Prewar Cases

Professor Schachter tells us that "probably the most frequently cited opinion in this field", the Chorzow Factory case in the Permanent Court of International Justice, "refers only to a duty to sic 'payment of fair compensation.' This is an inaccurate account of the Court's celebrated obiter dicta. The actual decision in the case turned upon a finding by the Court that Poland was in breach of its obligations to Germany under the Geneva Convention concerning Upper Silesia of May 15, 1922. In the case of an unlawful expropriation, the Court found, the primary duty was one of restitution kind, "or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear together with 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." The Court contrasted this with the obligation that Poland would have been under had this been normal expropriation "to render which lawful only the payment of fair compensation would have been wanting." But this is not the only dictum on the point, for on the very next page the Court spoke of the obligation, in cases of lawful expropriation, to pay "the just price of what was expropriated" and "the value of the undertaking at the moment of dispossession, plus interest to the day of payment." "The just price of what was expropriated" and "the value of the undertaking" are phrases rather more consistent with full compensation than with a more flexible standard, especially bearing in the mind the legal, political and economic assumptions of members of the Court, and of the legal systems they represented, in 1928. Moreover, it seems quite clear from the Judgment as a whole, the separate opinions and the pleadings, that the Court considered that the minimum pecuniary obligation in all cases was the payment of the full value of the property taken; what distinguished unlawful from lawful takings was the additional obligation in the former case, if restitutio in integrum was impossible, to compensate for consequential loss. What the Court said and assumed about the standard of compensation for lawful takings may, strictly speaking, be obiter, but it has traditionally been regarded as the locus classicus on the subject and, for better or for worse, it supports a "full compensation" standard.

7 Case Concerning the Factory at Chorzow (Mertis), 1928 PCIJ, ser. A, No. 18.
8 Chachter, supra note 3, at 123.
9 1928 PCIJ, ser. A, No. 17, at 47.
10 Id. at 46.
11 Including the instructions given for an expert inquiry by the Order issued simultaneously with the Judgment (id. at 99) -- an Order whose significance in matters of valuation appears to have been largely overlooked by commentators.

Referring Principles:

XI.1 - Compensation for expropriation