures amounted to an illegal expropriation[225] the tribunal stated:

> The law applicable to the determination of compensation for a breach of such Treaty obligations is customary international law. The Treaty itself only provides for compensation for expropriation in accordance with the terms of the Treaty.[226]

The *Siemens* tribunal expressly referred to Article 36 of the ILC Articles on State Responsibility[227] and to the *Chorzów Factory* standard[228] and held that under this 'customary international law' standard

> Siemens [was] entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise [had] gained up to the date of this Award, plus any consequential damages.[229]

The tribunal expressly distinguished this standard from the standard laid down in the applicable BIT providing for compensation '[...] equivalent to the value of the expropriated investment'.[230]

[222] Ibid., para. 495 (emphasis in original).
[223] Ibid., para. 499.
[224] *Siemens A.G. v Argentina*, above n. 98.
[225] See above text at n. 100.
[226] *Siemens A.G. v Argentina*, above n. 98, para. 349.
[227] See above n. 201.
[228] 'The key difference between compensation under the Draft Articles and the *Factory at Chorzów* case formula, and Article 4(2) of the Treaty is that under the former, compensation must take into account "all financially assessable damage" or "wipe out all the consequences of the illegal act" as opposed to compensation "equivalent to the value of the expropriated investment" under the Treaty.' *Siemens A.G. v Argentina*, above n. 98, para. 352.
[229] *Siemens A.G. v Argentina*, above n. 98, para. 352.
[230] Ibid.

C. Conclusions

The fact that recent investment arbitration has been dominated by issues of indirect expropriation with tribunals focusing on the question whether certain State measures amounted to expropriation, does not mean that the traditional legality requirements for the expropriation of foreign investment have lost their importance. Quite the contrary, the traditional criteria of 'public purpose', 'non-discrimination', 'due process', and 'compensation'—in spite of, or maybe because of, being frequently questioned as customary international law requirements—are often found in investment instruments such as BITs or other IIAs. Having determined that an expropriation took place, investment tribunals regularly scrutinize the lawfulness of an expropriation according to the applicable IIA standards or standards of general international law. In arbitral practice, both standards appear to converge largely with the traditional legality requirements standard.

A close analysis of the relevant arbitration decisions also demonstrates that tribunals are in fact willing to engage in a genuine investigation of whether the legality requirements are fulfilled. Although they may exercise some degree of restraint in adjudicating public policy issues inherent in the determination of 'public purpose', investment tribunals refuse to take 'public purpose' invocations by States at face value. Rather, they will disqualify expropriatory measures lacking a genuine 'public purpose'. Similarly, investment tribunals have demonstrated their resolve to regard as illegal discriminatory expropriations either because they were directed at foreigners as opposed to nationals of the expropriating state or because they singled out particular groups of foreign nationals often motivated by political considerations. Though there is relatively little arbitration practice on the 'due process' requirement, tribunals seem to approximate this legality requirement to a fair trial right, offering affected investors an opportunity to challenge expropriation decisions before an independent and impartial domestic body.

Finally, investment tribunals are fairly consistent in requiring compensation, or at least an offer of compensation, in order to regard an expropriation as lawful. The precise amount of compensation will usually be guided by the express treaty provisions on expropriation. Tribunals have been rather consistent in permitting the application of these treaty provisions only in cases of lawful expropriations. They largely concur that where an expropriation was carried out either not for a 'public purpose', in a 'discriminatory' fashion, or not in accordance with 'due process', damages for an internationally wrongful act are due.